U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20388501

Date: MAY 31, 2022

Appeal of San Antonio, Texas Field Office Decision

Form I-212, Application for Permission to Reapply for Admission

The Applicant seeks conditional permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii), because he will be inadmissible pursuant to Section 212(a)(9)(A)(ii) of the Act upon departing from the United States for having been previously ordered deported.

The Director of the San Antonio, Texas Field Office denied the application. The Director determined that the Applicant was inadmissible pursuant to section 212(a)(9)(C) of the Act, for having entered the United States without being admitted after having been ordered removed. The Director concluded that as the Applicant had not remained outside the United States for 10 years since his last departure, the application must be denied.[1] On appeal, the Applicant asserts that he is not inadmissible but needs an approved Form I-212 in order to file the Form I-601A, Application for Provisional Unlawful Presence Waiver.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i), who has been ordered removed or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of a noncitizen convicted of an aggravated felony) is inadmissible.

Noncitizens found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) if "prior to the date of the reembarkation at a place outside

[1] The Director erroneously cites section 212(a)(9)(A)(i) of the Act in the decision. However, the Applicant was ordered deported pursuant to former section 241(a)(1)(B) of the Act for having entered the United States without inspection. Therefore, he is inadmissible under section 212(a)(9)(A)(ii) of the Act.

the United States or attempt to be admitted from foreign continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission."

Section 212(a)(9)(C) of the Act provides that any noncitizen who has been unlawfully present in the United States for an aggregate period of more than one year, or has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible.

Noncitizens found inadmissible under section 212(a)(9)(C) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii), which provides that inadmissibility shall not apply to a noncitizen seeking admission more than 10 years after the date of last departure from the United States if, prior to the reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

II. ANALYSIS

The issue on appeal is whether the Applicant is eligible for permission to reapply for admission in the exercise of discretion. The Applicant is statutorily ineligible for permission to reapply for admission to the United States because he has not remained outside the United States for at least 10 years since his last departure.

The Applicant, a native and citizen of Honduras, currently resides in the United States. The Applicant has an approved immigrant visa petition filed by his U.S. citizen spouse, and is requesting conditional approval of the Form I-212 under 8 C.F.R. § 212.2(j) before he departs. The approval of the application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

On appeal, the Applicant contests his inadmissibility under sections 212(a)(9)(A) and 212(a)(9)(C) of the Act, but states that he needs an approved Form I-212 in order to file a provisional unlawful presence waiver. In his affidavit submitted in support of his application, the Applicant asserts that he departed the United States before a deportation order was entered against him. In support of his departure, the Applicant submits a copy of his passport page with an entry stamp to Honduras on January 9, 1997.

The record reflects that the Applicant entered the United States without being admitted in [redacted] 1996.[2] Subsequently, he was apprehended and placed in deportation proceedings.[3] In [redacted] 1996, the Applicant was ordered deported in absentia by the Immigration Judge pursuant to former section 241(a)(1)(B) of the Act for having entered the United States without inspection. The Applicant left the United States in January 1997. The Applicant subsequently reentered without being admitted in July 2000 and has remained in the United States to date. He is thus inadmissible pursuant to section

[2] Form I-213, Record of Deportable Alien, indicates that the Applicant entered without inspection on or about [redacted] 1996.
[3] The Applicant was apprehended at or near [redacted] Texas, and the deportation proceedings were initiated in [redacted] Texas. On [redacted] 1996, counsel for the Applicant motioned for a change of venue to [redacted] Maryland. The Immigration Judge denied the Applicant's motion and notified him of the hearing date on [redacted] 1996 in [redacted] Texas.

212(a)(9)(A)(ii) of the Act, for his deportation, and section 212(a)(9)(C)(i)(II) of the Act, for entering the United States without being admitted after having been ordered deported.

On appeal, the Applicant asserts that he is not inadmissible because he had not accumulated unlawful presence at the time the Illegal Immigration Reform and Immigration Responsibility Act of 1996 was enacted. However, section 212(a)(9)(C)(i)(II) of the Act applies to noncitizens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997.[4]

A noncitizen who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless the noncitizen has been outside the United States for more than 10 years since the date of the noncitizen's last departure from the United States. See Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006); Matter of Briones, 24 I&N Dec. 355 (BIA 2007); and Matter of Diaz and Lopez, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be that the Applicant's last departure was at least 10 years ago, the Applicant has remained outside the United States, and U.S. Citizenship and Immigration Services has consented to the Applicant's reapplying for admission. The Applicant has not remained outside the United States for 10 years after his last departure in January 1997. He is thus currently ineligible to apply for the exception to his inadmissibility under section 212(a)(9)(C) of the Act.[5] The application for permission to reapply for admission must remain denied.

ORDER: The appeal is dismissed.

[4] The instructions to the Form I-212 also state that section 212(a)(9)(C)(i)(II) inadmissibility applies to individuals who were removed from the United States under any provision of the Act or any other provision of law before, on, or after April 1, 1997. The instructions to the Form I-212 may be found at: https://www.uscis.gov/sites/default/files/files/form/i-212instr.pdf

[5] No purpose would be served in considering the Applicant's request for permission to reapply under section 212(a)(9)(A)(iii) of the Act, for having been ordered deported, as he would remain inadmissible under section 212(a)(9)(C) of the Act.