U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17403955

Date: MAY 2, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied abroad for an immigrant visa and seeks to waive an inadmissibility finding that he left the United States after remaining "unlawfully present" for more than a year. *See* Immigration and Nationality Act (the Act) sections 212(a)(9)(B)(i)(II) 8 U.S.C. § 1182(a)(9)(B)(i)(II).

The Director of the Nebraska Service Center denied the waiver application as a matter of discretion. *See* section 212(a)(9)(B)(v) of the Act. On appeal, the Applicant asserts that the Director did not sufficiently explain her decision and disregarded the Applicant's justifications for his U.S. immigration violations. He also submits additional evidence in support of his arguments.

The Applicant bears the burden of establishing eligibility for the waiver by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. THE INADMISSIBILITY GROUND

Noncitizens who have been unlawfully present in the United States for at least a year cannot generally gain admission to the country within 10 years of leaving. Section 212(a)(9)(B)(i)(II) of the Act. The term "unlawful presence" means presence in the United States after the expiration of a period of authorized stay, or after entry without admission or parole. Section 212(a)(9)(B)(ii) of the Act.

U.S. Citizenship and Immigration Services (USCIS) may waive this inadmissibility ground if applicants demonstrate that denials of their admissions would cause "extreme hardship" to their U.S.-citizen or lawful-permanent-resident spouses or parents. Section 212(a)(9)(B)(v) of the Act. Applicants for unlawful presence waivers must also demonstrate that they merit favorable exercises of discretion. *Id.*

The Applicant, a 52-year-old native and citizen of China, concedes that, before leaving the United States in 2017, he remained unlawfully present for more than a year. The record shows that he entered the country from Mexico near [redacted] Arizona in [redacted] 1991 without admission or parole. Within a week of his entry, U.S. immigration officers apprehended him and placed him in deportation

proceedings. In [redacted] 1992, an Immigration Judge (IJ) denied the Applicant's applications for relief and ordered him deported to China. The Board of Immigration Appeals (BIA) dismissed his appeal in April 1994, affirming the IJ's deportation order. Despite the order, the Applicant remained in the United States until 2017, when immigration officers again apprehended him and deported him to China.

The Applicant remained unlawfully present for more than a year, from the April 1, 1997, effective date of section 212(a)(9)(B)(i)(II) of the Act until his deportation from the United States in 2017. The record therefore demonstrates his inadmissibility under section 212(a)(9)(B)(i)(II) and his need for a waiver under section 212(a)(9)(B)(v).[1]

II. THE DISCRETIONARY DETERMINATION

The Director found that the Applicant demonstrated that denial of his admission would cause his U.S.-citizen spouse extreme hardship. But the Director denied the filing as a matter of discretion.

In addition to demonstrating extreme hardship to qualifying relatives, applicants for unlawful presence waivers must establish that they merit favorable exercises of discretion. *See* section 212(a)(9)(B)(v) of the Act (providing the Secretary of Homeland Security with "sole discretion" to waive inadmissibility based on unlawful presence). Thus, successful waiver applicants must demonstrate that social and humanitarian considerations outweigh adverse factors in their records. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996) (discussing discretionary analysis in the context of an application to waive criminal grounds of inadmissibility under section 212(h) of the Act).

In determining whether to exercise favorable discretion, USCIS should consider: the bases and recency of applicants' removals; the lengths of their U.S. residences; their moral characters and respect for law and order; evidence of their rehabilitations; their family responsibilities; commissions of repeated immigration violations; hardships to themselves or others; close family ties in the United States; needs for their services in the country; and any other relevant factors. *Matter of Mendez-Moralez*, 21 I&N Dec. at 301.

A. The Director's Decision

If a USCIS officer denies an application, "the officer shall explain in writing the specific reasons for the denial." 8 C.F.R. § 103.3(a)(1). The basis of an agency's decision "must be set forth with such clarity as to be understandable." *SEC v Chenery Corp.*, 332 U.S. 194, 196 (1947).

