U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17588461

Date: FEB. 11, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, the spouse of a U.S. citizen, has requested an immigrant visa abroad and seeks a waiver of inadmissibility for prior unlawful presence in the United States under Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

The Director of the Nebraska Service Center denied the Form I-601, concluding that the Applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year; section 212(a)(9)(C)(i)(I) of the Act for reentering the United States without being admitted or paroled after having been unlawfully present in the country for more than one year; and, section 212(a)(9)(C)(i)(II) of the Act for having entered the United States without being admitted after having been ordered removed. The Director noted that the Applicant was ineligible to apply for the exception under section 212(a)(9)(C)(ii) of the Act, because he had not waited outside the United States for 10 years as required by law. Therefore, the Director denied the waiver of unlawful presence under section 212(a)(9)(B)(i)(II) as a matter of discretion. [1]

On appeal, the Applicant contests his inadmissibility under section 212(a)(9)(C)(i) and submits documentation of his continuous residence in the United States between 1999 and 2004. In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de nova* review, we will dismiss the appeal.

I. LAW

A noncitizen is deemed to be unlawfully present in the United States if he or she is present in the United States after the expiration of the period of authorized stay or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act. A noncitizen who has been unlawfully present in the United States for one year or more, and who again seeks admission within

[1] In addition to the Applicant's Form 1-601, he also concurrently filed Form 1-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. The Director denied the Form 1-212 in a separate decision dated December 18, 2020. As such, a separate Form 1-290B, Notice of Appeal or Motion, must be filed in order to appeal the denial of the Form 1-212.

10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act. U.S. Citizenship and Immigration Services (USCIS) may waive this ground of inadmissibility as a matter of discretion if the noncitizen establishes that refusal of admission would result in extreme hardship to his or her U.S. citizen or lawful permanent resident spouse or parent. Section 212(a)(9)(B)(v) of the Act.

A noncitizen, other than an "arriving alien," who has been ordered removed under section 240 or any other provision of law, or who 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. Section 212(a)(9)(A)(ii) of the Act. There is an exception to this ground of inadmissibility available to noncitizens who apply for and receive permission to reapply for admission to the United States. Section 212(a)(9)(A)(iii).

A noncitizen who has been unlawfully present in the United States for an aggregate period of more than one year and who enters or attempts to reenter the United States without being admitted is inadmissible. Section 212(a)(9)(C)(i)(I) of the Act. A noncitizen who has been ordered removed from the United States and enters or attempts to reenter the United States without being admitted is inadmissible. Section 212(a)(9)(C)(i)(II) of the Act. There is an exception to the bars at Section 212(a)(9)(C)(i) of the Act available to noncitizens who have departed from the United States, remained abroad for at least 10 years since their last departure, and who then apply for and receive permission to reapply for admission to the United States. Section 212(a)(9)(C)(ii) of the Act.

II. ANALYSIS

The record reflects that the Applicant first entered the United States without being admitted in December 1989. The Applicant was placed in removal proceedings in [redacted] 1990. On [redacted] 1990, an Immigration Judge granted the Applicant voluntary departure until [redacted] 1990, with an alternate order of removal to Ecuador. When the Applicant did not comply with the grant of voluntary departure it was converted to a removal order. USCIS records indicate that the Applicant remained in the United States without permission until he departed on an unknown date while the removal order was pending and re-entered on September 11, 2002. On October 25, 2003, he departed the United States and subsequently re-entered without inspection on an unknown date. The Applicant then remained until his final departure to Ecuador in April 2018.[2]

Following an immigrant visa interview a U.S. Department of State (DOS) Consular Officer determined that the Applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more beginning on April 1, 1997.[3] The Applicant does not contest that he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The consular officer found the Applicant to be additionally inadmissible under section 212(a)(9)(A)(ii) of the Act, as a noncitizen who departed the United States while an order of removal was outstanding and who seeks admission within 10 years of his date of departure.

[2] The Applicant indicates he departed the United States in 2018 to attend a consular interview on his Form I-601A, Application for Provisional Unlawful Presence Waiver, where he claims he first was informed that he "had a deportation order from 1990."

[3] The accrual of unlawful presence for the purpose of inadmissibility determinations under sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i) of the Act begins on April 1, 1997, the effective date of the amendment enacting these sections.

Further, the Applicant was found to be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, for re-entering the United States without being admitted after having accrued more than one year of unlawful presence in the United States, and under section 212(a)(9)(C)(i)(II) of the Act, for having procured entry to the United States without being admitted after having been ordered removed from the United States. The Director of the Nebraska Service Center denied the waiver, noting the consular officer's inadmissibility findings, and concluding that the applicant is statutorily ineligible for relief based his inadmissibility under section 212(a)(9)(C)(i) of the Act.[4]

On appeal, the Applicant contests the determination that he is inadmissible under section 212(a)(9)(C)(i) of the Act. He asserts that he did not depart the United States between his December 1989 entry without inspection and his April 2018 departure to Ecuador. The Applicant submits his own additional statement and documentation showing his residence in the United States between 1999 and 2004. We acknowledge the Applicant's contention and statements concerning the inadmissibility findings. However, because the Applicant is residing abroad and applying for an immigrant visa, DOS makes a final determination concerning his eligibility for the visa and any applicable inadmissibility grounds.

The Applicant also previously noted that before he last departed the United States in April 2018, USCIS approved his application for a provisional unlawful presence waiver. *See* 8 C.F.R. § 212.7(e). The provisional unlawful presence waiver, however, only excused his inadmissibility under section 212(a)(9)(B)(i) of the Act. *See* 8 C.F.R. § 212.7(e)(12)(iii). It did not excuse his inadmissibility under sections 212(a)(9)(C)(i) and 212(a)(9)(A)(ii) of the Act. Moreover, denial of an immigrant visa application for any reason other than those listed under section 212(a)(9)(B)(i) of the Act automatically revokes the approval of a provisional unlawful presence waiver. 8 C.F.R. § 212.7(e)(14)(i). As stated, the record indicates that the consular officer denied the Applicant's immigrant visa application, in part, under sections 212(a)(9)(A)(ii) and 212(a)(9)(C)(i) of the Act. Thus, the immigrant visa application was denied on a ground other than those listed under section 212(a)(9)(B)(i), and the denial automatically revoked the approval of the provisional unlawful presence waiver. The Applicant's provisional unlawful presence waiver, therefore, cannot excuse the inadmissibility grounds against him.

A noncitizen who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless he or she has been outside the United States for more than 10 years since the date of the 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, for the exception at section 212(a)(9)(C)(ii) of the Act to apply, it must be the case that the Applicant's last departure was at least ten years ago, the Applicant has remained outside the United States, and USCIS has consented to the applicant's reapplying for admission. In the present case, the record establishes that the Applicant's last departure was in April 2018. Thus, the Applicant must wait abroad until at least April 2028 to reapply for admission to the United States. Under those circumstances, a waiver of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act would not be warranted in the exercise of discretion even if the Applicant were able to demonstrate extreme hardship to his qualifying relative. We will therefore dismiss the appeal as a matter of discretion.

[4] The Director's decision did not address the Applicant's inadmissibility under section 212(a)(9)(A)(ii) of the Act.

ORDER: The appeal is dismissed.