U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22722488

Date: OCT. 6, 2022

Appeal of Chicago, Illinois 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).

The Director of the Chicago, Illinois Field Office denied the application, concluding that the Applicant did not establish eligibility for permission to reapply for two reasons. First, the Director determined that the Applicant was not eligible to apply because on the date he submitted his application, 10 years had not elapsed since his final order of removal dated [redacted] 2011. Second, the Director determined that Immigration and Customs Enforcement (ICE) could reinstate the Applicant's removal order, which would make the Applicant ineligible for any relief under the Act. We withdraw both determinations because they are erroneous as matters of law.

First, the Applicant does not need to wait for 10 years prior to applying for permission to reapply for admission. The Applicant's inadmissibility under section 212(a)(9)(A)(ii) will be triggered upon leaving the United States. However, the Applicant in this matter is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j)[1] before departing from the United States to seek an immigrant visa at a U.S. consulate abroad, as he will be inadmissible under section 212(a)(9)(A)(ii) upon his departure due to his prior removal order. The approval of his application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

Second, to support her determination that ICE could reinstate his removal order, the Director cited to three circuit court decisions: *Delgado v. Mukasey*, 516 F.3d 65 (2d Cir. 2008); *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004); and *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003). While these cases discuss the reinstatement bar to removal, they do not address the factual scenario at issue in this case and are thus irrelevant. The reinstatement of removal bar applies to a noncitizen who was removed (or deported or excluded) or departed under a removal order, and who then reenters without authorization. In that scenario, the prior removal order may be reinstated from its original date. Under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), the noncitizen "is not eligible and may not apply for any

[1] The regulation at 8 C.F.R. § 212.2(j) provides that a noncitizen whose departure will execute an order of exclusion, deportation, or removal may, prior to leaving the United States, seek conditional approval of an application for permission to reapply for admission.

relief under this Act [and] shall be removed under the prior order at any time after the reentry." The Applicant does not have a reinstated removal order and has not departed the United States or attempted to reenter the United States illegally such that his prior removal order can be reinstated. As such, the Director erred when denying the application on that basis.

As the Director did not assess whether the Applicant merits conditional approval of his application as a matter of discretion, we will remand the matter so that she may do so and enter a new decision regarding the Applicant's eligibility. As always 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.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.