U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5302135

Date: NOV. 15, 2019

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant seeks to enter the United States using an immigrant visa, but has been found inadmissible for having been previously unlawfully present in the United States for over one year under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), and for subsequently reentering the country without admission after her unlawful presence under section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i).

The Director of the Nebraska Service Center denied the Form I-601 waiver application for unlawful presence as a matter of discretion because the Applicant remains inadmissible for her subsequent reentry without admission and has not remained outside of the United States for at least 10 years, as required. The Applicant filed an appeal, arguing she was not inadmissible under either ground of inadmissibility. We dismissed the appeal, affirming the Applicant's inadmissibility on both grounds and concluding that no purpose would be served in adjudicating her waiver application because she would remain inadmissible until 10 years had passed since her last departure from the United States. The Applicant now submits a combined motion to reopen and reconsider.

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 review, we will dismiss the motions.

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

As an initial matter, the Applicant indicates on the Form I-290B that she is filing a combined motion to reopen and motion to reconsider for both of our decisions regarding the Form I-601 waiver application and the Form I-212, Application for Permission to Reapply for Admission. However, the record shows that the Applicant has paid only one fee for one appeal. According to of the Adjudicator's Field Manual, the Form I-601 is to be adjudicated first. *Adjudicator's Field Manual*, Chapter 43.2(d) ("If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first."). Therefore, we will consider the Applicant's filing to be a motion of the Form I-601.

In our last decision, which we incorporate here, we found that we did not need to address the Applicant's argument that because she had entered the United States using a Mexican border crossing card, but was never issued a Form I-94, she did not accrue unlawful presence. We specified, among other things, that the Applicant did not present evidence that she had been issued a border crossing card prior to January 1999, that she was admitted into the United States using a border crossing card in 1998 or 2001 as claimed, or that her presence during these times was authorized. We further noted that it was uncontested that the Applicant had entered the United States without inspection in November of 2002. We concluded that no purpose would be served in adjudicating the Applicant's waiver application for unlawful presence because she would remain inadmissible under section 212(a)(9)(C)(i) of the Act for her November 2002 entry without inspection after she had been unlawfully present in the United States for over a year and was not yet eligible to apply for an exception to this second ground of inadmissibility.

Currently, on motion, the Applicant submits a copy of her border crossing card that was issued in 1996. She also submits the first page of her passport, as well as pages 6 and 7 which show a passport stamp indicating an admission into the United States on July 18, 1998. Counsel asserts in his brief that the Applicant entered the United States in 2001 using this same border crossing card (issued in 1996) and that the Applicant did not accrue unlawful presence after her 1998 and 2001 entries, but rather, should be considered as a nonimmigrant admitted for duration of status.

We do not find that the Applicant has sufficiently addressed or overcome the deficiencies discussed in our prior decision. Even assuming the Applicant did not accrue unlawful presence after her 1998 admission into the United States, there remains no evidence addressing the Applicant's 2001 entry. Rather, counsel's new contention on motion that the Applicant entered in 2001 using her 1996 border crossing card contradicts previously submitted evidence. In two affidavits, the Applicant attested under penalty of perjury that after her 1998 entry, she "returned to Mexico and applied for a new B1/B2 BCC [and] reentered the United States [on] approximately May 12, 2001 on [her] new B1/B2 BCC," a contention counsel reiterated as recently as in his appeal brief. Therefore, the record continues to indicate that the Applicant, who entered the United States in May of 2001 and remained until September of 2002, was unlawfully present for over one year. Her 2002 entry without inspection after she was unlawfully present for over a year renders her inadmissible under section 212(a)(9)(C)(i) of the Act. Because she departed the United States in 2017, she is not currently eligible for an exception to this ground of inadmissibility. *See* section 212(a)(9)(C)(ii) of the Act (requiring more than ten years since the date of their last departure from the United States in order to apply for permission to reapply for admission); *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

Furthermore, because the Applicant currently resides abroad and is applying for an immigrant visa, we note that the U.S. Department of State makes the final determination regarding her inadmissibility. Here, a Department of State consular officer has determined that the Applicant is inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i) of the Act.

No purpose would be served in adjudicating the Applicant's waiver application for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act as the Applicant remains inadmissible under section 212(a)(9)(C)(i) of the Act. The waiver application remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.