U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-M-C-

DATE: JUNE 8, 2017

APPEAL OF DENVER, COLORADO FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of grounds of inadmissibility for crimes involving moral turpitude and for unlawful presence. *See* Immigration and Nationality Act (the Act) sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant sections 212(h) and 212(a)(9)(B)(v) of the Act discretionary waivers if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director of the Denver, Colorado, Field Office found the Applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. Specifically, the Director found that in 2002, the Applicant was convicted in the Colorado District Court of Felony Menacing/Simulated Weapon F5, in violation of Colorado Revised Statute section 18-3-206(1)(a) and (b). The Director also found the Applicant to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States, in that the record reflected that 1) the Applicant was admitted into the country as a nonimmigrant B2 visitor in October 1997, with permission to remain until April 3, 1998, however, she remained until June 2000; and 2) the Applicant was admitted into the United States as a nonimmigrant B2 visitor in July 2000, with permission to remain until December 2, 2000; but remained in the country until June 2003. The Director concluded the Applicant did not establish that denial of her admission would result in extreme hardship to a qualifying relative. The waiver application was denied accordingly.

We found upon initial review of the Applicant's case that, although not addressed in the Director's decision, the Applicant was also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for an aggregate period of more than one year and reentering the country around October 2003 without admission. Because the Director did not address this ground inadmissibility, we issued a notice of intent to dismiss (NOID) to allow the Applicant an opportunity to address our finding.

The Applicant submits additional evidence on appeal and in response to our NOID, and asserts that she is not inadmissible under sections 212(a)(9)(B)(i)(II) or 212(a)(9)(C)(i)(I) of the Act. She does not contest that she remained in the United States for over a year beyond the authorized admission dates discussed in the Director's decision. She contends, however, that she was lawfully admitted into the country subsequent to each period of unlawful presence, and that the law and USCIS policy allows her unlawful presence bar period to be served inside the United States and does not require her to obtain a waiver. The Applicant asserts that she is also not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that court decisions demonstrate that her felony menacing offense does not qualify as a crime involving moral turpitude. In the event that she is found to be inadmissible, she claims that evidence in the record shows her U.S. citizen spouse would experience extreme hardship if she is denied admission into the country, and that a favorable exercise of discretion is warranted in her case.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is a native and citizen of Mexico who currently resides in the United States and seeks to adjust status to that of a lawful permanent resident. A foreign national seeking to be admitted to the United States as an immigrant or to adjust status must be "admissible" or receive a waiver of inadmissibility.

Any foreign national convicted of, or who admits having committed, or admits committing acts which constituted the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. *See* section 212(a)(2)(A) of the Act. An individual found inadmissible under section 212(a)(2)(A)(i)(I) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act.

In addition, a foreign national who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. *See* section 212(a)(9)(B)(i)(II) of the Act. The foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or if she or he is present in the United States without being admitted or paroled. *See* section 212(a)(9)(B)(ii) of the Act. This inadmissibility may be waived under section 212(a)(9)(B)(v) of the Act.

USCIS may generally grant section 212(h) and section 212(a)(9)(B)(v) of the Act waivers of inadmissibility as a matter of discretion, if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident qualifying relative, and the foreign national has demonstrated that a waiver is warranted in the exercise of discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 299 (BIA 1996).

Any foreign national who has been unlawfully present in the United States for an aggregate period of more than one year, who enters or attempts to reenter the United States without being admitted is also inadmissible. *See* section 212(a)(9)(C)(i)(I) of the Act.

There is no waiver available for inadmissibility under section 212(a)(9)(C)(i) of the Act, and an individual must instead seek permission to reapply for admission into the country under section 212(a)(9)(C)(ii) of the Act, by filing a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.[1]

II. ANALYSIS

The issues in this case are: 1) whether the Applicant is inadmissible 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 prior to departures and reentries into the country in 2000 and 2003; and 2) whether the Applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act for reentering the United States without admission after having been unlawfully present in the country for an aggregate period of more than one year. If the Applicant is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act, remaining issues are whether the Applicant's felony menacing/simulated weapon conviction is for a crime involving moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act; and whether she established that her U.S. citizen spouse would experience extreme hardship if she is denied admission into the country.