If a USCIS officer denies an application as a matter of discretion, "the denial will explain the reasons the request was not granted." 1 *USCIS Policy Manual* E(9)(B)(3), https://www.uscis.gov/policy-manual. "The discretionary analysis involves the review of all relevant, specific facts and circumstances in an individual case, both favorable and unfavorable to the exercise of discretion." *Id.*

[1] Consular officers also found the Applicant inadmissible for seeking U.S. admission within 10 years of his deportation. *See* section 212(a)(9)(A)(ii)(I) of the Act. The Director denied the Applicant's Form I-212 application, finding that he did not qualify for an exception to that inadmissibility ground. *See* section 212(a)(9)(iii) of the Act. In a separate opinion, we dismissed the Applicant's appeal of the Director's decision on the Form I-212.

The Applicant asserts that the Director did not sufficiently explain how she arrived at her decision. Specifically, the Applicant claims that the Director did not indicate how she balanced the discretionary factors in his case. He states that he "has been robbed of his opportunity to have a meaningful review on appeal because he has absolutely no idea what [the Director] balanced specifically."

Contrary to the Applicant's assertions, however, the Director's decision identifies the discretionary factors she considered. The Director found the following four factors to favor the Applicant: 1) potential, extreme hardship to his spouse; 2) his ties to relatives in the United States; 3) his lack of a criminal record; and 4) his spouse's length of U.S. residency.

On the other hand, the Director found the following six adverse factors: 1) the Applicant's inadmissibility for unlawful presence; 2) his illegal entry into the United States; 3) his U.S. employment without authorization; 4) his U.S. residence "unlawfully for over 25 years;" 5) his additional inadmissibility based on his deportation order; and 6) his "lack of respect for the immigration laws of the United States and blatant disregard[] of the Immigration Judge and Board of Immigration Appeals' order of [his] deportation."

The decision states:

> While USCIS acknowledges that denial of your admission to the United States would have an adverse effect on your family, the unfavorable factors in support of your Form I-601 outweigh the favorable factors. Your lack of respect for the immigration laws of the United States and blatant disregard[] of the Immigration Judge and Board of Immigration Appeals' order of your deportation has weighed heavily in your unfavorable factors.

The Director listed the discretionary factors that she considered and indicated which ones she found most determinative. Based on that information, the Applicant could have argued that the Director improperly included or excluded discretionary factors. Also, he could have contended that the Director improperly weighed the factors. Thus, contrary to the Applicant's argument, he had a meaningful opportunity to challenge the discretionary decision on appeal.

B. The Applicant's Explanations for His Immigration Violations

The Applicant also asserts that the Director erred by overlooking the reasons for the Applicant's immigration violations. Because of his circumstances, the Applicant denies that his transgressions "amount to a flagrant disregard of the immigration rules."

In an affidavit submitted on appeal, the Applicant states that he illegally entered the United States because he "fear[ed] for [his] life." Although the IJ denied his application for asylum, the Applicant states that "[his] fear [of persecution] was [his] reason for this entry." *See* section 208 of the Act, 8 U.S.C. § 1158 (authorizing noncitizens to apply for asylum if they fear persecution abroad for specified reasons).

The Applicant also contends that, despite the BIA's issuance of a decision in 1994, he did not know of his appeal's dismissal "until recently," when counsel purportedly obtained copies of records of his

deportation proceedings. The Applicant claims that, because prior counsel did not inform him of the appellate decision, he did not immediately know that he was under a final order of deportation. The Applicant also states that the BIA dismissed his appeal because prior counsel did not submit a written brief as the attorney told the Board he would. *See* 8 C.F.R. § 3.1(d)(1-a)(i) (1993) (authorizing the BIA to summarily dismiss appeals that insufficiently describe the filings' factual or legal bases).

The Applicant attempts to justify his immigration violations for the first time on appeal. Thus, the Director was unaware of these assertions or the evidence supporting them. We cannot fault the Director for disregarding explanations and evidence that were not before her.

