U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15777859

Date: JUNE 13, 2022

Appeal of Queens, New York 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 is inadmissible for having been previously ordered removed.

The Director of the Queens, New York Field Office denied the application. The Director concluded that the Applicant had not shown that a favorable exercise of discretion is warranted, because the Applicant is also inadmissible under another ground (section 212(a)(6)(B) of the Act) that cannot be waived.

The matter is now before us on appeal. On appeal, the Applicant submits additional evidence and argues that the U.S. Department of State (DOS) did not find him inadmissible under section 212(a)(6)(B) of the Act.

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 who has been ordered removed, or who departed the United States while an order of removal was outstanding, is inadmissible for 10 years after the date of departure or removal.

A noncitizen 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.

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); *see also Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character).

Section 212(a)(6)(B) of the Act provides that any noncitizen who, without reasonable cause, fails to attend a proceeding to determine their inadmissibility or removability is inadmissible for five years after their departure or removal from the United States. There is no waiver for this ground of inadmissibility.

II. ANALYSIS

The Applicant does not dispute that he entered the United States without admission in April 2000. The Applicant failed to attend a removal hearing in [redacted] 2010, and was ordered removed *in absentia*. The Applicant was still in the United States when he filed the Form I-212 application in July 2017. At the time, he sought conditional permission to reapply, to take effect upon departure from the United States, as provided by the regulation at 8 C.F.R. § 212.2(j). While the application was pending, he departed the United States in September 2019, at which time he became inadmissible under sections 212(a)(9)(A)(ii) and 212(a)(9)(B)(i)(II) of the Act.

The Director denied the Form I-212 application in September 2020, noting the favorable and unfavorable discretionary factors in the case. The Director concluded that the Applicant is inadmissible under section 212(a)(6)(B) of the Act because he failed to attend his removal hearing, and was ordered removed in absentia at that hearing. Citing that provision's non-waivable five-year bar on readmission, the Director denied the application as a matter of discretion, because the Applicant "will remain inadmissible even if USCIS [U.S. Citizenship and Immigration Services] were to [approve the] Form I-212."

On appeal, the Applicant submits evidence to establish that he departed the United States in 2019, while the Form I-212 application was pending, and he appeared for an immigrant visa interview at the U.S. Consulate in Guayaquil, Ecuador, in January 2020. The consular officer refused to grant the immigrant visa, finding the Applicant inadmissible under sections 212(a)(9)(A)(i) and 212(a)(9)(B)(i)(II) of the Act, because he departed the United States under an order of removal and was unlawfully present in the United States for a year or more. Each of these grounds renders the Applicant inadmissible for ten years, but can be overcome with the approval of, respectively, Forms I-212 and I-601, Application for Waiver of Grounds of Inadmissibility.

The Consulate notified the Applicant that the immigrant visa would not be issued, because of unresolved grounds of inadmissibility. The written notice did not cite inadmissibility under section 212(a)(6)(B) of the Act. The Applicant argues that, because DOS did not cite that ground of inadmissibility, he has therefore overcome it and the Director erred by citing it in the denial notice.

In these proceedings, it is the applicant's burden to establish by a preponderance of the evidence eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Counsel for the Applicant states, on appeal, that the interviewing consular officer "determin[ed] there was reasonable cause for failing to appear for his immigration court hearing." But the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). We must consider the underlying procedural documents, rather than counsel's interpretations of those materials.

As noted above, the Consulate's notice to the Applicant did not list section 212(a)(6)(C) of the Act among the grounds of inadmissibility. But there is no indication that DOS considered that ground of inadmissibility; there is simply no discussion of that ground at all, and no indication that DOS was aware that the Applicant had been ordered removed *in absentia* owing to his failure to attend his hearing.[1] The Applicant bears the burden of proof to establish eligibility for the benefit sought. Nothing shows that the Applicant made DOS aware of his *in absentia* order of removal for their consideration.

It is of particular concern that, throughout this proceeding, the Applicant has not explained why he failed to attend his removal proceeding. The absence of any such explanation further weighs against counsel's unsupported claim that DOS found that the Applicant had shown reasonable cause for his failure to attend.[2] Materials relating to the Applicant's removal proceeding show that he pursued motions to reopen and appeals of the removal order, none of which were decided in his favor. The same materials also show that the Applicant repeatedly refused to cooperate with agents of U.S. Immigration and Customs Enforcement (ICE). For example, he would not sign various documents or surrender his passport.[3]

At the time the Applicant filed the application in 2017, he was in the United States, and his grounds of inadmissibility were a matter before USCIS. Based on this jurisdiction, USCIS found the Applicant to be inadmissible under section 212(a)(6)(B) of the Act. Because the Applicant has not submitted any evidence in this proceeding to show that he had reasonable cause to miss his 2010 removal hearing, we agree with the Director that the Applicant is inadmissible under section 212(a)(6)(B) of the Act.

Because the Applicant is now outside the United States, an affirmative DOS finding of reasonable cause would provide a strong argument for revisiting the Director's conclusions. But, to date, the record does not show that DOS has made such a finding. The absence of any such evidence prevents a finding that the Applicant has met his burden of proof in this regard.

ORDER: The appeal is dismissed.

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[1] The immigrant visa application asked whether the Applicant had "failed to attend a hearing on removability or inadmissibility *within the last five years*." The Applicant truthfully answered "no," because he filled out that application in 2019, more than nine years after his failure to attend the removal hearing in 2010, but the passage of time had not remedied his inadmissibility because the Applicant had remained in the United States for most of that time. The five-year bar on re-entry did not commence until the Applicant left the United States in 2019.

[2] We acknowledge that, because the Applicant is outside the United States, the ultimate determination regarding the Applicant's admissibility rests with DOS. At issue here is whether DOS had all relevant information before it when making its prior determination.

[3] We further note that he did not file a motion to reopen the removal proceeding until ICE apprehended him two years after he was ordered removed *in absentia*.