U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17681156

Date: APR. 20, 2022

Appeal of Oakland Park, Florida Field Office Decision

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

The Applicant will be inadmissible upon his departure from the United States for having been previously ordered removed and seeks permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii). The Director of the Oakland Park, Florida Field Office, denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), as a matter of discretion, concluding that no purpose would be served in granting conditional approval for permission to reapply for admission as the Applicant, upon his departure, would also become inadmissible under section 212(a)(6)(B) of the Act for failure to appear at his removal proceedings. Furthermore, the Director evaluated the favorable and unfavorable factors in the Applicant's case and concluded that a favorable exercise of discretion was not warranted. On appeal, the Applicant contends that he has established eligibility for the benefit sought. We review the questions raised 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 provides, in part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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, 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 reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission. The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

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. There is no waiver for this inadmissibility.

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 will become inadmissible upon departing the United States pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The issue raised on appeal is whether the Applicant should be granted conditional approval of his Form I-212 in the exercise of discretion.

The Applicant entered the United States without inspection on or about [redacted] 2005. He was subsequently apprehended by immigration officials and served a Notice to Appear (NTA). The Applicant did not attend his removal hearing on [redacted] 2005, and was ordered removed by an immigration judge *in absentia* on that date. The Applicant has remained in the United States, and upon his departure, he will become inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The Applicant appears to be seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. 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.

The Applicant claims that his Form I-212 should be granted notwithstanding his inadmissibility under section 212(a)(6)(B) of the Act because U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction to consider his inadmissibility under section 212(a)(6)(B) of the Act. The Applicant contends that he requires an approved Form I-212 to pursue relief for his *in absentia* order through consular processing. The Applicant states that it is a requirement for a noncitizen with an *in absentia* order to receive a Form I-212 prior to applying for a Form I-601A, Application for Provisional Unlawful Presence Waiver. The Applicant also maintains that it does not fall under the purview of USCIS to determine inadmissibility under section 212(a)(6)(B) of the Act, but rather a U.S. consular officer.

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. 776 (Reg'l Comm'r 1964). Because the Applicant will depart the United States and apply for an immigrant visa, the U.S. Department of State will make the final determination concerning his eligibility for a visa, including whether the Applicant is inadmissible under section 212(a)(6)(B) or under any other ground. Evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available, however, is relevant to determining whether a Form I-212 should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances. *See id.*

The Applicant contends that he has established reasonable cause for failing to attend his removal hearing in [redacted] 2005. Specifically, the Applicant contends that he failed to appear for his hearing because the officers who apprehended him spoke Spanish when the Applicant is a Portuguese speaker and he was unaware of the date and time of his hearing. He further contends that his NTA was defective because it did not include the date and time of the hearing with the immigration court.

Based upon the evidence provided, the Applicant has not demonstrated that he had reasonable cause for not attending his 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]."[1] While the Applicant asserts that he did not know the date and time of his hearing because some of the officers spoke to him in Spanish during his apprehension, this is not a circumstance not within his reasonable control that would prevent him from attending his hearing. Rather, the record indicates that, prior to his release on recognizance, the Applicant was served with and signed an NTA advising him that he was "required to provide [legacy Immigration and Naturalization Service (INS)], in writing with [his] full mailing address and phone number" using a Form EOIR-33, Change of Address. The Applicant's signed NTA also indicates that he was "provided oral notice in the Portuguese language of the time and place of his or her removal hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act." The immigration court listed in the NTA subsequently sent a notice of hearing on July 6, 2005, to the address the Applicant provided which specified the date and time of the Applicant's hearing. Based upon the evidence provided, the Applicant has not demonstrated he had reasonable cause to not attend his removal hearing.

On appeal, the Applicant argues an NTA that does not specify the date and time of his hearing is defective and cites to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) as well as *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148 (11th Cir. 2019) in support. In *Pereira v. Sessions*, the Supreme Court made a narrow finding that an applicant seeking cancellation of removal served with a NTA that does not specify the date, time, and location of the hearing does not trigger the "stop-time" rule in cancellation of removal proceedings when the subsequent notice of hearing was sent to the wrong address. *Pereira*, 138 S. Ct. at 2110, 2113. However, the Applicant in this case is not seeking cancellation of removal and, unlike in *Pereira v. Sessions*, the notice of hearing was sent to the correct address provided by the Applicant. The Board of Immigration Appeals (BIA) has found that "a notice to appear that does not specify the time and place of an [applicant's] initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the [applicant]."[2] *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018) (distinguishing *Pereira v. Sessions*). Here, we find the Applicant was properly served with a NTA and provided with a notice of hearing sent to the address the Applicant provided during his apprehension.

The Applicant also cites to *Perez-Sanchez*, contending the 11th Circuit finds NTAs lacking a date and time to be defective. However, while the 11th Circuit took issue with these NTAs, the court found that the NTA nevertheless gave the Immigration Judge jurisdiction over the removal hearing which resulted in a valid final order of removal. *Id.* at 1157. The Applicant in this case was served with a NTA, provided with a notice of hearing sent to his address of record, and the immigration judge issued a valid order of removal *in absentia*. While we acknowledge the Applicant's arguments on appeal, the record reflects that he was ordered removed *in absentia* in [redacted] 2005, and has not shown

[1] 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).

[2] The Applicant also filed a motion to reopen with the immigration court asking the Immigration Judge to consider *Pereira v. Sessions*. The motion was denied on May 20, 2019.

reasonable cause for his failure to appear for his removal 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 . 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.