U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19223661

Date: JUL. 11, 2022

Motion on Administrative Appeals Office Decision

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

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

The Director of the Queens, New York Field Office denied the application as a matter of discretion, concluding that upon departure from the United States, the Applicant will become inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failing to attend removal proceedings, for which there is no available waiver. Therefore, the Director found that even if the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, were approved, the Applicant would remain inadmissible, and so adjudicating the Form I-212 would serve no purpose. We then dismissed the Applicant's appeal for the same reasons. The matter is now before us on a motion to reconsider.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. LAW

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 these requirements and demonstrates eligibility for the requested immigration benefit.

Section 212(a)(9)(A)(i) of the Act states in relevant part that a noncitizen who has been ordered removed under section 240 of the Act as an "arriving alien", subsequently departs the United States, and seeks admission within five years of the date of that departure, is inadmissible. Under section 212(a)(9)(A)(iii), U.S. Citizenship and Immigration Services (USCIS) may grant an exception to this inadmissibility in the exercise of discretion.

Section 212(a)(6)(B) of the Act states that any noncitizen who, without reasonable cause, fails to attend or remain in attendance at their immigration proceeding, and then seeks admission to the United States within five years of their subsequent departure or removal, is inadmissible. There is no waiver for this inadmissibility.

II. ANALYSIS

The issue on motion is whether the Applicant has shown that our prior 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. We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Applicant's claims on motion.

The record indicates that the Applicant entered the United States without inspection on or about [redacted] 2005. He was then apprehended by immigration officials and served a Form I-862, Notice to Appear. The Applicant did not attend his removal hearings in [redacted] and [redacted] 2005. On [redacted] 2006, an immigration judge ordered the Applicant removed *in absentia*. The Applicant remains in the United States. Upon his departure, he will become inadmissible to the United States for five years under section 212(a)(9)(A)(i) of the Act for having previously been ordered removed as an "arriving alien." The Applicant seeks an exception to this inadmissibility under section 212(a)(9)(A)(iii) of the Act. [1]

In our appeal decision, we concluded that the Applicant had not demonstrated that he merited a favorable exercise of discretion. This was due to the fact that even if the conditional Form I-212 were approved, the Applicant would remain inadmissible to the United States under section 212(a)(6)(B) of the Act, and so approving the Form I-212 would serve no purpose. On motion, the Applicant submits a brief from his attorney and asserts that we incorrectly applied the law when deciding his appeal for the reasons below.

The Applicant resubmits his argument that he had a reasonable cause for failing to attend his removal hearings. Specifically, he states that he was unable to attend his hearings because his brother refused at the last minute to give him a ride and he did not know how to reach the hearings himself. As noted in our prior decision, there is no statutory definition of the term "reasonable cause" as it is used in section 212(a)(6)(B) of the Act, but guiding USCIS policy provides that "it is something not within the reasonable control of the [noncitizen]."[2]

The record indicates that the Applicant personally received a copy of his Notice to Appear, as well as oral notice in Spanish, informing him of the time and location of his removal hearing and the consequences of failing to appear at the hearing. While the Applicant may not have had control over his brother's last-minute refusal to give him a ride, there is no indication in the record of why he did

[1] The Applicant is seeking conditional approval of his Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States. 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 failed to depart.

[2] Memorandum from Lori Scialabba, Assoc. Dir. for Refugee, Asylum & Int'l Operations Directorate, et al., USCIS, HQ 70/21.1 AD07-18, Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators: Revisions to the Adjudicator's Field Manual (AFM) to Include a New Chapter 40.6 (AFM Update AD07-18) (Mar. 3, 2009).

not find another means of transportation. This is especially true of the second time he missed his hearing, since on that occasion he had reason to know his brother was not a reliable means of transportation and had had over a month to figure out another way of reaching his hearing. The evidence does not indicate that the Applicant's reasons for failing to attend two removal hearings were beyond his reasonable control. Therefore, he will become inadmissible under section 212(a)(6)(B) of the Act upon departing the United States.

The Applicant argues in the alternative that denying the conditional Form I-212 on the basis of the Applicant's inadmissibility under section 212(a)(6)(B) of the Act "is equivalent to opining that anyone who does not attend his deportation or removal hearing will thus be ineligible for an I-212 waiver" [3] (emphasis removed). As stated in our prior decision, the inadmissibility described at section 212(a)(6)(B) of the Act does not apply to all individuals who fail to attend their removal hearings, but only to those who fail to establish that they had reasonable cause for the failure to attend. Furthermore, as the Applicant acknowledges in the brief, he may seek to obtain a waiver of any applicable inadmissibility grounds from abroad once the five-year bar to admissibility under section 212(a)(6)(B) of the Act has expired. The fact that this process may take longer than receiving advance permission to reapply while still in the United States does not constitute total ineligibility for relief.

