U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23015532

Date: OCT. 13, 2022

Motion on Administrative Appeals Office Decision

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

The Applicant was previously removed from the United States as an "arriving alien" and seeks permission to reapply for admission under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii).

The Director of the Los Angeles County Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212) and we dismissed the Applicant's subsequent appeal of that decision. We concluded that the Applicant is inadmissible under both sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i)(II) of the Act, and based on the latter ground of inadmissibility, is ineligible to apply for permission to reapply for admission until she has departed and remained outside the United States for ten years. We further observed that the Applicant, who concurrently filed an I-485 and a Form I-601, had been found inadmissible on multiple statutory grounds and was determined to be ineligible for adjustment of status before United States Citizenship and Immigration Service (USCIS). As such, we concluded that no purpose would be served in adjudicating her request for permission to reapply for admission under section 212(a)(9)(A)(iii) and dismissed the appeal as a matter of discretion. The matter is now before us on a motion to reconsider.

In these proceedings, it is the applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe,* 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we conclude that the Applicant has not met this burden and we will dismiss the motion to reconsider.

I. LAW

A motion to reconsider must state the reasons for reconsideration and must establish that our decision was (1) based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy and (2) incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

Any noncitizen who has been ordered removed as an "arriving alien" under section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1), departs the United States pursuant to an expedited order of removal, and

seeks admission within five years of the date of his or her departure or removal is inadmissible. Section 212(a)(9)(A)(i) of the Act. Noncitizens found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(iii) if "prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from a foreign continuous territory, the Secretary of Homeland security has consented to the foreign national's reapplying for admission."

Section 212(a)(9)(C)(i)(II) of the Act provides in relevant part that a noncitizen who has been ordered removed under section 235(b)(1) of the Act or any other provision of the law and who subsequently enters or attempts to reenter the United States without being paroled or admitted is inadmissible. An exception to this inadmissibility is available in cases where a noncitizen is seeking admission more than ten years after the date of their last departure from the United States and, prior to the noncitizen's re-embarkation at a place outside the United States, the Secretary of Homeland Security has consented to that individual reapplying for admission. Section 212(a)(9)(C)(ii) of the Act.

II. ANALYSIS

The issue on motion is whether the Petitioner has established that our prior decision was based on an incorrect application of law or USCIS policy, based on the evidence in the record of proceeding at the time of the decision.

A. Facts

The Applicant entered the United States without authorization on [redacted] 2003 and was apprehended the same day at the port of entry. She was deemed inadmissible as an "arriving alien" under section 212(a)(6)(A)(i) of the Act and ordered expeditiously removed on [redacted] 2003. Upon her removal, she became inadmissible for a period of five years under section 235(b)(1) of the Act. However, the Applicant immediately returned to the United States on the same date and has remained in the United States since her second entry. The Applicant asserts that when she reentered the United States on [redacted] 2003, she was "waved in" at the port of entry despite not being in possession of any valid entry document required by the Act.

On the Form I-212, the Applicant indicated she was seeking permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act because she returned to the United States before her five-year period of inadmissibility expired. She did not indicate she was inadmissible under section 212(a)(9)(C)(i) for reentering the United States without being inspected and admitted or paroled.

However, she concurrently filed Form I-601, Application to Waive Inadmissibility Grounds (Form I-601) with her Form I-212 and Form I-485, Application to Register Permanent Residence or Adjust Status. On the Form I-601, the Applicant marked Section A, Box 17, indicating that she is inadmissible for the following reason: "I have been ordered removed or I have been unlawfully present in the United States for more than one year, in the aggregate, and I subsequently reentered or attempted to reenter without being admitted."

B. Prior AAO Decision

As noted above, the Director denied the Form I-212 and we dismissed the Applicant's appeal. We determined that the Applicant was inadmissible under both sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i)(II) of the Act, and based on the latter ground of inadmissibility, must depart and remain outside the United States for ten years before she can become eligible to apply for the exception to this inadmissibility under section 212(a)(9)(C)(ii) of the Act. We further observed that the Applicant, whose concurrently filed Form I-485 and Form I-601 were also denied, was found to be inadmissible on multiple statutory grounds and was determined to be ineligible for adjustment of status.

On appeal, the Applicant cited *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010) and maintained that her admission to the United States on [redacted] 2003, was lawful because she was "waved through" at the port of entry. We acknowledged her claim but emphasized that the Applicant did not submit any additional evidence, beyond her own statement, in support of her assertion that she presented herself for inspection and was given permission to enter on that date. We acknowledged that in *Quilantan*, the Board of Immigration Appeals (Board) found that, in situations where the manner of entry was not in dispute, a noncitizen who was waved through at the border could be considered inspected and admitted for the purpose of section 245(a) of the Act, 8 U.S.C. § 1255(a). However, we emphasized that the Board, when issuing *Quilantan*, reaffirmed *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), in which it held that noncitizens bear the burden of establishing that they presented themselves for inspection. We concluded that the Applicant's statement alone was insufficient to meet this burden with respect to her inadmissibility under section 212(a)(9)(C) of the Act.