The Applicant does not contest on appeal that she was admitted into the United States with a nonimmigrant B1/B2/border crossing card on two occasions, and that she remained in the country for over a year beyond April 1998 and June 2000 authorized periods of stay. She claims, however, that she is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act, because her nonimmigrant B1/B2/border crossing card was valid until 2010; she was not told to renew her visa during the periods of time in question; and she was inspected and permitted reentry into the country with the nonimmigrant visa, and was therefore lawfully admitted. The Applicant asserts that under these circumstances the law and USCIS policy allows her to serve the section 212(a)(9)(B)(i)(I) of the Act 10-year bar to admission period in the United States, and does not require a waiver of inadmissibility.[2]

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[1] Section 212(a)(9)(C)(ii) of the Act states:

> 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, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the [Secretary of the Department of Homeland Security] has consented to the alien's reapplying for admission.

[2] With regard to her felony menacing offense conviction, the Applicant acknowledges that she was convicted of the offense of Felony Menacing/Simulated Weapon F5, in violation of Colo. Rev. Stat. § 18-3-206(1)(a) and (1)(b). She also accepts that past legal decisions have considered this offense categorically to be a crime involving moral turpitude. She asserts, however, that there are no Tenth Circuit Court of Appeals (the court with jurisdiction in her case) decisions discussing whether the Colorado felony menacing offense is a crime involving moral turpitude; that the 2015 Board of Immigration Appeals decision, *Matter of Silva-Trevino*, 24 I&N Dec. 550 (Att'y Gen. 2015) does not encompass this type of offense; and that case law prior to *Silva-Trevino* supports a finding that her felony menacing offense is not a

For the reasons discussed below, we find the Applicant has provided insufficient evidence to overcome the Director's finding that she is inadmissible 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 prior to her departures and reentries into the country in 2000 and 2003. In addition, she has not provided sufficient evidence to overcome our NOID determination that she is inadmissible under section 212(a)(9)(C)(i)(I) of the Act for having been unlawfully present in the United States for an aggregate period of more than one year and reentering the country without admission.[3]

A. Inadmissibility Under Section 212(a)(9)(B)(i)(II) of the Act

As stated above, the Applicant has been found to be inadmissible 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 prior to her departures and reentries into the country in 2000 and 2003. The Applicant does not contest that she was admitted into the United States with a nonimmigrant B1/B2/border crossing card on two occasions (in 1997 and in 2000), and that she remained in the country for over a year beyond April 1998 and December 2000 authorized periods of stay, and the record supports these facts.[4] Because the record shows the Applicant was unlawfully present in the United States for more than one year after April 1998 and prior to her departure from the country, and again after December 2000 and prior to her departure in 2003, she accrued sufficient unlawful presence for inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

The Applicant contends, however, that a waiver for inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is not required in her case. Specifically, she asserts that her B1/B2/border crossing card contained was valid between June 2000 and June 2010, and that she was not required to request a new nonimmigrant visa during the validity period. She claims that she was inspected and was allowed to enter the United States using the B1/B2/border crossing card after each period of unlawful presence; she was not told that the card was invalid or that she needed to request a new nonimmigrant visa; and that the law and USCIS policy therefore tolls her unlawful presence bar period, allows her to serve the unlawful presence bar period while she is in the United States, and does not require a waiver of inadmissibility.

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crime involving moral turpitude.

[3] There is no waiver available for the Applicant's inadmissibility under section 212(a)(9)(C)(i) of the Act. We therefore do not reach issues related to whether the felony menacing/simulated weapon offense is a crime involving moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act, or whether her qualifying relative spouse would experience extreme hardship if she were denied admission into the country.

[4] A Form I-94, Arrival/Departure Record, reflects that the Applicant was admitted into the United States as a B2 nonimmigrant visitor in October 1997, with permission to remain in the country until April 3, 1998. The Applicant did not depart the country until June 2000, more than two years later. A second Form I-94 reflects that the Applicant was admitted into the United States as a B2 nonimmigrant visitor in June 2000, with permission to remain until December 2, 2000; however, the Applicant remained in the country until May or June 2003, when she departed pursuant to a grant of voluntary departure.

