U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13502007

Date: APR. 27, 2022

Appeal of Johnston, Rhode Island 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 Johnston, Rhode Island Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), as a matter of discretion. The Director concluded 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. The Director determined that the Applicant did not establish reasonable cause for his failure to appear.[1] The matter is now before us on appeal.

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). 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

[1] The Director further observed that the Applicant provided false information on his Form I-601A, Application for Provisional Unlawful Presence, and that he may therefore be inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation of a material fact. We note, however, that the U.S. Department of State, which handles the processing of immigrant visa applications, makes the final determination whether the Applicant is inadmissible on this ground. As such, the Applicant's potential inadmissibility under section 212(a)(6)(C)(i) of the Act will not be addressed in this proceeding.

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.

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.

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], 2004. He was then issued a Notice to Appear and placed in removal proceedings pending a hearing that later took place on [redacted] 2004. The Applicant did not attend his removal hearing and was ordered removed by an immigration judge *in absentia*. Because the Applicant has remained in the United States since 2004, 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 is seeking conditional approval of his application for permission to reapply for admission 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 Director in this instance declined to address the merits of the application, concluding that the Applicant's inadmissibility under section 212(a)(6)(B) of the Act will preclude him from being able to seek admission to the United States for five years from time of his departure or removal. Therefore, approval of this application, related to section 212(a)(9)(A)(ii), even if warranted, would serve no purpose.

On appeal, the Applicant cites to certain regulatory provisions that pertain to provisional waivers for unlawful presence, arguing that a waiver may be granted to an applicant with an approved Form I-212. The Applicant did not, however, establish that this argument is relevant to the matter at hand, which involves the filing of Form I-212 itself. The Applicant further argues that there is no legal provision that precludes an approval of a conditional Form I-212 when filed by an applicant who is subject to an order of removal that was issued *in absentia*. We do not disagree with the Applicant's interpretation. However, as the Director correctly determined, no purpose would be served by providing the Applicant with a discretionary analysis or, if warranted, granting conditional approval of a Form I-212 to someone who, notwithstanding an approval, would become inadmissible under section 212(a)(6)(B) of the Act, a ground for which there is no waiver. Further, the Applicant's references to unpublished AAO decisions are not persuasive; the cited decisions are not published as precedent and, accordingly, as a non-precedent decision, they do not bind USCIS in future adjudications. *See* 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act"). Lastly, although the Applicant is correct in

stating that a reasonable cause showing is not a prerequisite for filing this application, such a showing is required in order to excuse the Applicant's failure to attend his scheduled removal hearing in 2004. As a result of his failure to attend, a removal order was issued *in absentia,* thereby establishing that upon departure from the United States, the Applicant will trigger inadmissibility under section 212(a)(6)(B) of the Act, a ground for which there is no waiver.

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) of the Act or under any other ground. However, evidence that the Applicant's departure will trigger inadmissibility for which no waiver is available 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.*

Based upon the evidence provided, the Applicant will become inadmissible upon his departure for a period of five years for failure to appear at her removal hearing. Under these circumstances, no purpose would be served by determining whether the Applicant merits approval of his application related to section 212(a)(9)(A)(ii) as a matter of discretion because she would remain inadmissible for five years under section 212(a)(6)(B) without a possibility to apply for a waiver. Consequently, we find no error in the Director's denial of the application in the exercise of discretion, and we need not address the evidence in the record relating to the positive and negative factors in the case or determine whether a favorable exercise of discretion would be warranted. The application will therefore remain denied.

ORDER: The appeal is dismissed.