U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16998524

Date: APR. 14, 2022

Appeal of Tampa, Florida Field Office Decision

Form I-212, Application for Permission to Reply for Admission

The Applicant seeks 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).

The Director of the Tampa, Florida Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction to adjudicate it.[1] The matter is now before us on appeal.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). This office reviews the questions in this matter *de novo*. *See 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 part, that a noncitizen who has been ordered removed under section 240 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. Foreign nationals found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) if prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Secretary of Homeland Security has consented to the foreign national's reapplying for admission.

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 Executive Office for Immigration Review (EOIR) immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1). 8 C.F.R.

[1] The Director concurrently denied the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, noting that he has an outstanding order of removal from an immigration judge. The Director determined that because the Applicant is a respondent in a removal proceeding that has not been terminated and is not an "arriving alien," only the Executive Office for Immigration Review (EOIR) has jurisdiction over his adjustment of status application.

§ 1245.2(a)(1) states that for any individual who has been placed in removal proceedings (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]

II. ANALYSIS

The Applicant was admitted to the United States in B-2 status on March 8, 2001. He was authorized to remain in the United States for six months and has not departed the United States since his arrival. The Applicant was apprehended in [redacted] 2002 and charged with being in violation of sections 237(a)(1)(B) and (C) of the Act, 8 U.S.C. §1227(a)(1)(B) and (C). An Immigration Judge granted him voluntary departure in lieu of removal on [redacted] 2002, advising that failure to depart by [redacted] 2002 would immediately result in a removal order.[3]

As noted, the record reflects that the Applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status, on October 4, 2019, with the Tampa, Florida Field Office. The Director determined that the Applicant is under the jurisdiction of the EOIR as his removal proceedings have not been terminated, he is not an arriving alien, and only the EOIR has jurisdiction to grant or deny his Form I-485 under 8 C.F.R. § 1245.2(a)(1). Therefore, the Director denied the Form I-485 due to lack of jurisdiction to review the application, and the record reflects that the Applicant has not filed a motion to reopen or reconsider that decision with the Director. The Director also denied the Form I-212 due to a lack of jurisdiction.

On appeal, the Applicant maintains that USCIS, and specifically the Tampa, Florida Field Office, has exercised jurisdiction over other Form I-485 and Form I-212 applications filed by similarly situated applicants, but does not articulate how the Director has erred as a matter of fact or law in denying the Applicant's Form I-212 application. The Applicant also claims that he is eligible for *nunc pro tunc* approval of his Form I-212 and therefore requests that the application be adjudicated on its merits.[4]

However, as discussed, the Director denied the Form I-485 on the grounds that the Applicant is not eligible to adjust his status before USCIS. Therefore, no purpose would be served in adjudicating his application for permission to reapply as it would not result in his adjustment of status to that of a lawful

[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.

[3] Immigration and Customs Enforcement (ICE) served an I-66, Notice to Deportable Alien, to the Applicant by certified mail on [redacted] 2003, advising him to report for departure on [redacted] 2003. He did not appear at the designated location on that date.

[4] Board of Immigration Appeals precedent allows *nunc pro tunc* approval in limited circumstances where a grant of permission to reapply for admission would eliminate the only ground of inadmissibility and thereby effect a complete disposition of the case. *See Matter of Garcia-Linares*, 21 I&N Dec. 254 (BIA 1996); *Matter of Roman*, 19 I&N Dec. 855, 859 (BIA 1988); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976).

permanent resident.[5] The appeal of the denial of the Form I-212 will therefore be dismissed as a matter of discretion.[6]

ORDER: The appeal is dismissed.

[5] We recognize that individuals who currently reside in the United States may seek conditional approval of a Form I-212 prior to their departure from the United States under the regulation at 8 C.F.R. § 212.2(j). The record does not establish that the Applicant intends to apply for an immigrant visa and is thus seeking conditional permission to reapply for admission prior to departing the United States.

[6] We further note that as the Applicant asserts that he has not departed the United States pursuant to the removal order, the record does not support a finding that he is currently inadmissible under section 212(a)(9)(A) of the Act for having departed the United States after being ordered removed.