U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18572940

Date: APR. 25, 2022

Appeal of Newark, New Jersey Field Office Decision

Form I-212, 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. *See* section 212(a)(9)(A)(ii) of the Act.

The Director of the Newark, New Jersey Field Office denied the application, concluding that the Applicant would become inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failing to attend removal proceedings without reasonable cause, further indicating that there is no waiver for this ground of inadmissibility. The matter is now before us on appeal.

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 because the Applicant has not met this burden.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any noncitizen, 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 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) 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 noncitizen'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. *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. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973).

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 such noncitizen's subsequent departure or removal is inadmissible. Section 212(a)(6)(B) of the Act.

II. ANALYSIS

The Applicant is currently in the United States and seeks permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing the United States.[1] The record indicates that the Applicant will become inadmissible upon departing the United States under section 212(a)(9)(A)(ii) of the Act.[2]

On appeal, the Applicant contends that the Director erred in deciding on his inadmissibly under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause. The Applicant states that there is a reasonable cause exception for failure to attend a removal proceeding and that the Director did not "consider possible reasonable causes," issue a request for evidence (RFE) to obtain evidence of reasonable cause, or provide analysis as to why he did not have reasonable cause to not attend. The Applicant asserts that a decision as to whether he is inadmissible under section 212(a)(6)(B) should be decided later by a U.S. Department of State (DOS) consular officer where he would have the opportunity to submit evidence as to reasonable cause. Lastly, the Applicant contends that the Director did not properly weigh the favorable and adverse factors in making a discretionary decision.

The Applicant does not contest that he did not attend a scheduled removal hearing in [redacted] 2001, nor does he assert that he did not receive proper notice of this hearing. Under section 212(a)(6)(B) of the Act, the inadmissibility period applies to any noncitizen who, without reasonable cause, fails to attend a removal proceeding and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal. The Applicant has not yet departed the United States, but upon his departure he will be subject to inadmissibility under section 212(a)(6)(B) of the Act.

Here, the Applicant contends that U.S. Citizenship and Immigration Services (USCIS) had no power to conclude that he was inadmissible under section 212(a)(6)(B) of the Act, but that this decision should only be provided by a DOS consular officer at the time of his interview abroad. We acknowledge that, as the Applicant intends to depart the United States and apply for an immigrant visa, DOS will make the final determination concerning his eligibility for a visa, including whether the Applicant is inadmissible under section 212(a)(6)(B) of the Act or under any other ground, when

[1] The approval of his application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart.

[2] The record reflects that on [redacted] 2001, the Applicant was ordered removed *in absentia* by an immigration judge in [redacted] Texas. The Applicant filed a motion to reopen his removal proceedings in [redacted] 2018 and this motion was denied by the immigration judge in [redacted] Texas in [redacted] 2018.

he seeks to reenter. However, evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available is relevant to determining whether permission to reapply for admission should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances. *See Matter of Martinez-Torres,* 10 I&N Dec. 776, 776-77 (Reg'l Comm'r 1964) (stating that, when the applicant is mandatorily inadmissible to the United States under a provision of the Act, "no purpose would be served in granting" the Form 1-212). Here, the Director properly concluded that the Applicant's departure would trigger inadmissibility under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause.

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 USCIS policy provides that "it is something not within the reasonable control of the alien."[3] On appeal, the Applicant provides no specific evidence or contentions with respect to why he had reasonable cause to not attend his removal hearing in [redacted] 2001, but appears to reserve this, for unexplained reasons, for a later consular interview. We note it is the burden of the Applicant to demonstrate reasonable cause for not appearing at the scheduled hearing for the exception to be granted. Further, given that it is the Applicant's burden to establish this exception, the Director was under no obligation to issue a RFE to collect evidence as to reasonable cause. Furthermore, even if the Director had committed a procedural error in not issuing an RFE, which they did not, it is not clear what remedy would be appropriate beyond the appeal process itself. However, as noted, the Applicant declines to submit any additional evidence or assertions with respect to reasonable cause with us on appeal.

In support of the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, the Applicant stated that since he was living in New Jersey at the time of his hearing and "not a person of means," he could not afford to attend the hearing in Texas where he was detained. The Applicant stated he requested that the immigration court transfer his hearing to a venue more local to his residence in New Jersey. The Applicant indicated that he made this request this without the benefit of an attorney and therefore sent the request to the wrong location and the change in venue was not granted. The Applicant asserted that because of this result he was "frustrated by the rigors of the system" and due to his lack of financial means, he could not appear for the hearing in Texas.

Even if we accept that these circumstances could be considered beyond the Applicant's reasonable control, which we do not, these statements appear inconsistent with those on the record made by the Applicant in a previous motion to reopen removal proceedings he filed with the New York Immigration Court in [redacted] 2018. In this filing with the immigration court, the Applicant claimed that he did not attend the hearing due to being admitted for surgery to remove his appendix. The Applicant does not discuss this previously asserted appendectomy in support of the Form I-212 or now on appeal. Further, the immigration court denied the Applicant's motion to reopen indicating that the submitted medical form was "not clear or legible enough to determine when it occurred." We agree, as this one-

[3] 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).

page document was undated, and did not clearly reflect that the Applicant had any surgery nor such a procedure near to the time of his hearing.

In addition, the Applicant stated in his motion to reopen filed with the immigration court in 2018 that he traveled to California in October 2000 for a job, returned to New Jersey, and then went back to California not long after since his "job offer was extended until March of 2001." The Applicant's assertions in the discussed motion to reopen indicate that he was traveling across the country to California multiple times, and employed during this time, leaving substantial doubt as to his assertion that he had no financial means to attend his hearing in Texas in [redacted] 2001.

Therefore, the Applicant's assertions of reasonable cause provided in support of the Form I-212 appear wholly inconsistent with those provided to the immigration court in 2018, leaving substantial uncertainty as to his claims. This uncertainty is only heightened by the Applicant's refusal to submit any basis or evidence to support reasonable cause to us on appeal, inexplicably reserving these contentions and evidence for DOS later, despite being on notice of this deficiency from the Director's decision. The Applicant must resolve inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We find the record supports the Director's determination that the Applicant would become inadmissible under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause. As discussed, there is no waiver for this ground of inadmissibility.

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 Applicant would remain inadmissible under section 212(a)(6)(B) of the Act for a period of five years upon his departure. There is no waiver available for this ground of inadmissibility; therefore, the Applicant's application for permission to reapply for admission will remain denied as a matter of discretion.

ORDER: The appeal is dismissed.