U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21819192

Date: SEP. 22, 2022

Appeal of Los Angeles, California Field Office Decision

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

The Applicant seeks permission to reapply for admission to the United States under Immigration and Nationality Act (the Act) section 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii). He concedes that he twice reentered the United States without admission after being ordered deported. *See* section 212(a)(9)(C)(i)(II) of the Act.

The Director of the Los Angeles, California Field Office denied the application as a matter of discretion. The Director concluded that, even if she granted the Applicant permission to reapply for admission, he would not qualify for a waiver of inadmissibility based on his criminal conviction for a controlled substance violation. On appeal, the Applicant argues that the Superior Court of California, [redacted] vacated his conviction, eliminating the additional inadmissibility ground.

The Applicant bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that the criminal court's vacatur eliminated the Applicant's inadmissibility based on his conviction. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.[1]

I. INADMISSIBILITY

Noncitizens who reentered or attempted to reenter the United States without admission after being ordered deported, excluded, or removed generally cannot gain admission to the country. Section 212(a)(9)(C)(i)(II) of the Act. An exception exists, however, if these noncitizens seek admissions more than 10 years after their last departures from the country and, prior to their returns, U.S. Citizenship and Immigration Services (USCIS) consents to their reapplications for admission. Section 212(a)(9)(C)(ii) of the Act.

The record indicates that the Applicant, a 57-year-old native and citizen of Mexico, first entered the United States without admission or parole in 1983. He concedes that, in 1985, he pleaded *nolo*

[1] The Applicant also appealed the denial of his application to waive inadmissibility based on his alleged controlled substance conviction. *See* section 212(a)(2)(A)(ii) of the Act. We address that appeal in a separate decision.

contendere to use, or being under the influence, of an illegal drug. *See* Cal. Health & Safety Code § 11550(b) (1985). In 1987, U.S. immigration authorities placed him in deportation proceedings, where he received permission to voluntarily leave the country without being deported. *See* section 244(e) of the Act, 8 U.S.C. § 1254(e) (1987). After this "voluntary departure," the Applicant again entered the United States without admission or parole. Authorities again placed him in deportation proceedings, and he was deported to Mexico in [redacted] 1988. Again, the Applicant reentered the United States without admission or parole and was deported in [redacted] 1989. A few days later, he returned to the United States without admission or parole.

The record demonstrates that the Applicant twice reentered the United States without admission after being deported. He is therefore inadmissible under section 212(a)(9)(C)(i)(II) of the Act and requires an exception to legally return to the country. *See* section 212(a)(9)(C)(ii) of the Act.

In his application, the Applicant asserted that section 212(a)(9)(C)(i)(II) of the Act does not render him inadmissible because his U.S. reentries occurred before the provision's effective date of April 1, 1997. But the United States Court of Appeals for the Ninth Circuit, the precedent decisions of which bind us in matters arising under its area of jurisdiction, recently held that the provision "applies retroactively to unlawful entries made before April 1, 1997, provided the alien did not apply for adjustment of status before that date." *Rivera Vegas v. Garland*, 39 F.4th 1146, 1156 (9th Cir. 2022). The record does not indicate the Applicant's filing of an adjustment application before April 1, 1997. Thus, based on the evidence before us, we find that section 212(a)(9)(C)(i)(II) applies to the Applicant.

III. DISCRETION

USCIS may consent to reapplications for admission at its discretion. Section 212(a)(9)(C)(ii) of the Act. Thus, applicants must demonstrate that favorable social and humanitarian considerations outweigh adverse evidence in their records. *Matter of Tin*, 14 I&N Dec. 371, 373 (BIA 1973).

As a matter of discretion, USCIS may deny an application for permission to reapply if the applicant does not qualify to waive another inadmissibility ground against them. *See Matter of J-F-D-*, 10 I&N Dec. 694, 695 (Reg'l Comm'r 1963). Such an application would not merit a favorable exercise of discretion as "no purpose would be served in granting the application." *Id.*

The Director found that the Applicant's 1985 offense rendered him inadmissible for conviction of a controlled substance violation. *See* section 212(a)(2)(A)(i)(II) of the Act. The Director also found the Applicant ineligible to waive this inadmissibility ground, concluding that his offense did not involve "simple possession of 30 grams or less of marijuana." *See* section 212(h) of the Act.

But, in our separate decision on the Applicant's waiver appeal, we found that the criminal court vacated his conviction, erasing its inadmissibility consequences. Thus, section 212(a)(2)(A)(i)(II) of the Act does not render the Applicant inadmissible, and *J-F-D-* does not support discretionary denial of his application for permission to reapply.

For these reasons, we will withdraw the Director's decision and remand the matter. On remand, the Director should reconsider the Applicant's application for permission to reapply.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.