U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21482030

Date: JUL. 5, 2022

Appeal of New York, New York District Director (Queens Field Office) Decision

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

The Applicant is inadmissible for having been previously ordered removed and seeks permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The Director of the New York District Office denied the application. The Director determined that the Applicant was also inadmissible pursuant to section 212(a)(9)(C) of the Act, for having entered the United States without being admitted after having been ordered removed. The Director concluded that as the Applicant had not remained outside the United States for 10 years since his last departure, the application must be denied. The Director further found that the Applicant did not merit a favorable exercise of discretion. On appeal, we affirmed the Director's decision and dismissed the appeal accordingly.

On motion to reopen and reconsider, the Applicant asserts that he did not depart the United States in 2004 and subsequently reenter the United States without being admitted and thus, he is not inadmissible pursuant to section 212(a)(9)(C) of the Act. He further contends that his departure in 2010 with a valid advance parole document renders him eligible to obtain permission to reapply for admission to the United States at this time. He also maintains that he merits a favorable exercise of discretion.

The Applicant bears the burden of proof 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 (AAO 2010). Upon review, as explained below, we will remand the matter for the entry of a new decision.

I. LAW

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

We may grant a motion that satisfies the above requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The first issue on motion is whether the Applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act, for entering the United States without being admitted after having been ordered removed, as determined by the Director and affirmed in our decision to dismiss the appeal.

The record reflects that on or about [redacted] 1986, the Applicant entered the United States without inspection. He was apprehended and placed in removal proceedings, at the conclusion of which he was granted voluntary departure. The Applicant did not comply with his voluntary departure and was removed in [redacted] 1986. Government records further reflect that he reentered the United States without inspection on or about September 1991. The Applicant's prior removal order was reinstated on [redacted] 2004. The Applicant failed to depart on [redacted] 2004, the date of his booked ticket. The Director determined that the Applicant was removed on [redacted] 2004, and reentered the United States without inspection at an unknown place and time, and was thus inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Act, for his removal, and section 212(a)(9)(C)(i)(II) of the Act, for entering the United States without being admitted after having been ordered removed.

On motion, the Applicant reasserts that despite the Director's finding to the contrary, he never departed the United States in [redacted] 2004 after his removal order was reinstated in [redacted] 2004, and that his only departure since his removal in 1986 was in 2010 with a valid advance parole document. He claims that he is thus not inadmissible pursuant to section 212(a)(9)(C) of the Act and is eligible to obtain permission to reapply for admission to the United States in the exercise of discretion at this time. In support of his assertion that he did not depart the United States in 2004, the Applicant has submitted pay stubs establishing his employment in the United States in late 2004 and early 2005; a letter from his employer indicating that the Applicant has been employed since 1997 and was physically present in New York when he worked the hours listed on his December 2004 and January 2005 pay stubs; and a letter from his pastor detailing that the Applicant has taught in the Sunday School Department at a church in New York since September 2004 "without interruption" and has not been absent from church activities since becoming a member in 1993.

Upon further review, we find that the record does not support the Director's finding that the Applicant was in fact removed from the United States on [redacted] 2004; nor is there any evidence that he departed the United States on his own in 2004. Although the Applicant's prior deportation order was reinstated in [redacted] 2004, government records do not indicate that U.S. Immigration and Customs Enforcement (ICE) removed the Applicant or witnessed his departure on [redacted] 2004, or on any other date after the order was reinstated. We further note that ICE officials took possession of the Applicant's passport at the time it reinstated the deportation order in [redacted] 2004, and said passport was not in the Applicant's possession after that time. Accordingly, the record does not establish that the Applicant entered the United States without being admitted after April 1, 1997, the effective date of section 212(a)(9)(C)(i) of the Act, and he is not inadmissible pursuant to section 212(a)(9)(C)(i) for entry without admission after being ordered removed.

