U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27336580

Date: JULY 19, 2023

Appeal of New York City, New York 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 be inadmissible upon departing from the United States for having been previously ordered deported. 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 New York City, New York Field Office denied the application as a matter of discretion, concluding in part that the Applicant did not establish he had an approved immigrant visa petition based on which he could seek an immigrant visa abroad, or adjustment of status in the United States. The matter is now before us on appeal.

On appeal, the Applicant submits a Form I-130, Petition for Alien Relative (visa petition) filing receipt, and asserts that the Director's decision was in error because the regulations do not require a noncitizen to have an approved visa petition before filing a Form I-212. He reiterates that his U.S. citizen spouse and children will experience hardship without his support, and renews his request for a grant of permission to reapply for admission to the United States.

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.

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that a noncitizen who has been ordered removed, or who departed the United States while an order of removal was outstanding, is inadmissible for 10 years after the date of such departure or removal. Noncitizens inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission 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. Section 212(a)(9)(A)(iii) of the Act.

The record reflects that in [redacted] 2002 an Immigration Judge ordered the Applicant removed from the United States and in 2003 the Board of Immigration Appeals dismissed his appeal of that decision. The Applicant has not departed from the United States since that time.

He is seeking conditional approval of his request for permission to reapply for admission under the regulation at 8 C.F.R. § 212.2(j) before he travels abroad.[1]

The Applicant indicated on the instant Form I-212 that after departing the United States he would seek an immigrant visa at a U.S. Embassy or U.S. Consulate in China as a spouse of a U.S. citizen. However, the record shows that in 2017 USCIS denied the visa petition the Applicant's spouse filed on his behalf. Although in 2021 his spouse filed a subsequent visa petition, that petition remains pending. The Applicant therefore has not established that he currently has a basis for pursuing an immigrant visa abroad.

We acknowledge the Applicant's assertion that the regulations do not specifically require him to have an approved visa petition before requesting permission to reapply for admission to the United States. Nevertheless, as the Applicant indicated that the reason he is requesting such permission is to apply for an immigrant visa before the U.S. Department of State, there is no constructive purpose in evaluating whether approval of his request is warranted at this time absent evidence that he has an approved underlying visa petition, with which to seek an immigrant visa.[2]

Consequently, the Applicant has not demonstrated that he merits permission to reapply for admission to the United States in the exercise of discretion at this time, and his Form I-212 remains denied.

ORDER: The appeal is dismissed.

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

[2] We note that the Applicant may be inadmissible to the United States for fraud or misrepresentation. Specifically, the record reflects that the Applicant was apprehended by U.S. Customs and Border Protection agents in Florida in 1999, and testified at the time that he entered the United States at a New York airport with a Korean passport he had purchased in Spain.