U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16211514

Date: APR. 19, 2022

Appeal of Boston 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 Boston 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 argues that he is not yet inadmissible under section 212(a)(6)(B) of the Act for having failed to appear at a removal hearing, and that the approval of his application would allow him to proceed with his immigrant visa application abroad.

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." 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) 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 foreign national'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.

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 [redacted] 1996. He was apprehended and placed into removal proceedings but failed to appear for a scheduled hearing and was ordered removed in absentia on [redacted] 1997. *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 1996, and he seeks permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing. An immigrant visa petition filed by his U.S. citizen spouse was approved in 2014.

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. Because he would thus be inadmissible even if this application were to approved and additional grounds of inadmissibility waived through a subsequent application, there would be no purpose served in approving this application, and so the Director denied the application as a matter of discretion.

On appeal, the Applicant asserts that he is not inadmissible because (1) the issue of his inadmissibility under section 212(a)(6)(B) of the Act is speculative, as he has not departed the United States and is therefore not inadmissible; (2) his circumstances can be distinguished from those at issue in *Martinez-Torres* and *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963), as the grounds of inadmissibility in those cases took effect without further requirements or actions, whereas section 212(a)(6)(B) of the Act requires departure from the Unites States in order to trigger inadmissibility; (3), the denial is contrary to USCIS policies regarding section 212(a)(6)(B) of the Act; and (4), USCIS and Executive Office for Immigration Review policies dictate that he proceed with a motion to reopen his removal

proceedings only after securing approval of this application for permission to reapply for admission followed by an application for a provisional waiver of unlawful presence.

After review, we agree with the Director's determination that a favorable exercise of discretion is not warranted in his case and find that no purpose would be served in approving his Form I-212, as the record indicates that he would become inadmissible upon departure from the United States pursuant to section 212(a)(6)(B) of the Act, a ground for which no waiver is available.

While we acknowledge the Applicant's arguments on appeal, the record reflects that he was ordered removed *in absentia* in [redacted] 1997, and he does not argue on appeal that he had reasonable cause for failing to attend 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. *Martinez-Torres,* 10 I&N Dec. at 776-77. As he seeks conditional approval of his application, its approval is conditioned upon departure from the United States and would have no effect if the Applicant does not depart. In this case, approving the Form I-212 would serve no purpose as the record indicates that the Applicant will become inadmissible under section 212(a)(6)(B) of the Act upon his departure and remain inadmissible for a period of five years.

As the record indicates that the Applicant will become inadmissible upon his departure under section 212(a)(6)(B) of the Act, and there is no waiver available 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.