U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17302844

Date: APR. 8, 2022

Appeal of Fort Smith, Arkansas 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), because he will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the Fort Smith, Arkansas Field Office denied the application. The Director concluded that permission to reapply for admission would serve no purpose at this time because the Applicant has not left the United States, and has not indicated that he will do so in the future.

The matter is now before us on appeal. On appeal, the Applicant states his Form I-212 application must be approved before he can adjust status and become a lawful permanent resident.

We review the questions raised 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 dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that any noncitizen 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 is inadmissible.

Noncitizens who are 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 contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

II. ANALYSIS

The Applicant is currently in the United States and seeks permission to reapply for admission under the regulation at 8 C.F.R. § 212.2(j).

The Applicant entered lawfully as a B-2 nonimmigrant in 1999, changing to R-1 religious worker nonimmigrant status in 2000 and remaining in the United States after that status expired in 2003. The Applicant was ordered removed in 2010, and granted withholding of removal in 2015. In the 2015 order, the Immigration Judge clarified that withholding of removal does not grant "the right to remain in the United States"; rather, it "confers . . . the right to not be deported to a particular country" (in this case, Ethiopia). If the Applicant were to depart the United States, then he would execute the removal order and become inadmissible under section 212(a)(9)(A)(ii) of the Act.

A prospective employer filed an immigrant petition in 2016, seeking to classify the Applicant as a special immigrant religious worker. That petition was approved in 2017. The Applicant filed the Form I-212 application in April 2018, concurrently with Form I-485, Application to Register Permanent Residence or Adjust Status. In an accompanying statement, the Applicant stated:

> [T]he Applicant is not inadmissible under INA section 212(a)(9)(A) or (C) since he has not actually been removed from or departed the United States. As such, there is not an actual category on the Form I-212, Part 2 that fits Applicant's *sui generis* condition. However, this does not make the Applicant ineligible to apply for [permission to apply for admission]. Therefore, for the purpose of applying for Applicant'[s] Adjustment of Status, we are filing the I-212 Form as the DHS[1] law indicates.

The Applicant cites page two of the Form I-212 instructions, which state that an "applicant for adjustment of status" "may file Form I-212 if [he or she is] inadmissible under INA section 212(a)(9)(A)." But those instructions also state that inadmissibility under that section of the Act is triggered only upon removal or departure from the United States while under an order of removal. Here, the Applicant has never departed the United States while under the order of removal.

If a noncitizen files a Form I-212 application before departing the United States, then the approval of the application is conditioned upon the applicant's departure from the United States and would have no effect if the applicant does not depart. Here, however, the Applicant does not indicate that he intends to depart the United States.

The Director denied the Form I-212 application, concluding that "there is no deficiency . . . that can be resolved through the filing of Form I-212," because the "outstanding order of removal has not been executed," and the Applicant has not "shown any indication of a desire to depart from the United States in an effort to pursue consular processing at a United States consulate abroad."

On appeal, the Applicant cites the regulation at 8 C.F.R. § 212.2(e), which states, in part: "An applicant for adjustment of status under section 245 of the Act . . . must request permission to reapply for entry in conjunction with his or her application for adjustment of status." The regulations at 8 C.F.R. § 212.2, however, apply specifically to "[a]ny alien who has been deported or removed from the United States." 8 C.F.R. § 212.2(a). The Applicant has not shown that the cited provisions apply to an adjustment applicant who has not departed the United States following the removal order, and

[1] U.S. Department of Homeland Security.

who does not intend to do so. Rather, the regulations presume that the noncitizen has either departed and returned[2] or will depart.[3]

The Applicant cites various federal court cases, but all of the cited cases concerned individuals who departed while under a removal order, returned to the United States, and then applied for adjustment of status. Most of the Applicant's citations circle back to the language of 8 C.F.R. § 212.2(e), discussed above. For example, the Applicant quotes language from *Delgado v. Mukasey*, 516 F.3d 65 (2nd Cir. 2008). The plaintiff in that case was removed in 1999 and returned without admission in 2000, before applying for adjustment of status in 2006. *Id.* at 67. The Applicant quotes a passage from *Delgado* which is, itself, a direct quotation from 8 C.F.R. § 212.2(e).

The Applicant has not demonstrated that any of the cited regulations or case law apply to individuals who, like the Applicant, have never departed the United States under an order of removal. The Applicant does not dispute the Director's finding that the Applicant does not intend to depart in the future. Under the circumstances, we agree with the Director's determination that the Form I-212 application is not ripe for review, and that the Applicant has not shown that future events will warrant consideration of the application. Therefore, we will dismiss the appeal.

We note that the Applicant also disputes the denial of his Form I-485 adjustment application, which the Director declined to consider on the merits, citing jurisdictional grounds. The adjustment application, however, is a separate proceeding, over which we have no appellate authority. *See* 8 C.F.R. § 245.2(a)(5)(ii).

ORDER: The appeal is dismissed.

[2] If the individual filed Form I-212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of the application shall be retroactive to the date on which the individual *embarked or reembarked at a place outside the United States.* 8 C.F.R. § 212.2(i)(2).

[3] An individual whose departure will execute an order of deportation shall receive a conditional approval *depending upon his or her satisfactory departure.* 8 C.F.R. § 212.2(j).