U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17017605

DATE: APR. 12, 2022

Appeal of Newark, New Jersey Field Office Decision

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

The Applicant, a native and citizen of the Dominican Republic, 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), for having been previously ordered removed. The Director of the Newark, New Jersey Field Office denied the Form I-212, Application for Permission to Reapply for Admission (application for permission to reapply), concluding that the Applicant did not require an application for permission to reapply and in the alternative, did not merit a favorable exercise of discretion. On appeal, the Applicant submits a brief asserting his eligibility. The Administrative Appeals Office reviews the questions in this matter *de novo*. *Matter of Christo's Inc*., 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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."

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) (discussing and weighing certain unfavorable and favorable factors).

Section 246(a) of the Act, 8 U.S.C. §1256(a), provides, in pertinent part:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General [now Secretary of Homeland Security, "Secretary"] that the person was not in fact eligible for such adjustment of status, the [Secretary] shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the [Secretary] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

The regulation at 8 C.F.R. Part 246.1, regarding notice, states:

> If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case, . . . a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Except where a different standard is specified by law, an applicant must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The record reflects that the Applicant entered the United States without inspection in March 1996, and he was ordered removed *in absentia* from the United States in [redacted] 1996. The Applicant remained in the United States and subsequently filed Form I-485, Applicant to Register Permanent Residence or Adjust Status (adjustment of status application), in October 2001, falsely representing on the adjustment of status application that he had not been previously ordered removed. The Applicant received conditional lawful

permanent resident (LPR) status in February 2002. He departed the United States twice and returned both times in LPR status. The Applicant then filed Form I-751, Petition to Remove Conditions on Residence, in January 2004 and it was approved in October 2004. In February 2005, the Applicant filed Form N-400, Application for Naturalization (naturalization application), and it was denied as U.S. Citizenship and Immigration Services (USCIS) did not have jurisdiction to grant him LPR status as he was under a final order of removal. The Applicant filed another naturalization application in August 2015, and it was denied in December 2017, as the Applicant did not pass the civics portion of the naturalization exam.

The Applicant filed his application for permission to reapply in April 2020. In denying the application for permission to reapply, the Director found that the Applicant executed his removal order when he departed the United States in [redacted] 2002 and therefore did not require an application for permission to reapply. The Director also noted that an approved application for permission to reapply would not "cure" his prior unlawful admission. Lastly, the Director determined that the Applicant's unfavorable factors outweighed his favorable factors, and he therefore did not merit a favorable exercise of discretion.

On appeal, the Applicant asserts that USCIS has always been aware of his removal order, he is inadmissible under section 212(a)(9)(A) of the Act, and he requires permission to reapply for admission. Furthermore, the Applicant states that he was a minor when he initially entered the United States, he was not given oral notification for failure to attend his removal hearing, and he did not understand that he received a removal order and its immigration consequences.

In this case, the record reflects that the Applicant received LPR status in February 2002.[1] Section 246(a) of the Act establishes a five-year statute of limitation on the Secretary's power to rescind erroneously granted adjustments of status; however, the five-year limitation of section 246(a) of the Act does not extend to removal proceedings. *Asika v. Ashcroft*, 362 F.3d 264, 269-71 (4th Cir. 2004); *Stolaj v. Holder*, 577 F.3d 651, 655 (6th Cir. 2009); *Kim v. Holder*, 560 F.3d 833, 837-38 (8th Cir. 2009).

There is no evidence in the record that the Applicant was properly served with a notice of intent to rescind his LPR status or that his LPR status was properly rescinded in accordance with section 246 of the Act and 8 C.F.R. § 246.1. Furthermore, the record does not indicate that the Applicant was issued a final order of removal by an immigration judge resulting in a rescission of his LPR status. In the absence of such evidence, the Applicant still maintains LPR status. As such, no purpose would be served in approving the application for permission to reapply.

ORDER: The appeal is dismissed.

[1] Upon removal of the conditional basis of the Applicant's LPR status, he was deemed to be an LPR at the date of his original adjustment of status.