U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21391907

Date: JULY 8, 2022

Appeal of Queens, New York Field Office Decision

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

The Applicant will be inadmissible upon his departure from the United States 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 (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii). The Director of the Queens, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding, in pertinent part, that U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction to adjudicate it. The matter is now before us on appeal. On appeal, the Applicant contends that he has established eligibility for the benefit sought. We review the questions raised 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

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, 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. 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. The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010).

8 C.F.R. § 245.2(a)(1) provides that USCIS has jurisdiction to adjudicate an application for adjustment of status, unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1). 8 C.F.R. § 1245.2(a)(1) provides that in the case of any noncitizen who has been placed in deportation or 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 noncitizen may file.

II. PROCEDURAL HISTORY

The record reflects that the Applicant, a citizen of Colombia, first entered the United States without inspection in 1988. In [redacted] 1996, he was convicted of larceny in the second degree in violation of section 53a-123 of the Connecticut General Statutes Annotated; he received a five-year suspended jail sentence. In [redacted] 1996, he was convicted of criminal conspiracy and retail theft in violation of section 3929(a)(1) of the Pennsylvania Consolidated Statutes and was sentenced to two years of probation. In [redacted] 1997, he was convicted of possession of burglary tools in violation of section 466 of the California Penal Code; he received a 180-day jail sentence, with 175 days suspended, and three years of probation. Following this conviction, the Applicant was remanded to the custody of immigration officials. On [redacted] 1997, he was ordered removed by an Immigration Judge. In July 1997, an asylum application filed by the Applicant in March 1997 – under an alias – was denied, and he was placed into removal proceedings. On [redacted] 1997, he failed to appear at his removal hearing and was ordered removed in absentia. The Applicant claims that he departed the United States in December 1997. On [redacted] 2012, the Applicant was apprehended by immigration officials upon reentering the United States without inspection. On [redacted] 2012, the Applicant's [redacted] 1997 removal order was reinstated.[1]

In 2014, a Form I-130, Petition for Alien Relative, filed on the Applicant's behalf was approved. In 2018, the Applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, (Form I-485) and a Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application). In September 2019, he filed the instant Form I-212.

In July 2021, the Director administratively closed the Applicant's Form I-485 and waiver application, concluding that the Executive Office for Immigration Review (EOIR), not USCIS, has jurisdiction over the applications. The Director noted that EOIR has jurisdiction over all adjustment applications when the Applicant is a respondent in a removal proceeding except for "arriving aliens."

III. ANALYSIS

In denying the Form I-212, the Director determined that the Applicant is also inadmissible under the following sections of the Act: (1) section 212(a)(2)(A) for his larceny and retail theft convictions which are crimes involving moral turpitude; (2) section 212(a)(2)(B) for being convicted of two or more offenses for which the aggregate sentence of confinement imposed is five years or more; (3) section 212(a)(2)(C) which renders inadmissible any noncitizen who is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance or endeavored to do so; (4) section 212(a)(6)(B) for failing to attend his [redacted] 1997 removal hearing; (5) section 212(a)(6)(C)(i) for misrepresenting his identity in several encounters with immigration officials as well as in his asylum application; and (6) section 212(a)(9)(C)(i)(II) for attempting to reenter the United States without being admitted after being ordered removed.

[1] 8 C.F.R. § 241.8(a) provides than a noncitizen who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The noncitizen has no right to a hearing before an immigration judge in such circumstances.

The Director acknowledged the Applicant's favorable factors as his lengthy residency in the United States and his family ties, namely his U.S. citizen spouse and U.S. citizen children. The Director listed the Applicant's unfavorable factors as his multiple unlawful entries into the United States; his failure to appear for his removal hearing; unlawful presence; fraudulent use of multiple aliases to evade authorities and procure immigration benefits; his criminal history, specifically the fact that he was convicted of multiple crimes involving moral turpitude; and his additional grounds of inadmissibility. The Director denied the Form I-212 as a matter of discretion, concluding that the favorable factors did not outweigh the unfavorable factors in the Applicant's case. The Director also concluded that even if USCIS were to grant the Form I-212, the Applicant would remain inadmissible.

On appeal, the Applicant contends that he is not inadmissible under sections 212(a)(2)(A), 212(a)(6)(B), and 212(a)(9)(C)(i)(II) of the Act. He also argues that while his [redacted] 1997 removal order was reinstated, he was never physically removed because he was granted deferred action in order to assist in a federal law enforcement investigation and was also allowed to depart and reenter the United States in 2015, pursuant to grant of humanitarian parole. In addition, he claims that the Director erred in administratively closing the Form I-485 and waiver application because EOIR does not have jurisdiction as he executed his removal orders by remaining outside the United States from 1997 to 2012 and departed and reentered the United State as a parolee. He 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.[2]

As noted above, the Applicant's Form I-485 and waiver application were administratively closed for lack of jurisdiction on July 8, 2021, and there is no indication in the record that the Applicant has filed a motion to reopen or reconsider the denial of his Form I-485. The Applicant is under the jurisdiction of EOIR because his removal proceedings have not been terminated and he is not an arriving alien, and only EOIR has jurisdiction to grant or deny his Form I-485 under 8 C.F.R. § 1245.2(a)(1). As the Applicant was found ineligible to adjust status on a basis unrelated to his inadmissibilities, and he no longer has a pending, underlying adjustment of status application, no purpose would be served in adjudicating the Form I-212 or determining whether the Applicant is inadmissible under other sections of the Act as highlighted by the Director. The application will therefore remain denied.

ORDER: The appeal is dismissed.

[2] 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. Matter of Garcia-Linares, 21 I&N Dec. 254 (BIA 1996); Matter of Roman, 19 I&N Dec. 855 (BIA 1988); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976).