If the Applicant's assertions are true, then, contrary to the discretionary factors cited by the Director, the record may not support the Applicant's "lack of respect" for U.S. immigration laws or "blatant[] disregard[]" of the deportation order against him. But, contrary to the Applicant's claim, the record does not demonstrate that he feared for his life when he illegally entered the United States in 1991. The record indicates that, when applying for asylum in deportation proceedings that year, the Applicant claimed to fear persecution based solely on his purported, political disagreements with Chinese government officials. The record, however, indicates that, in 1995, he filed another asylum application with the former Immigration and Naturalization Service. His second application does not claim potential persecution for the political reasons stated in his first filing. Rather, the second application asserts future persecution based solely on his religion. He stated that he began advocating Christianity as a high school student in China and that Chinese authorities persecuted his mother for practicing the religion. He stated that he fled China to the United States "[f]earing that what had happened to my mother would happen to me." But, if the Applicant feared religious persecution when he came to the United States, he does not explain why his first asylum application omits mention of that fear. The Applicant's differing asylum claims cast doubts on their validity and his purported fear of persecution when entering the country.

The record also does not establish when the Applicant first learned of his appeal's dismissal. His affidavit states:

> I did not know I lost my appeal for a long time. I did not know that [prior counsel] never filed a brief that he was supposed to until recently when my current attorney filed to get a copy of my past immigration court papers. Please see attached.
>
> Then I met my first wife and my second wife in 2009. My current wife is not well and needs me and so I remained.

The affidavit states that current counsel informed the Applicant of his appeal's dismissal "recently." But the affidavit also suggests that the Applicant met his two spouses *after* learning of the appeal's dismissal ("*Then* I met my first wife and my second wife") (emphasis added). Evidence of record indicates that the Applicant married his first spouse in 2004, more than 15 years ago. The affidavit also suggests that the Applicant "remained" in the United States after learning of the appeal's dismissal because his current wife was ill. Thus, the record does not demonstrate that his purported unawareness of the appeal's dismissal excuses all his unlawful presence after the deportation order became final. Also, the Applicant has not established whether he ever asked prior counsel about the appeal's status or kept prior counsel informed of any changes in his address or telephone number.

Additionally, the Applicant accuses prior counsel of ineffective assistance without complying with procedural requirements. When asserting claims of ineffective assistance of counsel, noncitizens must generally submit: 1) written affidavits providing detailed descriptions of the actions that counsels agreed to take, the specific actions they took, and any representations they made about their actions; 2) evidence that applicants informed counsels of the allegations of ineffective assistance and gave them opportunities to respond; and 3) evidence that applicants filed complaints against counsels with appropriate disciplinary authorities or explanations for why complaints were not filed. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Applicants asserting ineffective assistance must also show that, but for counsels' deficiencies, the applicants would have prevailed on their claims. *Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020). The BIA established these evidentiary requirements to deter meritless claims and ensure that adjudicators have sufficient information to evaluate allegations of ineffective assistance. *Matter of Lozada*, 19 I&N Dec. at 639.

The Applicant submits a copy of prior counsel's 2017 obituary. As previously indicated, however, the Applicant has not demonstrated when he first learned of the appeal's dismissal. He has not established that he discovered the dismissal *after* prior counsel's death. Thus, the obituary does not excuse the Applicant from establishing that he informed prior counsel of the allegations of ineffective assistance and filed a complaint against the attorney. Also, contrary to the other case law requirements, the Applicant did not specify the actions prior counsel agreed to take or representations that he made about the actions. Further, the Applicant did not demonstrate that, but for prior counsel's alleged deficiencies, the Applicant would have prevailed on his appeal. For these additional reasons, we cannot credit the Applicant's claimed unawareness of the appeal's dismissal.

The Applicant's submissions on appeal do not sufficiently explain or mitigate his immigration violations.

III. CONCLUSION

The Director adequately explained how she arrived at her discretionary determination. Also, the record does not sufficiently support the Applicant's justifications for his immigration violations. We will therefore affirm the application's denial.

ORDER: The appeal is dismissed.