U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19298982

Date: MAY 09, 2022

Motion on Administrative Appeals Office Decision

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

The Applicant intends to depart the United States to apply for an immigrant visa and seeks permission to reapply for admission under sections 212(a)(9)(A)(iii) and 212(A)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(ii), after having been previously removed from the United States.

The Director of the Kendall Field Office in Miami, Florida denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that the Applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act based on his expedited removal from the United States in in 2007 and subsequent reentry without admission in September 2012. The Director determined that the Applicant is statutorily ineligible to seek an exception to this inadmissibility ground under section 212(a)(9)(C)(ii) of the Act because he has not been physically outside the United States for more than 10 years since the date of his last departure. We dismissed the Applicant's subsequent appeal of that decision after reaching the same conclusion.

The matter is now before us on a motion to reconsider. On motion, the Applicant asserts that our decision was "clearly erroneous" because his 2007 removal order required him to spend a period of only five years physically outside the United States and he fulfilled this requirement. He therefore contests our determination that he is ineligible to seek permission to reapply for admission.

In these proceedings, it is the applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe,* 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we conclude that the Applicant has not met this burden and we will dismiss the motion.

I. LAW

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

Any noncitizen who has been ordered removed as an "arriving alien" under section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1), departs the United States pursuant to an expedited order of removal, and seeks admission within five years of the date of his or her departure or removal is inadmissible. Section 212(a)(9)(A)(i) of the Act.

Section 212(a)(9)(C)(i)(II) of the Act provides in relevant part that a noncitizen who has been ordered removed under section 235(b)(1) of the Act or any other provision of the law and who subsequently enters or attempts to reenter the United States without being admitted is inadmissible. An exception to this inadmissibility is available in cases where a noncitizen is seeking admission more than ten years after the date of their last departure from the United States and, prior to the noncitizen's reembarkation at a place outside the United States, the Secretary of Homeland Security has consented to that individual reapplying for admission. Section 212(a)(9)(C)(ii) of the Act.

II. ANALYSIS

The issue on motion is whether the Petitioner has established that our prior decision was based on an incorrect application of law or USCIS policy, based on the evidence in the record of proceeding at the time of the decision.

The record reflects that in [redacted] 2007, the Applicant attempted to enter the United States without inspection. He was apprehended and expeditiously removed from the United States in [redacted] 2007, pursuant to section 235(b)(1) of the Act. The Applicant remained outside the United States until September 2012, when he reentered the United States without being inspected and admitted, or paroled. He has remained in the United States since that time.

In our decision dismissing the appeal, we addressed the Applicant's inadmissibility under both sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i)(II) of the Act. We determined that, although the Applicant was previously removed under section 235(b)(1), he is no longer inadmissible under section 212(a)(9)(A)(i) of the Act because he remained physically outside the United States for five years following his 2007 departure under the expedited removal order.

However, we concluded that he is permanently inadmissible under section 212(a)(9)(C)(i)(II) of the Act because he reentered the United States without inspection in 2012, after a prior removal under section 235(b)(1) of the Act. A noncitizen who is inadmissible under section 212(a)(9)(C)(i)(II) may not seek permission to reapply for admission until they have remained physically outside of the United States for at least ten years from the date of the last departure. Section 212(a)(9)(C)(ii) of the Act. Therefore, based on the facts presented we agreed with the Director's determination that the Applicant is statutorily ineligible to seek permission to reapply for admission.

On motion, the Applicant contends that our determination was incorrect as a matter of law. He emphasizes that his 2007 order of removal clearly stated he needed to remain outside the United States for five years and the record reflects that he spent this required period abroad. We acknowledged these facts in determining that the Applicant is not inadmissible under section 212(a)(9)(A)(i) of the Act and he does not require permission to reapply for permission under section 212(a)(9)(A)(iii) of the Act. While his departure under an expedited removal order subjected to him to five-year a bar on admission to the United States, his subsequent reentry in 2012 without admission after a prior removal

order is a separate immigration violation, and it carries separate consequences imposed under section 212(a)(9)(C)(i)(II) of the Act.[1]

The Applicant has not established how our determination that he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act is based on an incorrect application of law or USCIS policy. This section states, in relevant part, that any noncitizen who "has been ordered removed under section 235(b)(1) . . . and who enters or attempts to reenter the United States without being admitted is inadmissible." The Applicant does not contest that he was removed under section 235(b)(1) of the Act in 2007, and that he reentered the United States without being admitted or paroled in 2012.

On motion, the Applicant asserts that the case law we cited in our appellate decision (*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)), is inapplicable because the cited cases involved noncitizens who (1) did not have a previous expedited removal order and (2) were seeking to adjust status in the United States. The cases cited, while they are not factually identical to the Applicant's case, are relevant because they involved respondents who were determined to be inadmissible under section 212(a)(9)(C)(i) of the Act. We concluded that the Applicant is inadmissible pursuant to the plain language of section 212(a)(9)(C)(i)(II) of the Act because he reentered the United States without being admitted or paroled after having previously been removed. Further, *Torres-Garcia* states that a noncitizen is statutorily ineligible for a waiver of inadmissibility under section 212(a)(9)(C)(ii) of the Act unless more than ten years have elapsed since the date of the last departure. *Torres-Garcia,* 23 I&N Dec. 866, 873.

The remaining issue is whether the Applicant is eligible to file a Form I-212 to seek consent to reapply for admission to the United States even though he has not been physically outside the United States for ten years since his last departure, as required by section 212(a)(9)(C)(ii) of the Act. The Applicant emphasizes that since he had an expedited order of removal as an "arriving alien," he was subject to only a five-year bar on admission.

Section 212(a)(9)(C)(i)(II) applies to noncitizens previously subject to expedited removal as "arriving aliens" under section 235(b)(1), to those removed under section 240 of the Act, and to those previously removed under any other provision of the law. The consequences of reentry without admission following a prior removal order are the same regardless of which provision of the Act served as the basis for removal. Similarly, the eligibility requirements for applying for permission to reapply for admission under section 212(a)(9)(C)(ii) are the same for all noncitizens who reenter the United States without admission after a previous removal.

The instructions to the Form I-212 specify, on pages 2-3, that an applicant for an immigrant visa who is inadmissible under section 212(a)(9)(C) may not file an application for consent to reapply for admission if the applicant is in the United States or has not been physically outside the United States for more than ten years since the date of their last departure from the United States. Here, the Applicant

[1] The instructions to Form I-212, at page 6, state: "Even if the inadmissibility period under INA 212(a)(9)(A)(i) has already passed (you were required to remain abroad for 5 or 20 years and have done so . . .) you will become inadmissible under INA 212(a)(9)(C) if you enter or attempt to enter the United States without being inspected and admitted or paroled). *See* form instructions at https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf; *see also* 8 C.F.R. § 103.2(a)(1), which incorporates the form instructions into the regulations.

is in the United States and has not been physically outside the United States for more than ten years since his last departure. Based on the applicable statute and regulations, the Applicant is not eligible to apply for consent to reapply for permission to enter the United States.

For the reasons discussed, the Applicant has not established our prior decision was based on an incorrect application of law or USCIS policy. Accordingly, the motion will be dismissed and the application will remain denied.

ORDER: The motion to reconsider is dismissed.