U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8441096

Date: MAY 28, 2020

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant seeks a waiver of inadmissibility under Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), for unlawful presence.

Section 212(a)(9)(B)(ii) of the Act provides that a foreign national is deemed to be unlawfully present if in the United States after the expiration of a period of authorized stay or is in the United States without being admitted or paroled.

However, section 212(a)(9)(C)(i) of the Act also provides that any foreign national who has been ordered removed and who subsequently enters or attempts to reenter the United States without being admitted is inadmissible. Foreign nationals found inadmissible under section 212(a)(9)(C)(i) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act, which provides that inadmissibility shall not apply to a foreign national who seeks admission more than ten years after the date of their last departure from the United States if the Secretary of Homeland Security consents to their reapplying for admission prior to their attempt to be readmitted. A foreign national may not apply for permission to reapply unless they have been outside the United States for more than ten years since the date of their 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); *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

In addition to her inadmissibility for unlawful presence, the U.S. Department of State (DOS) found the Applicant to be inadmissible under section 212(a)(9)(C)(i)(II) of the Act, for reentering the United States without being admitted after previously being ordered removed. DOS also found the Applicant statutorily ineligible to request consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act because it had not been ten years since the date of her last departure, which occurred in June 2016. Because the Applicant would remain inadmissible even if her section 212(a)(9)(B)(v) of the Act unlawful presence waiver was granted, the Director denied the waiver as a matter of discretion. Notably, because the Applicant currently resides abroad and is applying for an immigrant visa, the U.S. Department of State makes the final determination regarding inadmissibility.

On appeal, the Applicant contends that she is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act because her expedited removal in 2003 was wrongly and unlawfully issued and should be

rescinded. She explains that, although she gave a false date of birth at the time, indicating she was an adult, she was in fact a minor, and expeditiously removing minors is against Department of Homeland Security (DHS) policy (citing to a 1997 memorandum issued by the legacy Immigration and Naturalization Service). The Applicant states further that her claims are supported by the actions of the Department of State, who rescinded and removed her inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, evidenced by her being sent a notification that she was eligible to apply for a waiver of her unlawful presence inadmissibility.[1]

The following facts are not in dispute. In [redacted] 2003, the Applicant attempted to enter the United States without inspection by hiding in the trunk of a car. At the time she was 16 years old (born in [redacted] 1986), but provided the immigration officers with an incorrect birthdate of [redacted] 1981, falsely claiming to be 21 years old. She was found to be inadmissible to the United States under section 212(a)(7)(A)(i)(I) of the Act, for not being in possession of a valid entry document, and was expeditiously removed. She then reentered the United States without inspection a month later, departing in June 2016 to attend her immigrant visa interview. Notably, the Applicant applied for and was denied a Form I-601A, Application for Provisional Unlawful Presence Waiver. During her immigrant visa interview, the consular officer determined the Applicant to be inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i) of the Act.

Despite the Applicant's assertions, she has not shown that the Director's decision is incorrect. Neither our records nor the documentation submitted by the Applicant indicate that DOS has removed or rescinded the inadmissibility finding under 212(a)(9)(C)(i) of the Act. First, our records indicate that at her visa interview the Applicant was given a section 212(a)(9)(C)(i) refusal letter and then DOS sent a second letter regarding her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. In addition, the documentation submitted by the Applicant on appeal indicates that the consulate in Ciudad Juarez, Mexico issued two notices *after* the Applicant's immigrant visa interview. One document indicates the Applicant has been found inadmissible under 212(a)(9)(C) of the Act and cannot apply for an exception/waiver of this inadmissibility with a Form I-212, Application for Permission to Reapply for Admission, until June 15, 2026. The other document indicates the Applicant has been found inadmissible under section 212(a)(9)(B)(i)(II) of the Act until June 15, 2026 and can apply for a Form I-601. The issuance of the second document did not rescind the first as they refer to two different grounds of refusal. Moreover, as stated above, neither indicate she is no longer inadmissible under section 212(a)(9)(C)(i) of the Act.

In regards to the Applicant's claims concerning minors and expedited removals, our records reflect the U.S. Customs and Border Protection (CBP) officer did not have any knowledge of the Applicant being a minor because she provided information indicating she was an adult. Furthermore, we cannot unilaterally rescind a decision by CBP to expeditiously remove a foreign national from the United States. Thus, as the record shows her removal in 2003 currently remains valid, we will apply the Act accordingly.

[1] The Applicant also claims that her due process rights were violated because she was not given the opportunity, through a request for evidence or notice of intent to deny, to respond to the section 212(a)(9)(C)(i) of the Act inadmissibility finding. Constitutional issues are not within the appellate jurisdiction of this office, therefore this assertion will not be addressed in the present decision. In addition, this finding relates to her immigrant visa application and was made by the Department of State.

In sum, the Applicant's last departure from the United States was in June 2016 and she has not remained outside of the country for at least 10 years, as required. Section 212(a)(9)(C)(ii) of the Act; *Matter of Torres-Garcia, supra.* She is therefore currently statutorily ineligible for permission to reapply for admission to the United States. Thus, the Director did not err in denying the waiver application as a matter of discretion considering no purpose would be served in adjudicating the waiver request for unlawful presence under section 212(a)(9)(B)(v) of the Act as she remains inadmissible under section 212(a)(9)(C)(i) of the Act. The waiver application remains denied.

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. The Applicant has not met this burden.

ORDER: The appeal is dismissed.