U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27571700

Date: SEPT. 11, 2023

Appeal of Philadelphia, Pennsylvania Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

The Applicant seeks advance 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 become inadmissible upon departing from the United States for having been previously ordered removed. 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 Philadelphia, Pennsylvania Field Office denied the application, concluding that the Applicant did not meet his burden of proof to establish that a favorable exercise of discretion was warranted in his case. The matter is now before us on appeal.

On appeal, the Applicant submits additional evidence and asserts that the Director's decision was in error.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions 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 relevant part that a noncitizen 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.

A noncitizen who is 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 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.

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).

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) (finding that 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) (explaining that 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).

In addition, section 212(a)(6)(B) of the Act, as in effect since April 1, 1997, renders inadmissible any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine their inadmissibility or deportability and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal. Neither the Act nor the regulations provide for an exception or a waiver of this inadmissibility ground.

II. ANALYSIS

The Applicant is currently in the United States and seeks advance permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing from the United States to obtain an immigrant visa abroad. He does not contest that he has an outstanding order of removal and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[1] The only issue on appeal is whether the Applicant has established that approval of his request for permission to reapply for admission is warranted as a matter of discretion. We have reviewed the entire record, as supplemented on appeal, and conclude that he has not.

The record reflects that the Applicant, a native and citizen of El Salvador, was apprehended by U.S. Customs and Border Protection (CBP) officers in Texas in [redacted] 2004, following his entry into the United States without inspection and admission or parole. He was transported to a checkpoint and personally served a Form I-862, Notice to Appear in Removal Proceedings under Section 240 of the Immigration and Nationality Act (NTA) before being released. Because the Applicant did not attend his removal hearing in [redacted] 2004, as required, an Immigration Judge ordered him removed to El

[1] The approval of the Applicant's Form I-212 under these circumstances is conditioned upon his departure from the United States and would have no effect if he does not depart.

Salvador in absentia. Over a year later, in February 2006 the Applicant's parents were admitted to the United States as lawful permanent residents (LPR) based on immigrant visa petitions[2] the Applicant's naturalized U.S. citizen sister filed for them.

The Applicant remained in the United States after having been ordered removed in 2004. He is residing in the United States with his fiancée, who is a national of Mexico, their U.S. citizen son born in 2011, and the fiancée's teenage daughter from a previous relationship. The Applicant is the beneficiary of an approved visa petition his LPR mother filed on his behalf in 2008, and intends to seek an immigrant visa abroad on that basis.

The Director acknowledged that the Applicant's longtime residence, family ties, employment in the United States, apparent lack of criminal history, poor conditions in El Salvador, and the claimed hardships to the Applicant and his parents were positive factors. Nevertheless, the Director determined that those favorable considerations were not sufficient to outweigh the negative impact of the Applicant's unlawful presence in the United States and unauthorized employment, as well as his failure to attend the removal hearing without reasonable cause. Specifically, the Director found that the Applicant's ties to his fiancée, son, and stepdaughter had diminished weight because they were created after he had been ordered removed from the United States. The Director further found that the Applicant also did not provide sufficient evidence to show that he assisted his parents, as their medical records indicated that one of his sisters accompanied them to their appointments, and he also did not explain how many of his siblings were residing in the United States, and whether they could help with the parents' care in his absence. The Director acknowledged the Applicant's statement that he did not attend the removal hearing because he was only 19 years old at the time and "very scared of going to court," but found that it was not sufficient to establish "a reasonable cause" within the meaning of section 212(a)(6)(B) of the Act. Thus, the Director determined that in view of the Applicant's failure to attend the removal hearing, the resulting inadmissibility for which no waiver was available, and other negative factors in the case, the Applicant did not merit a favorable exercise of discretion.

The Applicant now submits a personal statement and copies of his 2016-2021 income tax returns; reference letters from his fiancée, stepdaughter, U.S. citizen sister, and brother-in-law; and additional medical records for his parents and for his sister, who sponsored the parents to immigrate to the United States.

