U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15257174

Date: APR. 06, 2022

Appeal of Newark, New Jersey Field Office Decision

Form I212, Application for Permission to Reapply for Admission

The Applicant seeks 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.

The Director of the Newark, New Jersey Field Office denied the application, concluding that the record did not establish that a favorable exercise of discretion was warranted, as approval of the application would serve no purpose.

The matter is now before us on appeal. In his brief, the Applicant states that the Director erred by failing to properly consider several positive discretionary factors.

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 *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any alien, other than an arriving alien described in section 212(a)(9)(A)(i), 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible."

Foreign nationals found 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 continuous territory, the Secretary of Homeland Security has consented to the foreign national's reapplying for admission."

Section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), provides that any alien "who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the

alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible." There is no waiver for this inadmissibility.

Approval of an application for permission to reapply is discretionary, and any unfavorable factors will be weighed against the favorable factors to determine if approval of the application is warranted as a matter of discretion. *See Matter of Lee,* 17 I&N Dec. 275, 278-79 (Reg'l Comm'r 1978). Factors to be considered in determining whether to grant permission to reapply include the basis for the prior deportation; the recency of deportation; length of residence in the United States; the applicant's moral character; the applicant's respect for law and order; evidence of the applicant's reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to the applicant or others; and the need for the applicant's services in the United States. *See Matter of Tin,* 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee*, *supra*, at 278 (Finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience").

II. ANALYSIS

The record shows that the Applicant entered the United States without inspection on or about April 23, 2005, and was apprehended by United States Customs and Border Patrol on [redacted] 2005. He was placed in immigration proceedings, but failed to appear for a scheduled hearing and was ordered removed *in absentia* on [redacted] 2005. *See* section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A) (stating that any individual who does not attend a required hearing "shall be ordered removed in absentia if [the Department of Homeland Security (DHS)] establishes by clear, unequivocal, and convincing evidence that . . . written notice was . . . provided and that the [individual] is removable"). The Applicant has not departed the United States since entering in 2005.

The Applicant indicated in his application for permission to reapply for admission that he is seeking conditional approval pursuant to 8 C.F.R. § 212.2(j) before filing Form I-601A, Application for Provisional Unlawful Presence Waiver, and departing the United States to apply for an immigrant visa.[1] The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

In his decision, the Director noted that the Applicant will become inadmissible for five years under section 212(a)(6)(B) of the Act due to his failure to appear at his hearing and the resulting in absentia order of removal, and that there is no waiver for this ground of inadmissibility. Therefore, he concluded that as a matter of discretion, no purpose would be served in approving the instant application, as the Applicant would remain inadmissible. On appeal, the Applicant argues that this statement is incorrect, as he intends to file a Form I-601A after the approval of his application for permission to reapply for admission, and that he is not subject to another ground of inadmissibility. However, Form I-601A, if approved, grants a provisional waiver of only the unlawful presence

[1] On July 31, 2019, an immigrant visa petition filed on the Applicant's behalf by his spouse, a Lawful Permanent Resident, was approved.

grounds of inadmissibility under section 212(a)(9)(B) of the Act, and would not therefore address the Applicant's additional inadmissibility under section 212(a)(6)(B).

As noted above, the section 212(a)(6)(B) of the Act provides that noncitizens are inadmissible if any the fail to attend a removal proceeding "without reasonable cause." There is no statutory definition of the term "reasonable cause" as it is used in this section, but guiding U.S. Citizenship and Immigration Services (USCIS) policy provides that "it is something not within the reasonable control of the [applicant]."[2] Here, the Applicant asserts that his young age (23 years old at the time), inability to speak English, and lack of knowledge of court procedures led to him not providing an updated change of address form, and thus not receiving notice of the hearing on [redacted] 2005. However, the record indicates that at the time he was granted a change of venue and released from custody on bond in [redacted] 2005, he was represented by an attorney and provided with notice of the procedure for updating his address. That same notice advised him of the consequences of failing to appear at a scheduled hearing. Based on this evidence, the Applicant has not shown that his failure to attend the hearing was not within his reasonable control.

The Applicant was ordered removed in absentia, and he has not established that he had reasonable cause for failing to appear for that hearing. An application for permission to reapply for admission is denied, in the exercise of discretion, to a noncitizen who is mandatorily inadmissible to the United States under another section of the Act. *Matter of Martinez-Torres,* 10 I&N Dec. at 776-77 . We therefore agree with the Director that approval of the Applicant's Form I-212 would serve no purpose, as the record indicates that he will become inadmissible under section 212(a)(6)(B) of the Act upon his departure and remain inadmissible for a period of five years, and we need not address the evidence in the record pertaining to the positive and negative factors in the case or determine whether a favorable exercise of discretion would be warranted.

III. CONCLUSION

The Applicant has the burden of proof in seeking permission to reapply for admission. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Because the record shows that the Applicant will become inadmissible upon his departure under section 212(a)(6)(B) of the Act, and there is no waiver for this ground of inadmissibility, his application for permission to reapply for admission will remain denied as a matter of discretion.

ORDER: The appeal is dismissed.

[2] 8 *USCIS Policy Manual* I, retired *Adjudicator's Field Manual* Chapter 40.6, https://www.uscis.gov/policymanual.