



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 16729056

Date: APR. 20, 2022

Appeal of Phoenix, Arizona Field Office Decision

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

The Applicant has filed a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, seeking permission to reapply for admission to the United States under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii), because he will be inadmissible upon departing from the United States for having been previously ordered removed. *See* Section 212(a)(9)(A)(ii) of the Act.

The Director of the Phoenix, Arizona Field Office denied the Form I-212 application. The Director concluded that the Applicant did not demonstrate eligibility for the application because he had not left the United States and did not establish he would do so in the future.

The matter is now before us on appeal. On appeal, the Applicant asserts that his Form I-212 application should be granted, claiming “he is deserving of a favorable exercise of discretion on his Form I-212.” Upon *de novo* review, we will dismiss the appeal. *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that any noncitizen who has been ordered removed or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such departure or removal is inadmissible.

Noncitizens who are inadmissible under Section 212(a)(9)(A) of the Act may seek permission to reapply for admission under Section 212(a)(9)(A)(iii) if, prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen’s reapplying for admission.

II. ANALYSIS

The Applicant entered the United States in February 1994, through the visa waiver program (VWP), and was authorized to remain in the United States until May 1994. *See* Section 217 of the Act, 8 U.S.C. § 1187. The U.S. Immigration and Customs Enforcement (ICE) issued an order of removal against

the Applicant for being a VWP overstay, pursuant to Section 217 of the Act. If the Applicant were to depart the United States, he would execute the removal order and become inadmissible under Section 212(a)(9)(A)(ii) of the Act.

The record indicates that in 2018, the Applicant's adult child filed a Form I-130, Petition for Alien Relative, on the Applicant's behalf, which the U.S. Citizenship and Immigration Services (USCIS) approved in 2019. Also in 2018, the Applicant submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, seeking to adjust status to that of a lawful permanent resident, based on the Form I-130 petition. In 2019, the Director denied the Form I-485 application based on discretion. In 2020, the Applicant filed a Form I-212 application and a second Form I-485 application, seeking adjustment of status based on the approved I-130 petition. The Director denied both applications based on discretion.

Although ICE has issued a removal order, the Applicant is not inadmissible under Section 212(a)(9)(A)(ii) of the Act, until he departs the United States. A noncitizen may file a conditional Form I-212 application before departing the United States pursuant to the regulation at 8 C.F.R. § 212.2(j), in anticipation of applying for consular processing of an immigrant visa application abroad. But in this case, the Applicant has not indicated that he intends to depart the United States. Indeed, on page 12 of his appellate brief, the Applicant asserts that he would experience "extreme hardship if he [were] forced to leave the United States. In the decision denying the Form I-212 application, the Director stated: "as evidenced by [the Applicant's Form I-485] application for adjustment of status, [he is] not requesting consent to reapply for admission on an advance, conditional basis, prior to applying for an immigrant visa abroad." As the Applicant, who has not departed the United States, is not currently inadmissible under Section 212(a)(9)(A)(ii) of the Act, and as he has expressed no intention to leave the United States, no purpose would be served at this time to grant his Form I-212 application. See Section 212(a)(9)(A)(iii) of the Act.

On appeal, the Applicant, citing USCIS Policy Memorandum PM-602-0093, *Adjudication of Adjustment of Status Applications for Individuals Admitted to the United States Under the Visa Waiver Program* (Nov. 14, 2013), https://www.uscis.gov/sites/default/files/document/memos/2013-1114_AOS_VWP_Entrants_PM_Effective.pdf, argues that he, as a "VWP entrant[], . . . remain[s] eligible for adjustment of status despite the existence of an administrative removal order issued by ICE." Page 2 of the same policy memorandum explains that "U.S. Immigration and Customs Enforcement (ICE) has authority to order the removal of a VWP overstay, including an immediate relative, under [S]ection 217(b) of the Act and 8 C.F.R. § 217.4(b)." Page 3 of the policy memorandum specifies that "[i]f ICE has issued a removal order for violation of [S]ection 217 [of the Act], USCIS should interpret the entry of that order as the Secretary [of Homeland Security] exercising his or her discretion not to adjust the status of that individual." Regardless, the policy memorandum does not address the adjudication of Form I-212 applications, and thus does not support a finding that the Director erred in denying the Applicant's Form I-212 application based on discretion.¹

In conclusion, the Applicant has not shown that he is inadmissible under Section 212(a)(9)(A)(ii) of the Act, as he has not departed the United States, or that he intends to depart the United States, which

¹ In addition, we note that the Applicant's Form I-485 application is a separate proceeding, over which we have no appellate authority. See 8 C.F.R. § 245.2(a)(5)(ii).

would render him inadmissible under Section 212(a)(9)(A)(ii) of the Act. *See* 8 C.F.R. § 212.2(j). Under these circumstances, no purpose would be served at this time to grant his Form I-212 application, the Director thus properly denied the application in the exercise of discretion. We will therefore dismiss the appeal.

ORDER: The appeal is dismissed.