To support her assertions, the Applicant refers to the May 6, 2009, USCIS memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, and Pearl Chang, Acting Chief, Office of Policy and Strategy, (USCIS, HQDOMO 70/21.1) entitled, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, Revision to and Re-designation of Adjudicator's Field Manual (AFM) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03).* The Applicant claims that the memorandum describes the exact circumstances of her case and concludes that pursuant to the memorandum, an unlawful presence waiver is not required in such a scenario. However, she does not indicate where, in the 51 page memorandum, the policy she refers to is contained or exactly what the policy says, and we find that this unlawful presence memorandum does not support her claims. While the document does state that unlawful presence does not accrue while a foreign national is in the United States under a period of stay authorized by the Service, in the Applicant's case, she remained past her period of authorized stay. A discussion on lawful nonimmigrants also does not apply to the Applicant. The discussion provides that the period of authorized stay for a nonimmigrant may end on a specific date, or may continue for "duration of status" if the foreign national was admitted under such status, until USCIS or an immigration judge finds a duration of status violation. A section on non-controlled nonimmigrants (e.g. Canadian B-1/B-2) who were not issued a Form I-94 adds that these individuals are treated as nonimmigrants admitted for durations of status for purposes of determining unlawful presence. The duration of status provisions do not apply to the Applicant as her Forms I-94 contain specific admission dates and periods of stay. According to memorandum policy, the Applicant's unlawful presence in the United States therefore began to accrue the day following the expiration of her authorized periods of stay (in April 1998 and in December 2000). Moreover, nothing in the memorandum states that an individual in the Applicant's circumstances may serve the section 212(a)(9)(B)(i)(II) of the Act admission bar period while she or he is in the United States.

Opinion letters from the USCIS Chief Counsel, dated in July 2006 and January 2009, also do not support the Applicant's claims. Although the letters indicate that a section 212(a)(9)(B)(i) of the Act inadmissibility period may continue to run if an individual is paroled into the United States pursuant to certain section 212(d) of the Act provisions, the Applicant does not claim or submit evidence to demonstrate that subsequent to her unlawful periods of stay, she was paroled into the country. Moreover, both letters reflect that the interpretations therein do not apply to individuals who return to or remain in the United States unlawfully.

The Applicant also indicates that the exception discussed in the USCIS Chief Counsel letters also extends to individuals who have simply been lawfully admitted into the United States, whether or not the individual was paroled in. In support, she refers to one of our non-precedent decisions; however, according to her assertions, we determined in that case that an applicant for adjustment of status could satisfy the unlawful presence bar to admission through time spent outside or inside of the United States, where the individual was readmitted into the country *with advance parole* in order to continue the adjustment of status application. Again, the Applicant has not shown that subsequent to her unlawful periods of stay she was paroled into the United States. In addition, our decision was

not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

In addition, the Applicant cites to the Board of Immigration Appeals decision, *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006), for the proposition that a section 212(a)(9)(B)(i)(II) of the Act inadmissibility period continues to run if an individual is lawfully admitted into the United States subsequent to being unlawfully present for one year or more. *Rodarte*, however, does not address this issue and holds simply that "an alien's departure from the United States triggers the 10-year inadmissibility period specified in section 212(a)(9)(B)(i)(II) only if that departure was preceded by a period of unlawful presence of at least 1 year." *Id.* at 909.

Upon review, we find that the Applicant has not demonstrated that her accrual of unlawful presence in the United States after April 1998 and prior to her departure in June 2000, and again after December 2000 and prior to her departure around June 2003 was tolled, that she may serve the unlawful presence bar period while in the United States, or that she is otherwise shielded from a finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Because the record reflects that the Applicant was unlawfully present in the United States for more than one year prior to her departures and reentries into the country in 2000 and 2003, she is inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

B. Inadmissibility Under Section 212(a)(9)(C)(i) of the Act

We also find that the Applicant has not demonstrated that she was lawfully admitted into the United States in October 2003 (subsequent to departure from the country around June 2003), and that she is therefore inadmissible under section 212(a)(9)(C)(i)(I) of the Act, for accruing over one year of unlawful presence in the United States and reentering the country without inspection or admission.

Again, section 212(a)(9)(C)(i)(I) of the Act provides that any foreign national who has been unlawfully present in the United States for an aggregate period of more than one year, who enters or attempts to reenter the United States without being admitted is inadmissible. The Applicant does not contest that she reentered the country (around October 2003) after being unlawfully present in the United States for more than one year. She claims, however, that her October 2003 entry was pursuant to a lawful admission, and that she is therefore not subject to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Specifically, she states in an affidavit that she traveled by car to the [redacted] Texas border and then walked through the port of entry after presenting her nonimmigrant B1/B2/border crossing card to an immigration officer and being allowed to enter the country.[5] Citing to two Board of Immigration Appeals decisions, the Applicant contends that she was therefore lawfully admitted into the United States. *See Matter of Areguillin*, 17 I&N Dec. 308 (BIA

[5] She claims that she also had no problem remaining in the country when a second immigration officer inspected her nonimmigrant B1/B2/border crossing card on a bus in [redacted] New Mexico.

