U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23550645

Date: NOV. 29, 2022

Appeal of New York, New York Field Office Decision

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

The Applicant, a citizen of Canada, was found inadmissible for entering the United States without being admitted after having been ordered removed from the United States and after being unlawfully present in the United States for an aggregate period of over one year and seeks permission to reapply for admission into the United States. Immigration and Nationality Act (the Act) section 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii). Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the New York, New York Field Office denied the application, concluding that the Applicant was statutorily ineligible for an exception to his inadmissibility because he had not remained abroad for 10 years following his last departure from the United States. The matter is now before us on appeal.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 C.F.R. § 1361. Upon *de novo* review, we will remand the matter to the Director for the entry of a new decision.

I. LAW

Section 212(a)(9)(C)(i) of the Act provides that a noncitizen who has been ordered removed or who has been unlawfully present in the United States for more than one year, and who subsequently enters or attempts to enter the United States without being admitted, is inadmissible. Under section 212(a)(9)(C)(ii) of the Act, a noncitizen may apply for an exception to this inadmissibility if at least 10 years have passed since their last departure from the United States.

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 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; the applicant's moral character; the applicant's respect for law and order; evidence of the 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 the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973).

II. ANALYSIS

A. Procedural History

The record reflects that the Applicant attempted to enter the United States from Canada in [redacted] 2000, claiming that he was visiting family and friends for a few days. Upon questioning by U.S. Customs and Border Protection, the Applicant admitted that he had actually been living and working without authorization in New York for approximately two years, that the true purpose of his trip was to return to his New York home and job, and that he had been trying to conceal his true residency and employment when he was first questioned.[1]

The Applicant was found inadmissible to the United States under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an intending immigrant without a valid entry document. He was then ordered removed pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1), and informed that he would be inadmissible for five years from the date of his removal. Section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i).

In December 2000, the Applicant reentered the United States without inspection and remained there until he departed for Canada in 2011. In 2012, the Applicant married his wife, who was a legal permanent resident of the United States.[2] In 2013, the Applicant's wife filed a Form I-130, Petition for Alien Relative, on his behalf, which was subsequently approved. In 2016, a consular officer of the U.S. Department of State (DOS) found the Applicant inadmissible under section 212(a)(9)(C) of the Act and denied his immigrant visa application. The Applicant then filed Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. The Director denied the application, finding that the Applicant was statutorily ineligible to apply for an exception to his inadmissibility because 10 years had not passed since his last departure from the United States. The matter is now before us on appeal.

B. Eligibility for Permission to Reapply

The record indicates that the Applicant last departed the United States in 2011 and that he filed the Form I-212 underlying the instant appeal in 2016. A noncitizen who is inadmissible under section 212(a)(9)(C) of the Act may not seek an exception to this inadmissibility until they have remained outside the United States for at least 10 years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 23 I&N Dec. 355 (BIA 2007).

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[1] It is noted that the facts of this attempted entry may render the Applicant inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a benefit under the Act by willfully misrepresenting a material fact. *See Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994); *see also* 8 *USCIS Policy Manual* J.2(B), http://www.uscis.gov/policymanual. Because the Applicant is abroad and seeking an immigrant visa, the ultimate determination of his inadmissibility rests with DOS. However, USCIS may consider immigration violations and inadmissibility grounds under other sections of law when adjudicating Form I-212. *Matter of Tin*, 14 I&N Dec. at 371.

[2] USCIS records indicate that the Applicant's wife has since naturalized and become a U.S. citizen.

At the time the Form I-212 was adjudicated, the Director correctly found that the Applicant was statutorily ineligible for an exception to his inadmissibility because he had not remained outside the United States for at least 10 years. However, an application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law in effect at the time the application is finally considered. *See Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (citations omitted). In this instance, there has been no final determination on the Applicant's application for admission. Based on the facts in effect at the time of our adjudication, the Applicant has remained outside the United States for 10 years and is eligible to request an exception to his inadmissibility under section 212(a)(9)(C)(ii) of the Act. We will therefore remand this matter to the Director to consider whether the Applicant should receive such an exception in the exercise of discretion.

The Director may request any additional evidence considered pertinent to the new determination and any other issues. We express no opinion regarding the ultimate resolution of this case on remand.

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