U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9837095

Date: MAR. 01, 2021

Appeal of Dallas, Texas Field Office Decision

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

The Applicant, who currently residing in Mexico, seeks permission to reapply for admission to the United States because he would be inadmissible to the United States upon his return under section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act) for unlawful presence.

The Director of the Dallas, Texas Field Office denied the Form I-212 as a matter of discretion, concluding that no purpose would be served in approving the application because the Applicant did not establish he is an applicant for an immigrant visa with the U.S. Department of State (DOS) who has been interviewed by a consular officer and found inadmissible under a section of the Act that requires the filing of a Form I-212. On appeal, the Applicant asserts that he is not required to have completed his visa interview before seeking permission to reapply for admission.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the matter for the entry of a new decision.

A foreign national who "has been unlawfully present in the United States for an aggregate period of more than one year, or . . . has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted is inadmissible." Section 212(a)(9)(C)(i) of the Act. Section 212(a)(9)(C)(ii) of the Act provides for an exception to this inadmissibility in the exercise of discretion for those who seek admission after residing abroad for 10 years following their last departure.

Approval of an application for permission to reapply is discretionary, and any unfavorable factors will be weighed against the favorable factors to determine if approval of the application is warranted as a matter of discretion. See Matter of Lee, 17 I&N Dec. 275, 278-79 (Reg'l Comm'r 1978).

The Director denied the Form I-212 as a matter of discretion, indicating that approval would not serve any purpose and explaining that the Applicant has not established that he is an applicant for an immigrant visa with the U.S. Department of State who has been interviewed by a consular officer and found inadmissible.

The Applicant acknowledges that approval of permission to reapply for admission is discretionary. He asserts, though, that the Director's decision was an abuse of discretion because neither the Act, the regulations, nor the form instructions require an applicant to have completed their visa interview and been found inadmissible before filing their Form I-212. In support, the Applicant refers to those items to assert that a Form I-212 may be filed before a consular interview.

The Applicant also refers to the Form I-212 instructions that indicate individuals who are inadmissible under section 212(a)(9)(C) of the Act "may file Form I-212 if" they are an applicant for an immigrant visa. The Applicant contends that he should be considered an applicant for an immigrant visa because the Act does not define "applicant for an immigrant visa" and DOS routinely refers to individuals who are in the pre-screening process at the National Visa Center, prior to their interviews, as visa applicants. In addition, he asserts that whereas the instructions for the Form I-601, Application for Waiver of Grounds of Inadmissibility, clearly state that that the visa interview has to have taken place prior to filing a Form I-601 when the applicant is outside the United States, the Form I-212 instructions are ambiguous as to whether this is required, and therefore we should presume the difference is intentional and the Form I-212 is not subject to the same procedural requirements.

The record indicates that the Applicant is the beneficiary of an approved immigrant petition filed by his U.S. Citizen spouse that has been forwarded for processing at the National Visa Center. The Form I-212 instructions do not require that an individual who is an applicant for an immigrant visa be interviewed by a consular officer and found inadmissible before filing a Form I-212. Accordingly, we will remand the matter for the Director to weigh the positive factors in the Applicant's case, including the likelihood he will be eligible to become a lawful permanent resident in the near future based on his approved immigrant petition, and the negative factors and determine whether the Applicant merits approval of his application as a matter of discretion.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.