1980) (holding that admission occurs when an inspecting officer communicates to a foreign national that they have been determined to be not inadmissible, that such communication takes place when the officer permits the individual to pass through the port of entry, and that a foreign national who physically presents him or herself for questioning and makes no knowing false claim to citizenship is inspected and admitted even if the individual volunteers no information and is asked no questions by the immigration officer). *See also, Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010) (finding that a foreign national seeking to show that he or she has been admitted to the United States need only prove procedural regularity in his or her entry, which does not require the individual to be questioned by immigration officers or to be admitted in a particular status.)

We find that the scenarios in *Matter of Areguillin* and *Matter of Quilantan* are not similar to the facts in the Applicant's case, in that aside from her own affidavit, which was submitted in response to our NOID, the Applicant has presented no evidence to demonstrate that she was inspected by an immigration officer in October 2003 and allowed to enter the country.[6]

The Applicant questions the reliability of immigration records, or in her case the lack thereof, by alleging errors in a Notice to Appear (NTA) that was issued to her in May 2002, and in a related Form I-213, Record of Deportable Alien. She asserts the Form I-213 states she was apprehended at the [redacted] Texas border in May 2002, and that this was erroneous since criminal offense related documents show she was in police custody in Colorado at that time. However, the Form I-213 clearly reflects that the "date, place, and manner of the Applicant's last entry into the United States" was in [redacted] Texas in March 2002. The May 2002 apprehension information referred to by the Applicant relates to the date the Service took custody of, or apprehended, the Applicant from jail. The NTA also states that the Applicant entered the United States "at or near [redacted] Texas on or about March 8, 2002." This evidence does not demonstrate that immigration records are unreliable in the Applicant's case or that she was lawfully admitted into the United States in October 2003.

The Applicant has presented no Form I-94 admission or other evidence to establish a lawful admission into the country in October 2003. Immigration service databases also show no record of a lawful admission at any time after her June 2000 admission. Moreover, the record reflects that at the time of the Applicant's October 2003 entry into the country, she was clearly inadmissible for 10 years pursuant to section 212(a)(9)(B)(i)(I) of the Act, as found by an immigration judge during removal proceedings in May 2002.[7] Because the record lacks evidence reflecting that the Applicant

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[6] The Board also clarified in *Matter of Areguillin* that the Applicant "bears the burden of proving that she did, in fact, present herself for inspection." *Id.* at 310. The Board continued, stating:

> [i]nasmuch as the immigration judge found the respondent ineligible as a matter of law for adjustment under section 245, he made no finding with respect to the credibility or sufficiency of the evidence offered, which at present consists of the respondent's uncorroborated testimony. We shall accordingly remand the record to the immigration judge for further proceedings, during which the respondent should be accorded an opportunity to offer any additional evidence she may be able to produce in support of her assertions. . . . *Id.* at 310-11

[7] As previously discussed, the Applicant was placed into removal proceedings in May 2002 based on her unlawful presence in the country for a year or more without admission or parole. In February 2003 an immigration judge granted

was, despite this finding, lawfully admitted into the country, the inadmissibility provisions contained in section 212(a)(9)(C)(i)(I) of the Act apply to her.

C. A Waiver of Inadmissibility Is Not Presently Available

An individual who is inadmissible under section 212(a)(9)(C) of the Act must apply for consent to reapply for admission. The individual 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 individual's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006).

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 10 years ago, she has remained outside the United States, and USCIS has consented to her reapplying for admission. Here, the record shows that the Applicant returned to Mexico in June 2003; however, she reentered the United States around October 2003 without admission, without consent, and prior to remaining outside of the country for 10 or more years. The Applicant is therefore statutorily ineligible to apply for permission to reapply for admission. Having found the Applicant to be statutorily ineligible for relief at this time, no purpose would be served in adjudicating her waiver application under sections 212(a)(9)(B)(v) and section 212(h) of the Act.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-M-C-*, ID# 188287 (AAO June 8, 2017)

her voluntary departure in lieu of removal, and in 2003 she appeared at the Mexico to demonstrate that she departed the United States.