U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27167414

Date: MAR. 13, 2023

Service Motion on Administrative Appeals Office Decision

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

The Applicant seeks advance 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). The Director of the Kansas City, Missouri Field Office denied the application, concluding that the Applicant was statutorily ineligible to apply for permission to reenter the United States because he has not remained outside the country for a period of at least 10 years since his last departure. We dismissed a subsequent appeal, and the matter is now before us on a motion to reconsider.[1] Upon review, we will dismiss the motion.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i), 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of a noncitizen convicted of an aggravated felony) is inadmissible. Noncitizens found 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 continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

Section 212(a)(9)(C)(i)(I) of the Act provides that any noncitizen who enters the United States without being admitted after having accrued more than one year of unlawful presence is inadmissible. Noncitizens found inadmissible under section 212(a)(9)(C) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii), which provides that inadmissibility shall not apply to a noncitizen seeking admission more than ten years after the date of last departure from the United States if, prior to the reembarkation at a place outside the United States or attempt to be

[1] We note here that we previously issued a decision in the instant case. We are hereby reopening the proceedings sua sponte, pursuant to 8 C.F.R. § 103.5(a)(5), and reissuing to correct an error with the receipt number.

readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

I. ANALYSIS

As stated above, the Applicant has been found inadmissible under section 212(a)(9)(C)(i)(I) of the Act for entering the United States without being admitted after having accrued more than one year of unlawful presence. The issue on motion is whether our decision was based on an incorrect application of law or policy, and whether our prior decision was incorrect based on the record before us.

Referencing our reliance on Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006), the Applicant contends that his case can be distinguished from Matter of Torres-Garcia because he was never ordered removed from the United States, and he is an applicant for adjustment. He also contends that Matter of Torres-Garcia is fundamentally flawed because the Board of Immigration Appeals (Board) exceeded its authority and its reasoning is based upon the premise that 8 C.F.R. 212.2, the regulation governing permission to reapply for admission, is inapposite to determining the meaning of section 212(a)(9) of the Act. He also asserts that section 813(b)[2] of the Violence Against Women (VAWA) and Department of Justice Reauthorization Act of 2005 allows USCIS to waive inadmissibility under section 212(a)(9)(C)(iii), which supports his claim that individuals can obtain a Form I-212 approval without remaining outside the United States for 10 years.

We find the Applicant's contentions to be without merit. In Matter of Torres-Garcia, the Board held that a foreign national who is inadmissible under section 212(a)(9)(C)(i) of the Act remains inadmissible even if the foreign national obtained the Attorney General's permission to reapply for admission prior to reentering unlawfully. The Board also stated that the regulation governing permission to reapply for admission[3] does not implement section 212(a)(9)(C) of the Act and cannot be interpreted in a manner that would allow a foreign national to circumvent the statutory 10-year limitation on section 212(a)(9)(C) waivers. Id. at 876. Further, Matter of Briones, 24 I&N Dec. 355 (BIA 2007), the Board held that adjustment of status under section 245(i) is not available to a foreign national who is inadmissible under section 212(a)(9)(C)(i)(I). Thus, to avoid inadmissibility under section 212(a)(9)(C)(i) of the Act, it must be the case that the Applicant's last departure was at least 10 years ago, the Applicant has remained outside the United States for 10 years and submits his application prior to his reembarkation to the United States, and USCIS has consented to the Applicant's reapplying for admission. See Delgado v. Mukasey, 516 F.3d 65, 73 (2nd Cir. 2008) (providing that the consent to reapply provision requires a foreign national to seek permission to reapply for admission from outside of the United States after ten years have passed since the most recent departure from the United States).

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[2] Section 813(b)(1) provides that the Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion. Pub. L. No. 109-162, tit. VIII.

[3] 8 CFR 212.2

We also find that, in addition to being not supported by any pertinent precedent, the Applicant's conclusion that section 813(b) of the VAWA Reauthorization Act of 2005 is applicable to his case is erroneous as in enacting this legislation, Congress stated that DHS "should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994, cases involving nonimmigrants described in subparagraph (T) or (U) of section 101(a)(15) of the Act.[4] Accordingly, USCIS has exercised this discretion to waive inadmissibility under section 212(a)(9)(C)(iii) of the Act for an approved VAWA self-petitioner if the VAWA self-petitioner can establish a connection between the battery or extreme cruelty that is the basis for the VAWA claim and the subsequent unlawful entry or attempted reentry into the United States.

The Applicant's last known departure from the United States occurred in December 2004, and he is currently in the United States and has not remained outside of the country for at least 10 years. He is therefore statutorily ineligible for permission to reapply for admission to the United States. As such, we will not address whether the Applicant merits permission to reapply under section 212(a)(9)(A)(iii) of the Act as matter of discretion, as granting this relief would not result in the Applicant's admissibility to the United States. Accordingly, the application remains denied.

ORDER: The motion to reconsider is dismissed.

[4] Pub. L. No. 109-162, tit. VIII, sec. 813(b)(2).