Similarly, the Applicant asserts that USCIS is depriving the Applicant of the opportunity to have his inadmissibility under section 212(a)(6)(B) of the Act decided by a Department of State (DOS) consular officer at an immigrant visa interview. However, if he seeks admission from abroad after his five-year bar expires, a DOS officer would ultimately determine his admissibility. Furthermore, it is within USCIS's discretion to consider immigration violations and inadmissibility grounds under other sections of the law when adjudicating Form I-212. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973).[4]

The Applicant asserts that since approval under 8 C.F.R. § 212.2(j) is conditioned on a noncitizen's departure from the United States, it does not take effect immediately in any event, and therefore "[t]he issue is whether the Applicant can or will be able to show by a weighing of positive and negative factors that he deserves to have Permission to Reapply, assuming all other elements have been satisfied at some future date, possibly 5 years after his departure" (emphasis removed). We disagree.

The purpose of Form I-212 is to allow noncitizens to apply for an exception to their inadmissibility under section 212(a)(9)(A) or (C) of the Act so they can seek admission to the United States or adjustment of status to that of legal permanent resident.[5] If approval of Form I-212 cannot render a

[3] It is noted that an approved Form I-212 does not grant any waivers of inadmissibility, but permission to reapply for admission to the United States.

[4] The Applicant notes that the Queens Field Office decision characterized the list of factors to be considered under *Matter of Tin*, including grounds of inadmissibility, as "favorable factors," and argues that therefore the Applicant's inadmissibility should be considered a favorable equity. This is a mischaracterization of *Matter of Tin*, which lists both favorable and unfavorable circumstances to be considered when determining whether an applicant merits a favorable exercise of discretion. *Matter of Tin*, 14 I&N Dec. at 373-374. We decline to consider the Applicant's inadmissibility for twice missing his removal hearings as a factor in his favor.

[5] *See* Instructions for Application for Permission to Reapply for Admission Into the United States After Deportation or Removal at 2, https://uscis.gov/sites/default/files/document/forms/i-212instr.pdf; *see also* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into regulations requiring its submission).

noncitizen admissible, then approving it serves no purpose.[6] When a noncitizen is subject to a ground of inadmissibility for which a waiver is not available, no purpose is served in determining whether an application for permission to reapply for admission merits approval as a matter of discretion. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964) (providing that an application for permission to reapply for admission is properly denied, in the exercise of discretion, to a foreign national who is mandatorily inadmissible to the United States under another section of the Act).

The Applicant further asserts that we erred in our citation of *Matter of Martinez-Torres* in our prior decision because the applicant in that case was subject to permanent inadmissibility with no available waiver due to criminal activity, whereas the ground of inadmissibility in the present case is not based in criminality and has an exception and an expiration period. As discussed above, the evidence does not show that the Applicant qualifies for the exception to the inadmissibility ground at section 212(a)(6)(B) of the Act - namely, having a reasonable cause for failing to attend his removal proceeding. Furthermore, the distinction between permanent inadmissibility and a temporary period of inadmissibility does not change the outcome in this case - specifically, that no purpose is served in determining whether the application for permission to reapply for admission merits approval as a matter of discretion. *Id.* Similarly, the fact that the inadmissibility in this case is not based in criminality does not impact the Applicant's eligibility for relief.

Finally, the Applicant asserts that our previous decision was in error because we declined to fully address the positive and negative factors in the Applicant's case, and "the Service and the AAO have no authority to refuse to decide the merits of a valid application" (emphasis removed). As noted above, advance permission to reapply for admission is a discretionary benefit. When adjudicating a discretionary benefit, USCIS first determines whether an applicant meets all threshold eligibility requirements and whether the applicant qualifies for a waiver, exemption, or other form of relief.[7] In the case of a Form I-212, prior to weighing an applicant's favorable and unfavorable factors, USCIS determines whether approving the application would enable the applicant to be admitted to the United States.[8] As discussed above, there is no waiver for inadmissibility under section 212(a)(6)(B) of the Act, and the evidence does not show that the Applicant qualifies for the exception to this inadmissibility ground. Thus, the discretionary denial of the application based on the fact that approval would not serve any purpose does not constitute an improper refusal to decide the application on the merits.

The documentation on motion does not 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). Therefore, the motion to reconsider will be dismissed.

ORDER: The motion to reconsider is dismissed.

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[6] 9 *USCIS Policy Manual* S, retired *Adjudicator's Field Manual* Chapter 43.2(d), https://www.uscis.gov/policymanual ("If even after approval of consent to reapply the alien would not be admissible, the application should be denied as its approval would serve no purpose.")

[7] 1 *USCIS Policy Manual*, *supra*, at E.8.B.4,

[8] 9 *USCIS Policy Manual, supra*, at S, retired *Adjudicator's Field Manual* Chapter 43.2(d).