U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-A-F-

DATE: JAN. 8, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Applicant, a native and citizen of Guatemala, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(i), 8 U.S.C. § 1182(i). The Field Office Director, Los Angeles, California, denied the application. We dismissed an appeal and denied a subsequent motion. A second motion was denied. The matter is now before us on a motion to reopen and reconsider. The motion will be denied.

In a decision, dated March 26, 2009, the Director found the Applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission into the United States by fraud or willful misrepresentation. The Director determined that the Applicant had not demonstrated that a qualifying relative would experience extreme hardship upon denial of his Form I-601 and denied the application accordingly.

On appeal, we determined that the Applicant was also inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and dismissed the appeal on this basis. In his first motion, we determined that in addition to his other inadmissibilities, the Applicant was also inadmissible under section 212(a)(9)(C)(i)(I) of the Act and we affirmed our prior decision.

In his second motion, the Applicant asserted that he did not accrue the requisite amount of unlawful presence in the United States because he had a pending asylum application and that the enactment of the Legal Immigration Family Equity (LIFE) Act allowed him to adjust status despite his inadmissibility. The Applicant asserted further that there was no ten year bar applicable to inadmissibility under section 212(a)(9)(C)(i)(II) of the Act.

In our decision, dated January 13, 2015, we found that although the period of time during which an applicant has a pending Form I-589, Request for Asylum in the United States, is not taken into account in determining periods of unlawful presence under section 212(a)(9)(B) of the Act, this exception does not apply to inadmissibility under section 212(a)(9)(C)(i) of the Act. We affirmed our decision that the Applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. We also affirmed our decision that the Applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act as someone who was removed from the United States pursuant to section 235(b)(1) of the Act and then subsequently entered the United States without inspection. We found that as a result of these

inadmissibilities the Applicant may not apply for consent to reapply unless he has been outside the United States for more than ten years since the date of his 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). We found further that the Applicant, who resides in the jurisdiction of the Ninth Circuit Court of Appeals, does not meet the terms of the settlement agreement under *Duran-Gonzales v. DHS,* No. C06-1411(W.D. Wash., 2014). We indicated that even if the Applicant met the terms of this agreement, he would continue to be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, which is not covered by the agreement. In the current motion, we acknowledge that the terms of this settlement agreement have changed, but the Applicant still does not qualify. To meet the terms of the settlement agreement, the Applicant would have had to have filed a Form I-212, Permission to Reapply for Admission in between the dates of August 13, 2004 and November 30, 2007. The Applicant's Form I-212 was filed on June 27, 2001.

In our decision on the Applicant's second motion, we found the Applicant's assertions pertaining to the enactment of the LIFE Act in 2000 allowing him to adjust his status despite his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act to be unfounded because to be eligible to adjust status under the provisions of the LIFE Act an applicant must be admissible and the Applicant is inadmissible. In addition, the Applicant's assertions that the section 212(a)(9)(C)(ii) exception to inadmissibility states that its ten year bar applies only to clause (i) were also determined to be unfounded based on a plain reading of the statutory language. Finally, we found that because the Applicant has not remained outside the United States for ten years, he is currently statutorily ineligible to apply for permission to reapply for admission, and, even if his waiver is granted he will remain inadmissible under section 212(a)(9)(C) of the Act.

On his third motion, the Applicant states that he is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act because he did not accrue over a year of unlawful presence in the United States. He again states that during the period of time when he had a pending asylum application, he did not accrue unlawful presence as it relates to section 212(a)(9)(C)(i)(I) of the Act. He states that the memorandum cited to by us in our previous decisions does not offer any legal authority as to its jurisdiction for overruling Congressional intent. The Applicant also states that sections 212(a)(9)(C)(i)(I) and 212(a)(9)(C)(i)(II) of the Act do not apply to him because these inadmissibilities must be precede by "previous immigration violations" as stated in the statute. Finally, the Applicant asserts that his waiver application for his inadmissibility under section 212(a)(6)(C) of the Act should operate independently of his inadmissibility under section 212(a)(9)(C)(i) of the Act.

