U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-V-

DATE: DEC. 21, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE 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 (the Act) § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii). The Field Office Director, San Bernardino, California, denied the application. We dismissed a subsequent appeal. The matter is now before us on motion to reopen. The motion will be denied.

In a decision dated January 27, 2014, the Field Office Director concluded that the Applicant did not meet the requirements for consent to reapply because she had not remained outside the United States for the requisite time since her last departure. The Applicant's Form I-212 was denied accordingly.

On appeal, we determined that the Applicant was statutorily ineligible to apply for permission to reapply for admission and she had not established that the decision in *Duran Gonzales v. DHS,* 508 F.3d 1227 (9th Cir. 2007), precluding relief under section 212(a)(9)(C) of the Act should not be applied retroactively to her case. The appeal was dismissed.

On motion, the Applicant submitted a request that USCIS reopen the Form I-212, Application for Permission to Reapply for Admission after Deportation Removal, under the Settlement Agreement in *Duran Gonzalez v. DHS*, Civ. No. 06-1411-MJP (W.D.Wa. Settlement approved 7/21/2014; Judgment entered 7/30/2014). As the request was received by USCIS before January 21, 2016, within 18 months of the effective date of the Settlement Agreement, it is timely.

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

> ....
>
> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-Any alien who-
>
> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
>
> and who enters or attempts to reenter the United States without being admitted is inadmissible.
>
> (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, 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 has consented to the alien's reapplying for admission.

The record indicates that on August 25, 1999, the Applicant attempted to procure entry to the United States by concealing herself in the trunk of a vehicle. She was ordered removed under section 235(b)(1) of the Act on August 25, 1999, and removed the same day. On September 4, 1999, the Applicant attempted to procure entry to the United States with a photo-substituted Mexican passport with a counterfeit temporary I-551 stamp. She was removed on September 4, 1999. The Applicant subsequently entered the United States without being admitted on or around June 4, 2000. The Applicant is therefore inadmissible under section 212(a)(9)(C)(i)(II) of the Act for having reentered the United States without being admitted after having been ordered removed.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than ten 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); *see also 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)(i) of the Act, the Board of Immigration Appeals (BIA) has held that 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.

On August 13, 2004, the Ninth Circuit Court of Appeals held that a foreign national could apply for adjustment of status under section 245(i) of the Act by filing a Form I-212 to overcome inadmissibility under section 212(a)(9)(C)(i)(II) of the Act without remaining outside the United States for 10 years. *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004). In *Matter of Torres-Garcia* the BIA rejected the Ninth Circuit's rational in *Perez-Gonzalez* and held that individuals inadmissible under section 212(a)(9)(C)(i)(II) of the Act could not be granted consent to reapply until they remained outside the United States for 10 years after the date of the latest departure. 23 I&N Dec. at 875-76. On November 30, 2007, the Ninth Circuit Court of Appeals deferred to the BIA's interpretation in *Torres-Garcia* and overturned *Perez-Gonzalez. Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) ("*Duran Gonzales I*").

Pursuant to the July 21, 2014, Settlement Agreement in the *Duran Gonzalez* class action lawsuit, certain individuals who reside within the jurisdiction of the Ninth Circuit may be afforded an

opportunity to establish that *Matter of Torres-Garcia* should not apply retroactively to them and have their applications for adjustment of status and consent to reapply for admission adjudicated on the merits.

The Settlement Agreement applies to class members defined as any person who:

1. Is the beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before April 30, 2001, provided that, if the immigrant visa petition or labor certification was filed after January 14, 1998:

    a. the beneficiary was physically present in the United States on December 21, 2000, or
    b. If a derivative beneficiary, the derivative beneficiary or the primary beneficiary was physically present in the United States on December 21, 2000.

2. Is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act ("INA"), because he or she entered or attempted to reenter the United States without being admitted after April 1, 1997, and without permission after having previously been removed;

3. Properly filed a Form I-485 (Application to Adjust Status) and Form I-485 Supplement A (Adjustment of Status Under Section 245(i)) while residing within the jurisdiction of the Ninth Circuit on or after August 13, 2004, and on or before November 30, 2007;

4. Filed a Form I-212 (Application for Permission to Reapply for Admission Into the United States After Deportation or Removal) on or after August 13, 2004, and on or before November 30, 2007;

5. Form I-485, Form I-485 Supplement A, and Form I-212 were denied by U.S. Citizenship and Immigration Services ("USCIS") and/or the Executive Office for Immigration Review ("EOIR") on or after August 13, 2004, or have not yet been adjudicated;

6. Is not currently subject to pending removal proceedings under INA § 240, or before the United States Court of Appeals for the Ninth Circuit on a petition for review of a removal order resulting from proceedings under INA § 240; and

7. Did not enter or attempt to reenter the United States without being admitted after November 30, 2007.

In this case, the Applicant has not provided sufficient evidence to demonstrate that she meets the fourth requirement of the Settlement Agreement as detailed above, as she has not established, nor does the record indicate, that she filed a Form I-212, on or after August 13, 2004, and on or before November 30, 2007. The only Form I-212 application in the record was submitted by the Applicant in April 2013 and denied on January 27, 2014.

As the Applicant does not meet all the requirements necessary to establish she is a class member under the terms of the Settlement Agreement, the Applicant is not eligible for benefits under said agreement. Consequently, the Applicant has not shown that she is eligible for permission to reapply for admission into the United States after deportation or removal pursuant to section 212 (a)(9)(C)(ii) of the Act.

Even if we were to conclude that the Applicant had established eligibility for consent to reapply based on the Settlement Agreement, we note that the record establishes that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry to the United States in September 1999 by fraud or willful misrepresentation, as discussed above. The Applicant therefore requires a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), and must obtain a Form I-601, Application for Waiver of Grounds of Inadmissibility, approval. The record establishes that the Applicant filed a Form I-601 on April 8, 2013, and it was denied on January 27, 2014. Without an approved Form I-601, no purpose would be served in granting the application for permission to reapply for admission at this time, even if we had determined that the Applicant was eligible for consideration under the Settlement Agreement, as it would not result in the Applicant's admissibility. *See Matter of Martinez-Torres,* 10 I&N Dec. 776 (Reg'l Comm'r 1964); *Matter of J-F-D-,* 10 I&N Dec. 694 (Reg'l Comm'r 1963).

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. After a careful review of the record, it is concluded that the Applicant is not eligible to apply for consent to reapply at this time. Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.

Cite as *Matter of R-V-*, ID# 14758 (AAO Dec. 21, 2015)