U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20793676

Date: JUN. 10, 2022

Appeal of Holtsville, New York 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 (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii).

The Director of the Holtsville, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (application), 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.

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). This office reviews the questions in this matter *de novo*. *See 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 that any noncitizen, other than an "arriving [noncitizen]" described in section 212(a)(9)(A)(i), who "has been ordered removed under section 240 or any other provision of law ... 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."

Section 212(a)(6)(B) of the Act renders inadmissible 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.

II. ANALYSIS

The record indicates that the Applicant, a native and citizen of El Salvador, 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 Applicant is 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 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] 1999. He was subsequently apprehended and detained by immigration officials. In [redacted] 1999, he was personally served a Notice to Appear (NTA) before an Immigration Judge for a hearing date "to be set." The Applicant signed the NTA, which also indicates that he was "provided oral notice in the Spanish 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." In August 1999, an Immigration Judge granted the Applicant's change of venue for his immigration proceedings from [redacted] Texas to [redacted] California. According to the Applicant's Form I-203, Order to Detain or Release [Noncitizen], that same day he was ordered released from custody subject to a $3,000 immigration surety bond, and that he would be residing at an address in California. The Applicant was supplied with Form EOIR-33, Change of Address, which noted:

> You are required to notify the Executive Office for Immigration Review [EOIR] of any change of address and telephone number within five days of moving. You will receive notification as to the time, date, and place of hearing or other official correspondence at the address provided by you.

Though provided with a hearing notice at the aforementioned California address, the Applicant did not attend his removal hearing on [redacted] 1999 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 Director determined in denying the application that the Applicant is inadmissible under section 212(a)(6)(B) of the Act, for failing to attend his removal proceedings, and noted that there is no waiver for this ground of inadmissibility. The record reflects and the Applicant does not dispute that he was

ordered removed *in absentia* in 1999. On appeal, he contends that he is not inadmissible because he had reasonable cause for failing to attend his removal hearing. Specifically, the Applicant avers that he failed to appear for his hearing because he never received the hearing notice, asserting:

> I entered the United States without inspection in 1999 across the border and have lived in the United States ever since. I was detained by the [U.S. Border Patrol] as soon as I arrived. They told me to wait for a letter in the mail, which would be an appointment to see an [I]mmigration [J]udge. I never received that letter, and it was only when I started this process (the I-130 petition that my wife filed for me, with the hopes of later applying for an immigration visa) that I learned there was a [removal] order against me. According to my lawyer, the order was issued on [redacted] 1999. I never received that order either.

Notably, the Applicant provided copies of his [redacted] 1999 removal order and his [redacted] 1999 Form I-200, Warrant of Removal/Deportation, in support of his Form I-821, Application for Temporary Protected Status [TPS] and a related Form I-765, Application for Employment Authorization which were both filed in October 2001.[1] The Applicant's submission of his removal documentation in support of his TPS-related applications two years after he was ordered removed casts doubt on the truthfulness of his assertion that he only "learned there was a [removal] order against me" when his spouse filed a Form I-130 immigrant petition for him in 2018.

On appeal, the Applicant submits a statement from his brother who explains that the Applicant resided with him for two years after coming to the United States. His brother contends that the Applicant "never received a letter from [the Court] or immigration." However, the brother's letter does not indicate the address where the two resided together, nor has the Applicant provided supporting evidence to show that he resided with his brother during this time frame. The record also lacks documentation to show that the Applicant resided at the California address that he provided to the Court in his August 1999 immigration surety bond (which he later breached) after his release from custody. We also note that the addresses that he gave in his 2001 TPS applications, the instant application, and on appeal collectively suggest that he has resided in the same town in New York since at least 2001. The record does not contain a Form EOIR-33 or other evidence to establish that the Applicant notified the Court of his address change as required. *See* 8 C.F.R. § 1003.15(d)(2).

Based upon the evidence provided, the Applicant has not demonstrated that he had reasonable cause for failing to appear at 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 USCIS policy provides that "it is something not within the reasonable control of the [applicant]."[2] The Applicant has not submitted probative, consistent evidence to support his contention that he was unaware of his scheduled hearing, or that there were any circumstances beyond his reasonable control preventing him from attending the hearing. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376.

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[1] The documents were provided with the Applicant's TPS application [redacted]

[2] 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).

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. *See Matter of Martinez-Torres*, 10 I&N Dec. 776, 776-66 (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 application). 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.