



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF V-A-A-

DATE: JUNE 1, 2016

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 Honduras, was found inadmissible for having been previously ordered removed and convicted of an aggravated felony and seeks permission to reapply for admission to the United States prior to the expiration of this inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). U.S. Citizenship and Immigration Services (USCIS) may remove the inadmissibility bar by granting permission to reapply for admission in the exercise of discretion.

The Director, Nebraska Service Center, denied the application. The Director denied the application as a matter of discretion because the Applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, had been denied and the Applicant would remain inadmissible to the United States even if the application for permission to reapply for admission had been approved.

The Applicant appealed the Director's decision to this office, which dismissed the appeal on July 24, 2015. We found the Applicant inadmissible for entering the United States without being admitted after having accrued unlawful presence in the United States for an aggregate period of more than one year and after having been removed. *See* section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), and section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

The matter is now before us on motion to reopen and reconsider. In the motion, the Applicant submits additional evidence and claims that the denial of the Applicant's Form I-212 was an abuse of discretion and that the Director erred in determining that he was precluded from seeking relief under section 212(h) of the Act for having been convicted of an aggravated felony after admission as a permanent resident. The Applicant further claims that the inadmissibility grounds under sections 212(a)(9)(C)(i)(I) and 212(a)(9)(C)(i)(II) are not applicable to him because he applied for permission to reapply for admission prior to the reinstatement of his removal order, and in the alternative, if these sections were to apply to him, that it is permissible for the Applicant to apply for a waiver within the United States pursuant to *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

We will deny the motion.

(b)(6)

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I. LAW

The Applicant is seeking permission to reapply for admission to the United States and has been found inadmissible for having been previously ordered removed and convicted of an aggravated felony. Specifically, he was charged with removability under sections 237(a)(2)(iii) of the Act after having been convicted of Rape in the Third Degree on [REDACTED] 1996, in [REDACTED] New York. The Applicant was removed on July 7, 2007. Section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), provides, in pertinent part:

Certain Aliens Previously Removed.-

(i) Arriving aliens

Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who-

- (I) has been ordered removed under section 240 or any other provision of law, or
- (II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's 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 an alien convicted of an aggravated felony) is inadmissible.

Individuals 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). Section 212(a)(9)(A)(iii) of the Act provides, in pertinent part:

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's 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 alien's reapplying for admission.

Section 212(a)(9)(C) 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.

A foreign national who is inadmissible under section 212(a)(9)(C) of the Act may not apply for permission to reapply for admission unless the individual 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.

II. ANALYSIS

The issues on motion are whether the Applicant is inadmissible under section 212(a)(9)(C) of the Act and whether he is statutorily eligible to apply for permission to reapply for admission to the United States. The Applicant claims that he is eligible to apply for permission to reapply for admission even though he is still present in the United States, and cites to *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The Applicant also claims the inadmissibility provisions under section 212(a)(9)(C) do not apply to him because he applied for permission to reapply for admission prior to the reinstatement of his removal order. The Applicant claims that, his permission to reapply for admission application was denied based on the erroneous denial of his waiver application, and it should now be approved, and cites to *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015).

The Applicant submits case materials for cited cases, a copy of a motion for bond hearing before the Executive Office of Immigration Review, a letter from the Applicant's pastor, and a copy of the Board of Immigration Appeals (Board) remand decision from 2003.

The record establishes that the Applicant is inadmissible pursuant to sections 212(a)(9)(C)(i)(I) and (II) of the Act and that he is statutorily ineligible to seek permission to reapply for admission until he has been outside the United States for a period of ten years pursuant to section 212(a)(9)(C) of the Act.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(9)(A) of the Act for having been previously ordered removed. Specifically, the Applicant was ordered removed on November 20, 2000, which became a final order of removal on December 6, 2005, after the Board dismissed his appeal, but he did not depart the United States until July 7, 2007. The Applicant subsequently re-entered the United States in October 2013 without being admitted and was apprehended by U.S. Customs and Border Patrol agents. It is the Applicant's re-entry without permission after having been ordered removed which renders him inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

In his decision, the Director denied the application as a matter of discretion because the Applicant's waiver application had been denied and no purpose would have been served in granting permission to reapply for admission since he would have remained inadmissible under section 212(a)(2)(A) of the Act. The Director's decision was not erroneous because it correctly applied precedent decisions of the Board at the time it was issued. In denying the Applicant's waiver application, the Director had found that the Applicant was not eligible to seek a waiver under section 212(h) because the Applicant had been convicted of an aggravated felony after having adjusted to lawful permanent resident status, and relied on *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012). Subsequently, the Board determined that an alien who adjusted status in the United States and who had not entered as a lawful permanent resident is not barred from establishing eligibility for a waiver under section 212(h) of the Act as a result of an aggravated felony conviction. *Matter of J-H-J-*, 26 I&N Dec. 563, 564-5 (BIA 2015) (citing *Matter of Small*, 23 I&N Dec. 448, 450 (BIA 2002)). The Board held that section 212(h) of the Act only precludes aliens who entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction, withdrawing from its decisions in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), and *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012). The record establishes that the Applicant adjusted status in the United States, rather than entering the United States as a lawful permanent resident. Thus the Applicant would now be eligible to seek a waiver of inadmissibility under section 212(h) of the Act.¹

¹ The Applicant also states that he was eligible for a stand-alone waiver, regardless of having permission to reapply for permission, and that the waiver application should not have been denied, but he does not need a stand-alone waiver

Even though the Applicant may now be eligible to seek a waiver under section 212(h) based on the Board's decision in *Matter of J-H-J-*, he remains inadmissible under section 212(a)(9)(C) of the Act because he was removed after accruing over one year of unlawful presence and then re-entered the United States without admission. He therefore requires permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act in addition to a waiver under section 212(h) for his criminal inadmissibility.

B. Permission to Reapply

The Applicant is inadmissible under section 212(a)(9)(C) of the Act for entering the United States without being admitted after having been unlawfully present for more than one year and having been ordered removed from the United States. We dismissed the Applicant's appeal because foreign nationals inadmissible under section 212(a)(9)(C) of the Act may not apply for permission to reapply for admission unless they have been outside the United States for more than 10 years since the date of their last departure. 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). The Applicant relies on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), for the proposition that it is permissible to file for permission to reapply for admission within the United States without first remaining outside the United States for ten years. In addition to the fact that the Applicant resides in a jurisdiction other than the Ninth Circuit and this case would not apply to him, *Perez-Gonzalez* has been overturned. See *Duran-Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9th Cir.2007).

The Applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act and is statutorily ineligible to apply for permission to reapply for admission under section 212(a)(9)(C)(ii) because he has not been outside the United States for 10 years. The fact that the Applicant is now eligible to apply for a waiver under section 212(h) does not overcome his inadmissibility under section 212(a)(9)(C) or his statutory ineligibility to apply for permission to reapply for admission.

In the present matter, the applicant's last departure from the United States occurred on July 7, 2007. The Applicant subsequently reentered the United States without being admitted and is currently in the United States, and therefore he has not remained outside the United States for 10 years since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission.

III. CONCLUSION

because he has applied for a waiver in conjunction with an immigrant visa application. Further, although the Applicant cites to *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) for the premise that it is permissible to file for a stand-alone waiver, the Board has since concluded that its decision in *Sanchez* is no longer valid in light of amendments to section 212(h). See *Matter of Rivas*, 26 I&N Dec. 130, 131-132 (BIA 2013).

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The Applicant has the burden of proof in seeking permission to reapply for admission. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, the motion to reopen and reconsider will be denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of V-A-A-*, ID# 16168 (AAO June 1, 2016)