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 requirements for a

motion to reopen have not been met as the motion does not state new facts supported by affidavits or other documentary evidence. The requirements for a motion to reconsider have not been met as the Applicant does not establish that our decision was incorrect based on the evidence of record at the time of the initial decision.

The Applicant's assertions are counter to a plain reading of the statute, which by definition would be an explicit reiteration of Congressional intent. The Applicant states that during the period of time when he had a pending asylum application, he did not accrue unlawful presence as it relates to section 212(a)(9)(C)(i)(I) of the Act. He states that the May 6, 2009, memorandum cited to by us in our previous decisions does not offer any legal authority as to its jurisdiction for overruling Congressional intent. As stated in our previous decisions, an exemption from the accrual of unlawful presence exists for asylees under section 212(a)(9)(B)(iii) of the Act. However this exemption specifically relates to section 212(a)(9)(B)(i). Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, USCIS, HQDOMO 70/21.1, *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) 28* (May 6, 2009), http://connect.uscis.dhs.gov/workingresources/immigrationpolicy/Documents/revision_redesign_AFM.pdf. Accordingly, no such exemption exists in relation to inadmissibility under section 212(a)(9)(C) of the Act. This memorandum does not overrule Congressional intent, but reinforces the plain meaning of the statute.

The Applicant also states that sections 212(a)(9)(C)(i)(I) and 212(a)(9)(C)(i)(II) of the Act do not apply to the Applicant because these inadmissibilities must be precede by "previous immigration violations" as stated in the statute. Again, these assertions are not supported by the record or a plain reading of the statute. The part of section 212(a)(9)(C) which reads, "[a]liens unlawfully present after previous immigration violations," is a subtitle describing the content of sections 212(a)(9)(C)(i)(I) and 212(a)(9)(C)(i)(II) of the Act. Sections 212(a)(9)(C)(i)(I) and 212(a)(9)(C)(i)(II) of the Act describe the previous immigration violations as being unlawfully present for more than one year and being removed from the United States.

Finally, the Applicant asserts that his waiver application for his inadmissibility under section 212(a)(6)(C) of the Act should operate independently of his inadmissibility under section 212(a)(9)(C)(i) of the Act. We disagree with this assertion. If an applicant will remain inadmissible even if a waiver is granted, that remaining inadmissibility may itself support a denial of the waiver application as a matter of discretion. *Matter of J-F-D-*, 10 I&N Dec. 694 (INS 1963).

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a

> visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The Applicant attempted to enter the United States on November 7, 1999 by presenting a border crossing card belonging to another individual. Accordingly, the Applicant is inadmissible under section 212(a)(6)(C) of the Act for attempting to procure admission into the United States through willful misrepresentation. The Applicant does not contest this ground of inadmissibility on motion.

Section 212(a)(9) 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, 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...

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply 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* U.S. Citizenship and Immigration Services has consented to the Applicant's reapplying for admission.

The Applicant entered the United States without admission or parole in November 1990 and departed from the United States in August 1998. The Applicant accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in August 1998. As stated above, on November 7, 1999, the Applicant attempted to enter the United States by presenting a border crossing card that did not belong to him. As a result, the Applicant was removed from the United States. The Applicant subsequently entered the United States without admission or parole on November 9, 1999 and has not departed from the United States since that date. As such, the Applicant is inadmissible under sections 212(a)(9)(C)(i)(I) and 212(a)(9)(C)(i)(II) of the Act.

Although, the Applicant's last departure from the United States occurred in August 1999, the Applicant is currently residing in the United States and therefore, 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 and thus, even if his waiver application were granted, he would remain inadmissible. As such, no purpose would be served in adjudicating his Form I-601 under section 212(i) of the Act.

In application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the motion is denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-A-F-*, ID# 14325 (AAO Jan. 8, 2016)