U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21983526

Date: DEC. 7, 2023

Appeal of West Palm Beach, Florida Field Office Decision

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

The Applicant, who is currently in the United States, seeks permission to reapply for admission under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii), after having been previously ordered deported.

The Director of the West Palm Beach, Florida Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that the Applicant was permanently inadmissible under section 212(a)(9)(C)(i)(II) of the Act and ineligible to seek permission to reapply for admission because he has not yet departed from the United States and has not remained abroad for 10 years, as required. On appeal, the Applicant asserts that the Director's finding concerning this inadmissibility ground was in error and renews his request for permission to reapply for admission.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that a noncitizen who has been ordered deported or 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, is inadmissible. A noncitizen who is inadmissible under section 212(a)(9)(A)(ii) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act if prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission. Noncitizens inside the United States may apply for retroactive permission to reapply for admission in conjunction with their applications for adjustment of status. 8 C.F.R. §§ 212.2(e), 212.2(i)(2).

Approval of an application for permission to reapply is discretionary, and any unfavorable factors must 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).

Section 212(a)(9)(C)(i)(II) of the Act provides, in relevant part, that a noncitizen who has been ordered deported or removed and who enters or attempts to reenter the United States without being admitted is inadmissible. There is an exception to this inadmissibility ground, but it is available only in cases where the noncitizen is seeking admission more than 10 years after their last departure from the United States and the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission. Section 212(a)(9)(C)(ii) of the Act.

II. ANALYSIS

The issue on appeal is whether the Applicant is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act and ineligible to seek permission to reapply for admission. We have reviewed the entire record and, for the following reasons, conclude that the Applicant is not inadmissible on this ground. We will therefore return the matter to the Director to consider if the approval of the Form I-212 is otherwise warranted when all positive and negative factors are weighed together.

The record reflects that the Applicant was apprehended by U.S. Border Patrol agents in [redacted] 1990, after he had entered the United States without inspection or admission or parole. The Applicant was placed in deportation proceedings,[1] and requested a hearing before an Immigration Judge. The Immigration Judge granted the Applicant permission to depart from the United States voluntarily by October 23, 1991, with an alternative order of deportation to Honduras if he failed to do so. The Applicant did not timely depart,[2] and was ultimately deported on [redacted], 1993. In or about March 1997 he entered the United States without inspection.[3] In November 2016 the Applicant and the Department of Homeland Security filed a joint motion to reopen deportation proceedings so the Applicant could seek adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1225(i), as a parent of a U.S. citizen. An Immigration Judge initially granted the motion, but later rescinded the grant finding that "the court lack[ed] jurisdiction to reopen the case as the [Applicant] departed the

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), which took effect on April 1, 1997, eliminated the distinction between deportation and exclusion proceedings by merging them into removal proceedings for all noncitizens regardless of whether they were charged as being inadmissible or deportable from the United States.

[2] The record shows that in September 1992 he requested an extension of time to depart, but there is no evidence that the request was granted.

[3] The Applicant attested in a sworn statement that he returned to the United States "in or around March 1997," and the divorce decree in the record reflects that he and his first spouse were divorced in Florida in [redacted] 1997.

U.S. in early 1993."[4] The Applicant subsequently filed the instant Form I-212 in conjunction with his request for adjustment of status before U.S. Citizenship and Immigration Services (USCIS).

As stated, the Director denied the Form I-212 finding that the Applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act because he departed from the United States under an order of deportation and then "re-entered the United States without [having] been admitted or paroled . . . on or around January 01, 1997."

The Applicant asserts that he is not inadmissible under section 212(a)(9)(C) of the Act, because he was deported and reentered the United States without inspection before that section went into effect on April 1, 1997, with the passage of IIRIRA. We agree.

Section 212(a)(9)(C) of the Act applies to noncitizens who were ordered removed before, on, or after April 1, 1997, and who subsequently enter or attempt to enter the United States without admission or parole at any time on or after that date. *See* Memorandum from Paul Virtue, Acting Executive Associate Commissioner, INS, HQIRT 50/5.12, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)* (June 17, 1997).[5] Here, the Applicant was deported in [redacted] 1993 and the evidence in the record indicates that he entered the United States without inspection in March 1997, before the IIRIRA's effective date. Absent evidence that the Applicant entered the United States without admission or parole after April 1, 1997, we cannot conclude that he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and we withdraw the Director's determination to the contrary.

Consequently, as the sole ground for the denial of the Applicant's Form I-212 has been overcome, we will return the matter for the Director to consider whether the Applicant otherwise merits a grant of permission to reapply for admission and to enter a new decision, accordingly.

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

[4] A noncitizen is considered to be "in proceedings" from the time the charging document is filed with the Immigration Court until the deportation or removal order is executed. 8 C.F.R. § 1245.1(c)(8). The record contains a Warrant for Deportation of the Applicant, which reflects that he was removed from the United States in [redacted] 1993.

[5] *See also* Instructions for Form I-212 at 7, https://www.uscis.gov/i-212 (clarifying that inadmissibility under section 212(a)(9)(C)(i)(II) of the Act applies to individuals who were ordered removed from the United States under any provision of the Act or any other provision of law before, on, or after April 1, 1997, and who enter or attempt to reenter without admission on or after April 1, 1997).