U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-E-S-A-

DATE: MAR. 11, 2019

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 currently residing in the United States, has applied to adjust status to that of a lawful permanent resident. A foreign national seeking to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for unlawful presence and seeks a waiver of that inadmissibility. Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director of the Lawrence, Massachusetts Field Office denied the application, concluding that the Applicant did not establish, as required, extreme hardship to a qualifying relative if he is denied admission or that he merits a favorable exercise of discretion. We dismissed a subsequent appeal, noting that the Applicant was inadmissible only for unlawful presence and not for seeking an immigration benefit through fraud/misrepresentation, and finding that the Applicant did not establish the requisite extreme hardship.[1]

The Applicant now files a motion to reconsider, contending that the 10-year bar for unlawful presence has already passed. Citing a letter from USCIS, Office of Chief Counsel, the Applicant argues that his 10-year period of inadmissibility continued to run when he was in the United States because he was admitted pursuant to his B-2 nonimmigrant visa.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to show that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also establish that the decision was incorrect based on the evidence in the record at the time of the initial decision. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] The Director stated that the Applicant was inadmissible under section 212(a)(6)(C) of the Act for fraud or misrepresentation. The basis for this finding appears to be the Applicant's misrepresentation of his identity and immigration status to obtain employment. The record does not indicate that the Applicant sought to procure an immigration benefit through fraud or misrepresentation.

As we stated in our previous decision, the Applicant concedes that he first entered the United States in 1997 without being admitted or paroled, and stayed until he departed in August of 2000. He therefore accrued unlawful presence beginning on April 1, 1997, the effective date of the unlawful presence provisions under the Act, until his departure in 2000. He subsequently reentered and departed the United States multiple times using a B-2 nonimmigrant visa. According to the Applicant, he is no longer inadmissible because more than 10 years have passed since his departure in 2000. He quotes a 2009 letter from Chief Counsel Lynden Melmed which states that the 10-year bar "continues to run even if the alien is paroled into the United States or is lawfully admitted as a nonimmigrant under section 212(d)(3), despite his or her inadmissibility under section 212(a)(9)(B)."[2]

The Applicant states that because 10 years have passed since the date of his last departure, he is no longer inadmissible, and he cites a 2009 letter from the USCIS Chief Counsel to support his assertions. This document is not binding authority, and we further note that it does not support a finding that the Applicant, who reentered the United States with a visitor's visa after having accrued unlawful presence, is no longer inadmissible. The letter states that if a foreign national is paroled back into the United States or admitted as a nonimmigrant with a section 212(d)(3) nonimmigrant waiver, then the 3- or 10-year period of inadmissibility may continue to run while the individual is in the United States. The Applicant reentered the United States with a nonimmigrant visa and did not obtain a section 212(d)(3) nonimmigrant waiver before entering with the visa. Therefore, because the Applicant returned to the United States before the 10-year period of inadmissibly had ended, he remains inadmissible under section 212(a)(9)(B)(i) of the Act and requires a waiver under section 212(a)(9)(B)(v) of the Act.

The terms and intent of section 212(a)(9) of the Act require that an individual be subject to the inadmissibility bar until he or she has remained outside the United States for the required period. Allowing a foreign national to serve any portion of their period of inadmissibility inside of the United States would reward recidivism and be contrary to the purpose of the enactment of section 212(a)(9) of the Act. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006) ("It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent."). Here, the Applicant has not remained outside of the United States for the requisite 10-year period. Although he is eligible to apply for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, as we found in our prior decision, he did not establish the required extreme hardship to a qualifying relative. He does not contest this finding on motion.

The burden of proving eligibility for entry or admission to the United States rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden and has not overcome our prior determination. The waiver application remains denied.

[2] Letter from Lynden Melmed, Chief Counsel, USCIS, Office of the Chief Counsel, to Daniel C. Horne, Jackson & Hertogs (Jan. 26, 2009).

ORDER: The motion to reconsider is denied.

Cite as *Matter of R-E-S-A-*, ID# 2133669 (AAO Mar. 11, 2019)