U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13791762

Date: APR. 18, 2022

Appeal of Raleigh-Durham, North Carolina Field Office Decision

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

The Applicant seeks conditional 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). The Director of the Raleigh-Durham, North Carolina Field Office denied the Applicant's application and the matter is now before us appeal. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), pertains to an "arriving alien" who has been ordered removed either under expedited removal[1] or at the end of removal proceedings[2] initiated upon arrival in the United States. Such an individual is inadmissible for five years after the date of removal; for 20 years in the case of a second or subsequent removal; or at any time if the individual has been convicted of an aggravated felony.

Noncitizens 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) of the Act if, prior to the date of the re-embarkation 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 noncitizen's reapplying for admission.

Any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine their inadmissibility or deportability and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal is inadmissible. Section 212(a)(6)(B) of the Act. The Applicant bears the burden of proof 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).

II. ANALYSIS

The record indicates that the Applicant arrived in the United States in 2001, in transit without a visa from El Salvador to Italy, and stated her intention to remain in the United States. Following an

[1] *See* section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).
[2] *See* section 240 of the Act, 8 U.S.C. § 1229a.

interview, the Applicant was served with a notice to appear for a hearing before an immigration judge and advised that she was subject to removal from the United States under section 212(a)(6)(C)(i) of the Act, because she had attempted to obtain an immigration benefit by fraud or willful misrepresentation, and section 212(a)(7)(A)(i)(I) of the Act, because she applied for admission without a valid entry document. The Applicant was also advised that failure to attend the hearing could result in an order of removal. The Applicant did not appear for the [redacted] 2002 hearing, and was ordered removed *in absentia* under the provisions of section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A). The immigration court notified the Applicant that the "decision is final unless a motion to reopen is filed." The record contains no evidence that the Applicant filed a motion to reopen the removal proceeding. The Applicant has not departed the United States.

The Applicant filed the Form I-212 application in 2020, seeking conditional approval of the application prior to her departure from the United States under 8 C.F.R. § 212.2(j) (enabling an applicant "whose departure will execute an order of deportation" to seek conditional approval depending upon their "satisfactory departure").

In a notice of intent to deny the application, the Director noted that the Applicant did not attend her [redacted] 2002 removal hearing. As a result, she will, upon departure, become inadmissible for five years under section 212(a)(6)(B) of the Act, a provision for which no waiver exists, unless she can show reasonable cause for missing the hearing. The Director cited *Matter of Martinez-Torres,* 10 I&N Dec. 776 (Reg'l Comm'r 1964), which states that, when an applicant is inadmissible (or will become inadmissible upon departure) under a non-waivable provision of the Act, "no purpose would be served in granting" the Form I-212 application. The Director advised that the burden is on the Applicant to show reasonable cause, and the Director noted that the materials submitted with the Form I-212 application did not any evidence or explanation to show reasonable cause for missing the hearing.

In response to the notice, the Applicant contends that, unlike the applicant in *Martinez-Torres* who was unambiguously subject to a mandatory ground of inadmissibility, she is not currently subject to any non-waivable ground of inadmissibility because (1) she intends to apply for an immigrant visa abroad, and the U.S. Department of State (DOS) will make the final determination regarding any grounds of inadmissibility; and (2) she had reasonable cause for failing to attend her removal hearing.

Regarding her claim of reasonable cause, the Petitioner asserts: "I consulted with an Immigration Attorney in North Carolina who recommended not to appear at the immigration court because the probabilities of getting an asylum case granted at the Atlanta Immigration Court were very low. The immigration attorney recommended me to hide and not to make any purchases under my name."

The Director denied the application, concluding that the Applicant had not shown reasonable cause for failing to attend her removal hearing, and therefore she would become inadmissible under section 212(a)(6)(B) of the Act upon departure from the United States.

On appeal, the Applicant repeats the argument that, because she intends to depart the United States and apply for an immigrant visa at a consulate abroad, authority to make determinations about her inadmissibility lies with DOS. Nevertheless, evidence that the Applicant's departure will trigger inadmissibility under a separate, non-waivable ground is relevant to determining whether to grant

permission to reapply for admission as a matter of discretion, as no purpose would be served in granting the application under these circumstances.