We also addressed the Applicant's contention that she was eligible for *nunc pro tunc* approval of her application to reapply for admission. We emphasized that she was found inadmissible under multiple grounds, noting that an application for permission to reapply for admission can be denied in the exercise of discretion to a noncitizen who is inadmissible to the United States under another section of the Act, as no purpose would be served in granting the application. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). We determined that she was not eligible for consideration of *nunc pro tunc* approval of her Form I-212 because it would not eliminate her only ground of inadmissibility.

B. Motion to Reconsider

On motion, the Applicant asserts that we erroneously determined that she is inadmissible under section 212(a)(9)(C) of the Act, noting that the facts surrounding the manner of her entry to the United States on [redacted] 2003 are similar to those presented in *Matter of Quilantan* and *Matter of Areguillin*. She objects to our determination that her statement alone is insufficient to establish that she presented herself for inspection and was permitted to enter without questioning. In this regard, the Applicant contends that it is "overly burdensome" to conclude that she cannot prove those events through her own testimony, which, in the absence of evidence that her statement is not credible "should be taken as truth." The Applicant maintains that prohibiting her to rely on her own testimony would render

reliance on *Matter of Quilantan* and *Matter of Areguillin* "impossible for anyone traveling on their own."[1]

We note, however, that the circumstances presented in this case can be distinguished from those in *Quilantan* and *Areguillin*. In *Matter of Quilantan,* the Board found "the basic facts" surrounding the respondent's manner of entry were not in dispute, including the respondent's claim that a U.S. immigration officer waved her into the United States without questioning her and without inspecting an entry document. *See Quilantan*, 25 I&N Dec. at 290. Specifically, the Board noted that the immigration judge had earlier found "the facts were undisputed that the respondent presented herself for inspection" and concluded that the respondent was admitted to the United States. *Id.* at 293.

In *Matter of Areguillin,* the Board determined that the respondent bore the burden of establishing that she presented herself for inspection. In that case, the immigration judge had not addressed the credibility and sufficiency of the respondent's evidence, specifically her uncorroborated testimony that she was admitted to the United States without documentation. *Matter of Areguillin,* at 17 I&N Dec. at 310. The Board remanded the matter to the immigration judge to give the respondent an opportunity to provide additional evidence. *Id.* The Board did not conclude that the respondent's uncorroborated testimony was sufficient to establish the manner of her entry.

In this case, the facts concerning the Applicant's admission are in dispute. The Applicant herself indicated on her concurrently filed Form I-601 that she is inadmissible because she entered the United States on [redacted] 2003 (following her removal) without being inspected and admitted or paroled, and she indicated on her Form I-485 that she entered without inspection on that date; she did not indicate a lawful admission. The Applicant's claim that she presented herself for inspection and was permitted to enter without questioning or showing any valid entry document was made for the first time in a sworn statement taken during her adjustment of status interview in February 2020.

Considering the inconsistencies in the record regarding the Applicant's manner of entry, the evidence is insufficient to establish that the Applicant presented herself for inspection and was admitted to the United States on [redacted] 2003. The Applicant has not established that we incorrectly applied the law or USCIS policy in determining that her uncorroborated testimony is insufficient to overcome those inconsistencies and to establish that she was admitted to the United States without presenting documentation that would allow her to be legally admitted. Accordingly, we affirm our determination that the Applicant is inadmissible under section 212(a)(9)(C)(i) of the Act.

The Applicant has been in the United States since entering in [redacted] 2003. She would need to depart and remain outside of the United States for ten years to become eligible to apply for the exception to inadmissibility under section 212(a)(9)(C) of the Act. Based on the applicable statute and regulations, the Applicant is not currently eligible to apply for permission to reapply for admission to the United States.

[1] Notwithstanding this statement, we observe that the Applicant does not claim that she was alone when she entered the United States on [redacted] 2003. Rather, she has asserted that she entered the United States as a passenger in a vehicle operated by an unidentified driver.

On motion, the Applicant also contests our determination that she is ineligible for *nunc pro tunc* approval of her Form I-212. Precedent from the Board allows *nunc pro tunc* approval in limited circumstances where a grant of permission to reapply for admission would eliminate the only ground of inadmissibility and thereby effect a complete disposition of the case. *See Matter of Garcia-Linares*, 21 I&N Dec. 254 (BIA 1996); *Matter of Roman*, 19 I&N Dec. 855, 859 (BIA 1988); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the Applicant was determined to be inadmissible on multiple grounds, including unlawful presence under section 212(a)(9)(B)(i) of he Act. This inadmissibility has not been waived. The Applicant contends that she entered the United States lawfully on [redacted] 2003 and that this lawful entry would leave her inadmissible solely under section 212(a)(9)(A)(i) of the Act. However, as discussed above, she did not meet her burden to establish that her last entry to the United States was lawful. Further, she did not file an appeal or motion to challenge the Director's decision to deny her Form I-601, where she was determined to be inadmissible on multiple grounds. Therefore, she has not overcome our determination that she is ineligible for consideration of *nunc pro tunc* approval of her Form I-212.

For the reasons discussed, the Applicant has not established our prior decision was based on an incorrect application of law or USCIS policy. Accordingly, the motion will be dismissed, and the application will remain denied.

ORDER: The motion to reconsider is dismissed.