U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29648502

Date: JAN. 29, 2024

Appeal of Chicago, Illinois Field Office Decision

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

The Applicant, who intends to request an immigrant visa abroad, 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 is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services may grant in the exercise of discretion.

The Director of the Chicago, Illinois Field Office denied the application, concluding that the Applicant did not meet the requirements for consent to reapply for admission. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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

Any noncitizen who is ordered removed as an "arriving alien," either through an expedited removal order or at the end of removal proceedings initiated upon arrival in the United States; departs the United States while the order of removal is outstanding; and seeks admission within five years of the date of his or her departure or removal is inadmissible. Section 212(a)(9)(A)(i) of the Act. An exception to this bar is available in cases where prior to the date of the noncitizen's 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 reapplying for admission. Section 212(a)(9)(A)(iii) of the Act.

Section 212(a)(6)(B) of the Act provides that 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 the noncitizen's subsequent departure or removal, is inadmissible. There is no waiver for this inadmissibility.

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.[1] The record indicates that the Applicant will become inadmissible upon departing the United States under section 212(a)(9)(A)(i) of the Act.

The record reflects that the Applicant entered the United States in March 2000 as a stowaway. After a credible fear interview with an asylum officer, he was placed in removal proceedings and released under bond from immigration custody in California. In [redacted] 2000, the Applicant's former counsel submitted a Motion for Change of Venue which was granted; the removal hearing was scheduled for [redacted] 2000; and the Applicant was ordered removed *in absentia* by an Immigration Judge in Chicago. In [redacted] 2019, the Applicant filed a Motion to Reopen his removal proceedings based on ineffective assistance of counsel and a defective Notice to Appear. The Immigration Judge denied the Applicant's Motion to Reopen and the Board of Immigration Appeals (Board) dismissed the subsequent appeal in [redacted] 2020.

In denying the Form I-212, the Director detailed the Applicant's immigration history, concluded the Applicant did not meet the requirements for consent to reapply for admission because he had not departed the United States prior to filing the application, and noted that his removal order may be reinstated. On appeal, the Applicant asserts that the Director did not take into account the totality of the discretionary factors and incorrectly required the Applicant to depart the United States prior to filing a Form I-212.

While we agree that the Applicant is allowed to seek conditional permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before he departs the United States, the record indicates that the Applicant would become inadmissible under section 212(a)(6)(B) of the Act, for failing to attend removal proceedings without reasonable cause, and there is no waiver for this ground of inadmissibility. There is no statutory definition of the term "reasonable cause" as it is used in section 212(a)(6)(B) of the Act, but guiding USCIS policy provides that "it is something not within the reasonable control of the alien."[2] Therefore, no purpose would be served in granting conditional approval for permission to reapply for admission as the Applicant would become inadmissible under section 212(a)(6)(B) of the Act upon his departure.

According to the brief submitted with the Form I-212, the Applicant contended that he missed his removal hearing and was ordered removed *in absentia* by an Immigration Judge as a result of ineffective assistance of his prior counsel. However, an Immigration Judge denied the Applicant's

[1] The approval of his application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart.

[2] 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).

2019 Motion to Reopen his removal proceedings based on ineffective assistance of counsel, indicating that he failed to comply with the procedural requirements for such claims laid out in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988). The Immigration Judge further noted, in part, that the notice of the scheduled removal hearing was properly mailed to the Applicant's counsel, according to the Applicant's Motion to Reopen his counsel advised him not to attend the hearing, and the Applicant waited 19 years after he missed his removal hearing before filing a Motion to Reopen. The Immigration Judge stated that though the Applicant claimed "he was never advised of the consequences of failing to appear at his immigration hearing, he was aware that he had been placed in proceedings as he had been detained by [Immigration and Naturalization Service and] he did nothing to try to legalize his status until [19] years after he was released from detention. Thus, [the Applicant's] lack of diligence weighs against reopening the case considering the totality of circumstances." The Board dismissed the Applicant's appeal in 2020 and affirmed the Immigration Judge's decision.

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). 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 become 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.

ORDER: The appeal is dismissed.