The second issue on motion is whether the Applicant is currently barred from obtaining any immigration relief pursuant to section 241(a)(5) of the Act, which states that when an order of removal is reinstated, "the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed." The record reflects that in [redacted] 2004, ICE issued the Applicant a Form I-871, Notice of Intent/Decision to Reinstate Prior Order, and in 2010, the Applicant departed the United States.[1] The Applicant's [redacted] 2004 reinstated order was thus fully executed in 2010,[2] and section 241(a)(5) of the Act, which barred him from applying for any relief under the Act at the time the order was reinstated, no longer applies. He is therefore eligible to apply for permission to reapply for admission into the United States at this time.

The third issue presented on appeal is whether the Applicant should be granted approval of his application for permission to reapply for admission in the exercise of discretion. The Applicant's departure in 2010 executed his reinstated removal order, and he remains inadmissible under section 212(a)(9)(A)(ii) of the Act for seeking admission within 20 years of his 2010 departure. Approval of an application for permission to reapply is discretionary, and any unfavorable factors will be weighed against the favorable factors to determine if approval is warranted as a matter of discretion. *Matter of Lee*, 17 I&N Dec. 275, 278-79 (Reg'l Comm'r 1978). Factors to be considered in determining whether to grant permission to reapply include the basis for the prior deportation; the recency of deportation; length of residence in the United States; the applicant's moral character; the applicant's respect for law and order; evidence of the applicant's reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to the applicant or others; and the need for the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience.")

As we detailed above, in the decision to deny the Applicant's request for approval of his application for permission to reapply in the exercise of discretion, the Director determined that the Applicant is inadmissible under section 212(a)(9)(C) of the Act and was not eligible for permission to reapply for admission until he had resided abroad for more than 10 years since his last departure. After making that finding, the Director then considered all the factors in the Applicant's case and concluded that the favorable factors in the case[3] did not outweigh the adverse factors.[4]

As we have discussed above, the Director erred in finding that the Applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act. We have also determined on motion that the Applicant's reinstatement order was executed and he is thus not barred from relief pursuant to section 241(a)(5) of

[1] The Applicant obtained an approved Form I-512L, Authorization for Parole of an Alien Into the United States (advance parole), and returned to the United States pursuant to advance parole on March 1, 2010.

[2] The online filing instructions for the Form I-212 specify that "[t]raveling abroad with an Advance Parole Document is a departure for purposes of INA section 212(a)(9)(A) or (C)." *See* Form I-212, Instructions for Application for Permission to Re-apply for Admission Into the United States After Deportation or Removal, at 1; see also 8 C.F.R. § 103.2(a)(1) ("The form's instructions are hereby incorporated into the regulations requiring its submission.").

[3] The Director acknowledged one favorable factor: the Applicant's family ties.

[4] Regarding adverse factors, the Director referenced the Applicant's repeated attempts to enter the United States, his repeated violation of immigration laws, absence of hardship to him and others, his failure to depart the United States as ordered, and his unlawful presence in the United States.

the Act. We also find that while the Director referenced the Applicant's family ties as a favorable factor, the Director's decision did not address additional evidence in support of the application, including the Applicant's long-term residence and ties in the United States; the Applicant's long-term employment and payment of taxes; the Applicant's apparent lack of a criminal record; the Form I-130 approval on the Applicant's behalf; church membership and involvement since 1992; long-term marriage[5] between the Applicant and his U.S. citizen spouse; letters in support of the Applicant from his spouse and current and past employers, attesting to his character and work ethic; evidence regarding the claimed hardships to the Applicant, his U.S. citizen spouse, and their U.S. citizen daughter; and the problematic country conditions in Guatemala, the Applicant's spouse's birth place, and Colombia, the Applicant's birth place.

Considering the Applicant is not subject to inadmissibility pursuant to section 212(a)(9)(C) and is not barred from relief under section 241(a)(5) of the Act, and considering the Director's decision did not properly weigh all the positive factors in the Applicant's case, we find it appropriate to remand the matter for the Director to reevaluate the submitted evidence and again consider whether the Applicant has established that he merits a favorable exercise of discretion.

ORDER: The motion to reopen and reconsider is granted and the matter is remanded for the entry of a new decision consistent with the foregoing analysis, which, if adverse to the Applicant, shall be certified to us for review.

[5] The Applicant and his spouse were married in [redacted] 1994.