U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-N-D-C-

DATE: SEPT. 10, 2015

MOTION OF AAO DECISION

APPLICATION: FORM I-212, APPLICATION FOR PERMISSION TO REAPPLY FOR ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR REMOVAL

The Applicant, a native and citizen of Mexico, seeks permission to reapply for admission into the United States. *See* Immigration and Nationality Act (INA, or the Act) § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii). The Field Officer Director, San Bernardino, California, denied the application. We dismissed the appeal. The matter is now before us on motion to reopen and reconsider. The motion is denied.

In a decision, dated November 7, 2011, the Director found that the Applicant did not meet the requirements for permission to reapply for admission and she denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, accordingly. In a decision, dated June 20, 2012, we found that the Applicant is currently statutorily ineligible to apply for permission to reapply for admission.

On motion,[1] the Applicant asserts that we did not specifically address whether *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008), applies to her case.

A motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The Applicant submits a brief on motion. The requirements of a motion to reopen have not been met. However, based on the legal arguments presented, the requirements of a motion to reconsider have been met, although the motion is denied, as the Applicant has not established that the decision was based on an incorrect application of law or USCIS policy.

[1] The motion was timely filed in July 2012, but we did not receive it until March 2015.

The record includes, but is not limited to, the Applicant's brief and previously submitted documents. The entire record was reviewed and considered in arriving at a decision on the motion.

On January 30, 2005, the Applicant was ordered removed from the United States pursuant to section 235(b)(1) of the Act, after she attempted to procure admission to the United States with a false identity and U.S. lawful permanent resident card not belonging to her. The Applicant subsequently entered the United States without inspection on the same day. We found that the Applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act, for having been ordered removed under section 235(b)(1) of the Act and reentering the United States without being admitted.

The Applicant asserts that an apprehension at the border is insufficient to constitute a valid order of removal that would render her inadmissible to the United States; 8 C.F.R. § 287.3 sets forth the regulatory requirements that the Department of Homeland Security must adhere to when an individual is arrested without a warrant; 8 C.F.R. § 287.8 defines an interrogation, rules on detention and questioning, and the use of information obtained; and Ninth Circuit case law requires the U.S. government to comply with the regulatory provisions of 8 C.F.R. § 287.3.

The Applicant's assertions relate to the basis on which the Applicant was removed from the United States. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). We exercise appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). We do not have jurisdiction over removal orders. The Applicant does not contest that she was in fact removed under section 235(b)(1) of the Act on January 30, 2005, and she subsequently reentered without inspection.

Section 212(a)(9)(C)(i) of the Act states, in pertinent part:

> (C) Aliens unlawfully present after previous immigration violations.-
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> (i) In general.-Any alien who-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
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> and who enters or attempts to reenter the United States without being admitted is inadmissible.
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> (ii) Exception.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless the alien has been outside the United States for more than 10 years since the date of the alien's 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, to avoid inadmissibility under section 212(a)(9)(C) of the Act, 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.

The motion does not establish that our previous decision was based on an incorrect application of law or policy. Moreover, in the present matter, the Applicant's last departure from the United States occurred on January 30, 2005, and she returned to the United States on January 30, 2005. The Applicant asserts that she is eligible to seek permission to reapply for admission into the United States. However, the Applicant currently resides in the United States and therefore has not remained outside the United States for 10 years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission.

In application proceedings, the burden of proving eligibility remains entirely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Applicant has not met that burden. Accordingly, the motion will be denied.

ORDER: The motion is denied.

Cite as *Matter of E-N-D-C-*, ID# 13326 (AAO Sept. 10, 2015)