U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23312190

Date: NOV. 28, 2022

Appeal of Los Angeles, California Field Office Decision

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

The Applicant seeks 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).[1]

The Director of the Los Angeles, California Field Office denied the Form I-212, concluding that the Applicant is also inadmissible under section 212(a)(9)(C) of the Act and does not meet the requirements for permission to reapply for admission under section 212(a)(9)(C)(ii) because he has not remained outside the United States for 10 years since his last departure. The Director observed that "USCIS records" show that the Applicant departed the United States on November 5, 2005. Further, the Director found that the Applicant, who currently resides in the United States, must have subsequently re-entered without being inspected and admitted or paroled. Because the Director determined that the Applicant is not currently eligible to file a Form I-212, he did not reach a determination regarding whether the application warranted a favorable exercise of discretion.

The matter is now before us on appeal. On appeal, the Applicant asserts that he has not departed the United States since his initial entry, and therefore is not inadmissible under section 212(a)(9)(C) of the Act. The appeal includes additional evidence of his physical presence in the United States in October and November 2005.

The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *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 remand the matter to the Director for the entry of a new decision.

[1] The Applicant, who is the beneficiary of an approved immigrant petition filed by his U.S. citizen spouse, currently resides in the United States. He is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. The approval of his 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.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), 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 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)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), provides that any noncitizen who has been unlawfully present in the United States for an aggregate period of more than 1 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 ten 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.

Approval of an application for permission to reapply is discretionary, and any unfavorable factors will be weighed against the favorable factors to determine if approval of the application is warranted as a matter of discretion. *Matter of Lee*, 17 I&N Dec. 275, 278-79 (Reg'l Comm'r 1978). Factors to be considered in determining whether to grant permission to reapply include the basis for the prior deportation; the recency of deportation; length of residence in the United States; an applicant's moral character; an applicant's respect for law and order; evidence of an applicant's reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to the applicant or others; and the need for an applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee*, 17 I&N Dec. at 278.

II. ANALYSIS

The issue before us is whether the Director correctly determined that the Applicant is inadmissible under section 212(a)(9)(C) of the Act and therefore ineligible to file a Form I-212 until he has departed and remained outside the United States for at least ten years.

The record indicates that the Applicant entered the United States without being inspected and admitted in 1993 or 1994. He was placed in deportation proceedings on February 3, 2005, when he was personally served an Order to Show Cause indicating that he must appear for a July 11, 1995 hearing at the Los Angeles Immigration Court. The Applicant did not report for his hearing, and, on September 13, 1995, the Immigration Judge issued a Warrant of Removal/Deportation. The Applicant does not contest that, based on these facts, he will become inadmissible under section 212(a)(9)(A)(ii) of the Act when he departs the United States to apply for an immigrant visa, and is therefore required

to apply for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act. The Applicant stated on the Form I-212 that he has not departed the United States since his initial entry.

The Director denied the petition after concluding that USCIS records show that the Applicant departed the United States on November 5, 2005, while under an unexecuted removal order. Because the Applicant currently resides in the United States, and there is no record of his arrival, the Director concluded that he must have subsequently re-entered without being inspected and admitted and therefore became inadmissible under section 212(a)(9)(C)(i) of the Act.

On appeal, the Applicant asserts that he is not inadmissible under section 212(a)(9)(C)(i) of the Act. He maintains that the information provided on the Form I-212 is correct and that he never departed the United States since his entry in 1993 or 1994. He also submits evidence of his physical presence in the United States at the time of his alleged November 2005 departure, including documentation from the Los Angeles Unified School District confirming his enrollment in, regular attendance and completion of an English as a Second Language course between early October and late November 2005. In addition, the Applicant provides copies of his 2004 and 2005 individual income tax returns and IRS Forms W-2 and emphasizes that the income he earned in these consecutive years is consistent with his claim of continuous physical presence in the United States. Finally, he submits additional declarations from his spouse and his pastor in support of his claim that he has not departed the United States.

After reviewing the record in its totality, including the new evidence provided on appeal, the "USCIS records" referenced by the Director, and other relevant Department of Homeland Security systems and records, we conclude that the Applicant has met his burden to establish that he, more likely than not, has not departed the United States since his initial entry. Based on this determination, he is not inadmissible under section 212(a)(9)(C)(i) of the Act.

As the Applicant is not inadmissible under section 212(a)(9)(C)(i) of the Act, we find it appropriate to remand the matter to the Director to determine whether the Applicant merits permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act as a matter of discretion.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.