U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17839634

Date: APR. 29, 2022

Appeal of Lawrence, Massachusetts Field Office Decision

Form I-212, Application for Permission to Reapply 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 Lawrence, Massachusetts Field Office denied the application, concluding that no purpose would be served in granting conditional approval for permission to reapply for admission as the Applicant, upon his departure, would also become inadmissible under section 212(a)(6)(B) of the Act for failure to appear at his removal proceedings. The matter is now before us on appeal.

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). We review 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, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i), who "has been ordered removed . . . or 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible."

Noncitizens 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) of the Act 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)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), provides that any noncitizen "who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible." There is no waiver for this inadmissibility.

II. ANALYSIS

The record indicates that the Applicant will become inadmissible upon departing the United States pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The issue raised on appeal is whether the Applicant should be granted conditional approval of his Form I-212 in the exercise of discretion.

The record shows that the Applicant entered the United States without inspection on or about [redacted] 2005. He was subsequently apprehended by immigration officials and served a Notice to Appear. The Applicant did not attend his removal hearing and was ordered removed by an immigration judge in absentia on [redacted] 2006. The Applicant has remained in the United States, and upon his departure, he will become inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The Applicant appears to be seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa.[1] The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

The Director's decision noted that the Applicant will become inadmissible for five years under section 212(a)(6)(B) of the Act due to his failure to appear at his hearing and the resulting in absentia order of removal, and that there is no waiver for this ground of inadmissibility.[2] Therefore, the Director concluded that as a matter of discretion, no purpose would be served in approving the instant application, as the Applicant would remain inadmissible. On appeal, the Applicant submits a statement and asserts that his failure to attend his hearing was not within his reasonable control. He further states that he was not given the opportunity to rebut the allegation of no reasonable cause for failing to attend his hearing.[3] The Applicant also maintains that a U.S. consular officer should make the determination on whether the Applicant is inadmissible under section 212(a)(6)(B) of the Act rather than U.S. Citizenship and Immigration Services (USCIS).

As noted above, the section 212(a)(6)(B) of the Act provides that noncitizens are inadmissible if they fail to attend a removal proceeding "without reasonable cause." There is no statutory definition of the term "reasonable cause" as it is used in this section, but guiding USCIS policy provides that "it is something not within the reasonable control of the [applicant]."[4] Here, the Applicant asserts that during his detention, immigration officials addressed him only in Spanish rather than in Portuguese – his native language; and therefore, he did not understand his obligation to appear in court or the consequences in failing to do so. However, the record indicates that on [redacted], 2005, the Applicant signed the Form I-862, Notice to Appear, acknowledging that he was provided the written notice, as well as an oral notice in the Portuguese language of the time and place of his hearing and the

[1] In March 2020, an immigrant visa petition filed on the Applicant's behalf by his spouse, a U.S. citizen, was approved.
[2] The order of the Immigration Judge indicates that on [redacted] 2006, the Applicant was ordered removed from the United States to Brazil for failing to appear for his hearing pursuant to a proper notice.
[3] Requesting additional evidence is discretionary. According to 8 C.F.R. § 103.2(b)(8)(iii), "[i]f all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the benefit request for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the benefit request and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS."
[4] 8 USCIS Policy Manual I, retired Adjudicator's Field Manual Chapter 40.6, https://www.uscis.gov/policymanual.

consequences of failure to appear. Furthermore, the Form I-831, Continuation Page for the Form I-213, Record of Deportable/Inadmissible Alien, identifies the interpreter by name who translated for the Applicant and served all the forms in Portuguese. Based on this evidence, the Applicant has not shown that his failure to attend the hearing was not within his reasonable control.

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). Because the Applicant will depart the United States and apply for an immigrant visa, the U.S. Department of State will make the final determination concerning his eligibility for a visa, including whether the Applicant is inadmissible under section 212(a)(6)(B) or under any other ground. Evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available, however, is relevant to determining whether a Form I-212 should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances. See id.

Based upon the evidence provided, the Applicant will become inadmissible upon his departure for a period of five years for failure to appear at his removal hearing. Under these circumstances, no purpose would be served by determining whether the Applicant merits approval of his application as a matter of discretion because he would remain inadmissible for five years without a possibility to apply for a waiver. Consequently, we find no error in the Director's denial of the application in the exercise of discretion, and we need not address the evidence in the record relating to the favorable and unfavorable factors in the case or determine whether a favorable exercise of discretion would be warranted. The application will therefore remain denied.

ORDER: The appeal is dismissed.