The issue on appeal is whether the Applicant should be granted conditional approval of her application for permission to reapply in the exercise of discretion. We agree with the Director's determination that a favorable exercise of discretion is not warranted in her case and find that no purpose would be served in approving her Form I-212, because the record indicates that she would become inadmissible upon departure from the United States under section 212(a)(6)(B) of the Act, a ground for which no waiver is available.

Based upon the evidence provided, the Applicant has not demonstrated that she had reasonable cause for not attending her removal hearing. There is no statutory definition of the term "reasonable cause" as it is used in section 212(a)(6)(B) of the Act, but guiding U.S. Citizenship and Immigration Services (USCIS) policy provides that "it is something not within the reasonable control of the [applicant]." USCIS policy further provides:

> Whether [an applicant] can meet the burden of proving "reasonable cause" for failure to attend the removal proceeding is determined by the officer adjudicating an application for an immigrant or nonimmigrant visa, for admission to the United States, for adjustment of status, change of status, or extension of stay, or *any other benefit under the immigration laws*.

Memorandum from Lori Scialabba, Associate Director for Refugee, Asylum & International Operations Directorate, et al., USCIS, HQ 70/21.1 AD07-18, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators: Revisions to the Adjudicator's Field Manual (*AFM*) to Include a New Chapter 40.6* (AFM Update AD07-18) (Mar. 3, 2009) (Emphasis added).

In this instance, permission to reapply is a benefit under the immigration laws. In order to determine whether an exercise of discretion would be warranted, it is therefore appropriate to consider the relevant question of whether the Applicant has shown reasonable cause for not attending her removal hearing. We acknowledge that DOS would make the final, binding determination on this question and the Applicant's eligibility for a visa, including whether she is subject to inadmissibility under section 212(a)(6)(B) or any other provisions of the Act. But the question of central relevance here is whether circumstances warrant a favorable exercise of discretion. It is beyond dispute that the Applicant failed to attend the removal hearing, and the evidence submitted does not suggest that reasonable cause would apply, which is material to the adjudication of the Form I-212 application.

Having thus established that it is appropriate for USCIS to consider the circumstances of the Applicant's failure to attend her removal hearing, we agree with the Director that the Applicant has not shown reasonable cause. The Applicant asserts that an attorney advised her to avoid the hearing and, instead, go into hiding, but she does not identify the attorney or provide any corroborating evidence.[3] The unsupported claim, more than 18 years after the fact, that an unnamed individual

[3] The Applicant's present attorney of record contends only that USCIS has no jurisdiction to address reasonable cause at all.

advised her not to attend the hearing does not meet the Applicant's burden of proof to show reasonable cause. The Applicant has submitted copies of court documents relating to the hearing, demonstrating that she was duly advised of the serious consequences of failure to appear. The Applicant does not claim or establish that the purported attorney failed to discuss these consequences with her. The Applicant was demonstrably aware of the time, date, and location of the removal hearing, and acknowledges that she deliberately chose not to attend. This choice was not outside the Applicant's reasonable control.

While we acknowledge the Applicant's arguments on appeal, the record reflects that she was ordered removed *in absentia* in 2002, and has not shown reasonable cause for her failure to appear for her removal hearing. An application for permission to reapply for admission is denied, in the exercise of discretion, to a noncitizen who is inadmissible to the United States, for grounds that cannot be waived, under another section of the Act. *See Matter of Martinez-Torres,* 10 I&N Dec. at 776-77. Approving the Form I-212 application would serve no purpose as the record indicates that the Applicant will become inadmissible under section 212(a)(6)(B) of the Act upon her departure and remain inadmissible for a period of five years.

Because the record indicates that the Applicant will become inadmissible upon her departure under section 212(a)(6)(B) of the Act, and there is no waiver available for this ground of inadmissibility, her application for permission to reapply for admission will remain denied as a matter of discretion.

ORDER: The appeal is dismissed.