U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19385126

Date: MAY 05, 2022

Appeal of New York, New York Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident and seeks a waiver of inadmissibility under 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) for unlawful presence of one year or more.

On March 10, 2020, the Director of the New York, New York Field Office denied both the Form I-601, Application to Waive Inadmissibility Grounds (waiver application) and the Applicant's concurrently filed Form I-485, Application to Adjust Status or Register Permanent Residence. The Director denied the Form I-485 concluding that U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction over the application.[1] In making this determination, the Director observed that an Immigration Judge had entered a final removal order against the Applicant on [redacted] 2011, and that "it does not appear" that removal proceedings have been terminated. The Director concluded that pursuant to 8 C.F.R. § 1245.2(a)(1), only the Executive Office for Immigration Review (EOIR) has jurisdiction to grant or deny the Applicant's Form I-485. The Director denied the wavier application on the grounds that the Form I-485 was denied and "USCIS does not have authority to grant an I-601 absent a pending application for adjustment . . . ."

The matter is now before us on appeal. On appeal, the Applicant contends that the Director incorrectly concluded that his adjustment of status and waiver applications do not fall under USCIS jurisdiction, and therefore erred by failing to adjudicate the waiver application on its merits.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office reviews 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 withdraw the Director's decision and remand the matter for further action as discussed below.

8 C.F.R. § 245.2(a)(1) states that USCIS has jurisdiction to adjudicate an application for adjustment of status filed by any noncitizen, unless an Immigration Judge has jurisdiction to adjudicate the application. 8 C.F.R. § 1245.2(a)(1) states that for any individual who has been placed in removal proceedings

[1] On April 10, 2020, the Applicant filed a combined motion to reopen and motion to reconsider the denial of his Form I-485. That motion is under the Director's jurisdiction and has not yet been adjudicated.

(other than as an arriving alien), the Immigration Judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the individual may file.[2]

While the Director's denial of the Form I-485 on jurisdictional grounds is not before us, the Applicant emphasizes that the denial of his waiver application directly resulted from the denial of the Form I-485 on such grounds and is therefore relevant to our adjudication of the instant appeal. We agree.

Here, the Director observed, and the Applicant concedes, that an Immigration Judge issued a final removal order for the Applicant on [redacted], 2011. The Director's determination that the Applicant's Form I-485 remains under the jurisdiction of the Immigration Judge appears to be based on a conclusion that the [redacted] 2011 removal order has not yet been executed and that removal proceedings have not been terminated pursuant to 8 C.F.R. § 245.1(c)(8)(ii).

The regulation at 8 C.F.R. § 245.1(c)(8)(ii)(A) states, in pertinent part, that the period during which the noncitizen is in deportation or removal proceedings terminates "[w]hen the noncitizen departs from the United States while an order of exclusion, deportation or removal is outstanding[.]"

Here, the Director observed in the decision denying the Form I-485 that the Applicant's most recent entry to the United States was on March 7, 2012, at which time he was inspected and admitted pursuant to an I classification nonimmigrant visa as a representative of foreign media. Therefore, the Director acknowledged, and the record reflects, that the Applicant did in fact depart the United States while the final removal order entered on [redacted], 2011 was outstanding, an action that effectively terminated the removal proceeding.[3]

Based on the foregoing, we will withdraw the Director's decision denying the waiver application and remand the matter to the Director. On remand, the Director is instructed to review the record considering the Applicant's contention that his adjustment of status and waiver applications fall within USCIS jurisdiction, and to enter a new decision.

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

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[2] Except if the applicant is an "arriving alien," the Immigration Judge (and not USCIS) has jurisdiction if an applicant is in removal proceedings, even if the proceedings have been administratively closed or if there is a final order of deportation or removal which has not yet been executed. *See* 7 *USCIS Policy Manual* A.3(D), https://www.uscis.gov/policy-manual. A removal order is considered executed once immigration authorities remove the noncitizen from the United States or the noncitizen departs from the United States. *Id.* (citing section 101(g) of the Act, 8 U.S.C. § 1101(g)).

[3] The record of proceeding also contains the Director's March 10, 2020, decision denying the Applicant's Form I-212, Application for Permission to Reapply for Admission, in which the Director observes that "USCIS records indicate . . . you were deported to Senegal on [redacted] 2011." U.S. Department of Homeland Security records confirm the Applicant's removal on this date.