U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17902947

Date: APR. 19, 2022

Appeal of Queens, New York Field Office Decision

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

The Applicant, who has an outstanding order of removal, 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. § l 182(a)(9)(A)(iii).

The Director of the Queens, New York Field Office denied the Form 1-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, as a matter of discretion, concluding that the favorable factors did not outweigh the unfavorable factors in the case. On appeal, the Applicant contends that he has established eligibility for the benefit sought.

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 provides in pertinent 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of a noncitizen 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) 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

A. Relevant Evidence and Procedural History

The Applicant filed the instant Form I-212 in February 2019, seeking conditional approval of the application prior to his departure from the United States under 8 C.F.R. § 212.2(j) (enabling an applicant whose departure will execute an order of removal to seek conditional approval depending upon their "satisfactory departure"). The Director denied the application, concluding that the Applicant was inadmissible under section 212(a)(9)(A)(ii) of the Act and did not establish that a favorable exercise of discretion was warranted in his case. In the denial, the Director cited the Applicant's failure to attend his removal hearing in [redacted] 2000, concluding that his violation of U.S. immigration laws and failure to comply with the order from the Immigration Judge weighed against approval of his permission to reapply for admission. The Director also noted that the Applicant did not appear to be eligible for a provisional waiver of inadmissibility for his unlawful presence in the United States based on extreme hardship to his spouse.[1] *See* section 212(a)(9)(B)(i), (v) of the Act. The denial states that because the Applicant is unlikely to qualify for a waiver for his unlawful presence, the remaining ground of inadmissibility is a negative factor that in itself supports denial of the Form I-212 as a matter of discretion.[2]

The record indicates that the Applicant entered the United States without inspection, authorization, or parole in [redacted] 2000 and was subsequently placed into removal proceedings before an Immigration Judge. In [redacted] 2000, the Applicant failed to appear for a hearing and was ordered removed *in absentia*.[3] *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.

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[1] *See* Instructions for Form I-601A, Application for Provisional Unlawful Presence Waiver at 7, https://www.uscis.gov/i-601a.

[2] While the Director found that it is unlikely the Applicant would establish extreme hardship to his spouse in order to qualify for a provisional waiver for his unlawful presence ground of inadmissibility, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Further, a provisional waiver application is a separate application for relief, and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver. The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) for unlawful presence will be needed after the Applicant departs and regardless of whether she obtains a provisional waiver. *See* Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal – Where to File, https://www.uscis.gov/i-212.

[3] Section 212(a)(6)(B) of the Act provides that any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the noncitizen's inadmissibility or deportability, and who seeks admission to the United States within five years of the noncitizen's subsequent departure or removal, is inadmissible. Section 212(a)(6)(B) of the Act is a separate ground of inadmissibility, applicable upon subsequent departure from the United States, that imposes a penalty specifically for failing to attend a removal hearing.

On appeal, the Applicant contends that hardship has been established by evidencing significant positive factors in support of his application. He does not discuss his failure to appear at his removal proceeding.

B. Discretion

The issue on appeal is whether the Applicant should be granted conditional approval of his 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 and find further that approving the Form I-212 would serve no purpose because 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] 2000, and he has not shown reasonable cause for his failure to appear for his removal hearing. An application for permission to reapply for admission will be 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. 776 (Reg'l Comm'r 1964). Approving the Form I-212 would therefore serve no purpose because the record indicates the Applicant will become inadmissible under section 212(a)(6)(B) of the Act upon his departure, and that he will then 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.