The Applicant reiterates on appeal that his mother suffers from several medical conditions that require medical attention and, although she currently lives with one of his sisters, he talks to her daily and provides her with emotional support when she is feeling down. The Applicant further states that he takes care of his father, who also has medical issues and depends on him for support. He explains that he is the primary provider for his family, which includes his fiancée, son, and stepdaughter, and that they would struggle emotionally and financially if he were not able to return to the United States before the end of his inadmissibility period. The Applicant's U.S. citizen sister reports that she is no longer able to take care of the parents due to her knee surgeries, and that her mother is living with her younger noncitizen sister while her father is residing with the Applicant. The Applicant's brother-in-law states that his spouse (the Applicant's noncitizen sister) is currently not working, and that the Applicant is helping him financially in taking care of the mother because his own salary "would not be adequate to

[2] Form I-130, Petition for Alien Relative.

cover every expense at hand." The Applicant's fiancée and stepdaughter describe the Applicant as a caring and loving father, who also helps his mother financially and emotionally. The record below also includes statements from the Applicant's parents and their medical records; letters of support from the Applicant's previous and current employers, his two adult U.S. citizen nieces, and a friend; and human rights report and travel advisory for El Salvador.

As stated, to determine if conditional approval of the Applicant's request for permission to reapply for admission is warranted as a matter of discretion we weigh favorable factors against the unfavorable ones. The favorable factors in this case are the hardships to the Applicant and his family members if he must remain outside of the United States for the entire inadmissibility period, his long-term residence in the United States, letters of support, gainful employment, payment of taxes, and the apparent lack of a criminal record. However, the fact that that the Applicant's residence in the United States for the past 19 years has been unlawful and his employment unauthorized diminishes the weight of these positive factors. Moreover, as his relationships with his fiancée, son, and stepdaughter were created after he had been ordered removed, they need not be accorded full weight. Similarly, the Applicant's parents did not immigrate to the United States until over a year after the removal order against him had been entered, and the record is still insufficient to show that his family members in the United States would not be able to provide adequate care for the parents in his absence.

The negative factors in this case are significant and include the Applicant's entry to the United States without inspection, his longtime unlawful presence, unauthorized employment, and his failure to attend the removal hearing, which resulted in the in absentia removal order against him. Moreover, the Applicant has not established that he had reasonable cause for not attending his removal hearing, which we consider to be a substantial adverse factor that weighs against him.

The Applicant reiterates on appeal that he was only 19 years old when he entered the United States. He states that he regrets failing to appear at the hearing, and explains that he was living in Delaware at the time and no one was willing or able to drive him to Texas, where the hearing was scheduled. He further explains that he did not understand the U.S. immigration system, could not afford to hire an immigration attorney, and relied on bad advice; if he had known about the consequences of not attending the removal hearing, he would have traveled to Texas. We acknowledge the Applicant's explanations, but find them unpersuasive.

Although there is no statutory definition of the term "reasonable cause," as used in section 212(a)(6)(B) of the Act, the guiding USCIS policy provides that "it is something not within the reasonable control of the [noncitizen]."[3] Here, the record does not establish that the Applicant's failure to attend his removal hearing was due to circumstances beyond his control. As stated, the record shows that the Applicant was personally served an NTA. The record also reflects that at that time the Applicant provided an address in Delaware where he intended to reside upon release from CBP custody, and he does not dispute that he was properly notified of the date and place of his removal hearing. Furthermore, the certificate of service in the NTA contains the Applicant's signature and fingerprint, confirming that he received oral notice in Spanish detailing the consequences of failure to

[3] *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).

appear at the removal hearing. The record also contains a copy of the list of free legal service providers in the [redacted] Texas area, which was given to the Applicant and which he signed acknowledging its receipt. We also note that neither the Applicant's young age, nor the fact that he moved to Delaware after having been placed in removal proceedings in Texas is sufficient to establish that his failure to attend his removal hearing was not within his reasonable control. *See Matter of Cubor-Cruz*, 25 I&N Dec. 470, 473 (BIA 2011) (holding that personal service of an NTA to a noncitizen who is 14 years of age or older at the time of service is effective); *Wijeratne v. INS*, 961 F.2d 1344, 1346-47 (7th Cir. 1992) (finding that a noncitizen who voluntarily moved to New York before their first scheduled removal hearing in Texas had no reasonable cause for failing to appear at such hearing). Thus, the record supports the Director's determination that upon departing from the United States the Applicant will also become inadmissible under section 212(a)(6)(B) of the Act for five years due to his failure to attend the removal hearing without reasonable cause. As stated, there is no exception or a waiver of this inadmissibility.

Considering the totality of the circumstances discussed above, we conclude that the Applicant has not established that the favorable factors in his case outweigh the unfavorable ones. Consequently, a favorable exercise of discretion is not warranted at this time, and the application will remain denied.

ORDER: The appeal is dismissed.