U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22737487

Date: OCT. 6, 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. Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the Newark, New Jersey Field Office denied the application, concluding that the Applicant did not establish a favorable exercise of discretion was warranted in his case. On appeal, the Applicant submits a legal brief and asserts that the Director erred by failing to consider the totality of positive factors in his case.

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. The approval of his application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart. The record indicates that the Applicant will become inadmissible upon departing the United States under section 212(a)(9)(A)(ii) of the Act.

The record reflects that the Applicant, a national and citizen of Costa Rica, entered the United States without inspection and admission or parole in [redacted] 2004 at the age of 28. He was apprehended shortly thereafter and served with a notice to appear. On [redacted] 2005, the Applicant was ordered removed *in absentia* by an Immigration Judge because he failed to appear at his removal proceeding. The Applicant filed a Motion to Reopen his removal proceedings based on *sua sponte* relief with the Immigration Court, which was denied. The Applicant did not leave and has been residing in the United States since that time. In 2008, he had a son born in the United States. In 2019, he married a U.S. citizen who subsequently filed an immigrant visa petition on his behalf, which was approved. His wife has three minor sons, all of whom are U.S. citizens.

In support of the instant Form I-212, the Applicant submitted a personal statement, and statements from his spouse, and friends. He also submits evidence that his three stepsons receive special education services through the New Jersey public education system, and other evidence to show that he is the primary income earner in his family, and the family's financial obligations such as rent and utilities. He also submits civil documents and country conditions information. The Director acknowledged that there were favorable considerations in the Applicant's case, including his family ties in the United States, and the claimed emotional, and financial hardship to his spouse, stepsons and son, and inferior economic and safety conditions in his native Costa Rica. The Director determined, however, that these positive factors were insufficient to overcome the negative impact of the Applicant's longtime unlawful residence in the United States, his failure to attend the scheduled removal hearing, noncompliance with the removal order, and his unauthorized employment.

The Applicant asserts that the Director did not take into account the totality of the discretionary factors and that it was error to give less weight to his after-acquired family ties. The Applicant further states that the Director gave too much weight to his prior immigration violations because every individual seeking permission to reapply for admission has violated immigration laws. He further argues that if

he is not permitted to remain in the United States his wife, three stepsons, and his son, who resides in Costa Rica with his mother, will suffer. In particular, his son has epilepsy and requires follow up treatment which he pays for. He argues that if he is forced to live in Costa Rica, he will not be able to provide any financial assistance to his wife or his stepsons, and son. Lastly, he argues that he is not inadmissible under section 212(a)(6)(B) of the Act because he had reasonable cause for failing to attend his removal hearing based on lack of notice of his hearing. He also argues that the U.S. Consulate in Costa Rica would be the one to determine if he is inadmissible under section 212(a)(6)(B) of the Act, and that anyway, section 212(a)(6)(B) inadmissibility only applies to removal orders that were entered before April 1, 1997.

We have reviewed the entire record, and for the reasons explained below agree with the Director that the evidence is insufficient to show that a favorable exercise of discretion is warranted.

The most significant negative factors in the Applicant's case are his unlawful presence in the United States, unauthorized employment, his failure to attend his immigration hearing, and the resulting *in absentia* removal order, as well as his failure to comply with his removal order. The positive factors include the Applicant's longtime residence and family ties in the United States, payment of taxes, apparent lack of criminal history, and difficult conditions in his country of origin.

As an initial matter, while there is no dispute that the Applicant's family in the United States (his wife and three stepsons) will be negatively affected if he must remain abroad for the entire inadmissibility period, any hardships to the Applicant's spouse and children hold diminished weight for purposes of our discretionary analysis because his marriage occurred after he was ordered removed in 2005. Likewise, the Applicant provides evidence of his three stepsons individualized education plans (IEP) through the New Jersey public school system. While we acknowledge this evidence, there is insufficient evidence to establish that the Applicant's removal from the United States would disturb his stepsons' access to these services. In his wife's statement, she asserts that she would not leave her sons in the United States and that she could not take them with her. However, a divorce document shows that his wife and her ex-husband have joint custody of his stepsons, therefore, it appears that the Applicant's three stepsons have two parental figures invested in their education, and care and custody. We acknowledge the Applicant's arguments related to his wife's financial dependence on him, however, the same divorce document shows that her ex-husband provides child support, and no evidence has been provided to demonstrate why his wife would be unable to access higher paying employment if she needs more income.

We agree with the Director that equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination). Therefore, the Applicant's marriage and relationship to his stepsons as well as their financial dependence on him are after-acquired equities that are given less weight in a discretionary analysis.

While we acknowledge the Applicant's son was diagnosed with epilepsy caused by a brain tumor, his

son no longer lives in the United States. The Applicant claims that he provides his son with financial support, however there is no evidence provided to show what medical treatment he receives in Costa Rica, and whether the Applicant's lack of financial support would mean his son would be unable to access that medical care. Moreover, publicly-available information shows that Costa Rica provides universal health care. Therefore, the Applicant's son's ongoing medical needs have not been established in the record, even though we do acknowledge that in the past, he received brain surgery in the United States.

Thus, the Applicant has not shown that the claimed hardships to himself, his son, his spouse, and his children outweigh the negative factors in his case, or that there are additional circumstances mitigating his immigration violations.

We acknowledge evidence of other favorable factors in the Applicant's case, including letters attesting to his good character and his strong work history, his payment of taxes, and the information about conditions in Costa Rica. This evidence, however, is insufficient to overcome the adverse impact of the Applicant's failure to attend his removal hearing, non-compliance with the removal order, unlawful presence in the United States since 2004, and unauthorized employment.

While we acknowledge the Applicant's arguments concerning his section 212(a)(6)(B) inadmissibility, his argument that only removal orders entered prior to April 1, 1997 are subject to this ground of inadmissibility is incorrect. In fact, the opposite is true. Moreover, his argument that he missed his removal hearing because he did not receive notice is not supported by the evidence and is therefore insufficient to establish reasonable cause under section 212(a)(6)(B). While there is no statutory definition of the term "reasonable cause" as it is used in section 212(a)(6)(B) of the Act, guiding USCIS policy provides that "it is something not within the reasonable control of the alien." *See* 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).

The record establishes that the Applicant was properly served with a Notice to Appear in [redacted] 2004, which provided the date and time of his hearing. The manner of service was personal service, which he signed and affixed his fingerprint to. He also received personal service of his removal order after failing to appear at his hearing. There is no basis upon which to find that he did not receive notice of his hearing. In addition, the immigration court denied the Applicant's Motion to Reopen his removal proceedings seeking *sua sponte* relief, stating "[f]ailing to appear at a hearing fourteen years ago for which he had notice and evading removal long enough to become eligible for relief is the epitome of circumventing the regulations."

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). As such, 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. As the Applicant will likely be found 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.

Consequently, we agree with the Director that the Applicant has not demonstrated that the positive factors in his case considered individually and, in the aggregate, outweigh the negative factors. A favorable exercise of discretion is therefore not warranted, and the Applicant's request for permission to reapply for admission to the United States remains denied.

ORDER: The appeal is dismissed.