U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18182423

Date: MAY 10, 2022

Motion on Administrative Appeals 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), because he will be inadmissible upon departing the United States for having been previously ordered removed. Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the Los Angeles, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission, concluding that no purpose would be served in determining whether the Form I-212 should be approved as a matter of discretion because, upon departure from the United States, the Applicant would still become inadmissible under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause, a ground of inadmissibility for which there is no waiver. We dismissed the Petitioner's subsequent appeal.

The matter is now before us on a combined motion to reconsider and motion to reconsider. Upon review, we will dismiss the motions.

I. LAW

A motion to reconsider must establish that the Director's decision was based on an incorrect application of law or policy to the prior decision 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). A motion to reopen must state new facts supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

Any foreign national who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the foreign national's inadmissibility or deportability and who seeks admission to the United States within five years of such foreign national's subsequent departure or removal is inadmissible. Section 212(a)(6)(B) of the Act.

Section 212(a)(9)(A)(ii) of the Act provides that any foreign national, 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. 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.

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 of the application 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).

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. Except where a different standard is specified by law, an applicant must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

In our prior decision dismissing the Applicant's appeal, we noted that the Applicant had not yet departed the United States, but that upon his departure, he would become inadmissible under section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed and would also be subject to a five-year period of inadmissibility under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause. With respect to the Applicant's inadmissibility under section 212(a)((6)(B), we determined that the Applicant had not demonstrated that he had reasonable cause for failing to attend his removal proceedings before the immigration court, as the record established that he was properly served with a Notice to Appear and was notified of the consequences of failing to appear at his next court hearing. Finally, while we acknowledged the Applicant's arguments that he failed to appear at the instruction of his former counsel who had provided ineffective assistance of counsel, we noted that the immigration court found that he did not provide the requisite documentation for such claims laid out in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988) and denied his 2001 motion to reopen his removal proceedings based on the same claim. We therefore agreed with the Director that there would be no purpose served in approving the Form I-212 to waive the Applicant's inadmissibility under section 212(a)(9)(A)(ii) as a matter of discretion because, upon his departure from the United States, the Applicant would still be inadmissible for a period of five years under section 212(a)(6)(B) of the Act, for which there is no waiver.

On motion, the Applicant again argues that he is not statutorily inadmissible under section 212(a)(6)(B) of the Act because he was ordered removed *in absentia* over five years ago in 2001. Citing the Act's reference to a "departure or removal," he asserts that the five-year period of inadmissibility under this provision begins to run *either* on the date of a foreign national's removal order or at the time of their departure from the United States. He therefore maintains that USCIS incorrectly applied the law in finding that he would become inadmissible under section 212(a)(6)(B) for a period of five years only after departing from the United States. In the alternative, the Applicant again contends that if he is found inadmissible for failing to attend his removal proceedings, he qualifies for the reasonable cause exception because of the ineffective assistance of his former counsel, and in support of this assertion, he submits documentation regarding the disbarment of his former counsel and his own supplemental affidavit. In his affidavit, he indicates that he relied on former counsel instructions to him to not to attend his removal hearing. The Applicant further states that our appeal decision improperly focused on the fact that the Applicant had received notice of his hearing, which the Applicant did not argue against on appeal. Finally, the Applicant renews claims that his application warrants a favorable exercise of discretion.

We do not find that on motion the Applicant has established that our previous decision was based on an incorrect application of law or policy or incorrect based on the evidence of record at the time of the decision. Contrary to the Applicant's assertion on motion, and as we stated in our previous decision, inadmissibility under section 212(a)(6)(B) of the Act is triggered only after a foreign national, who failed to attend their removal proceedings without reasonable cause, subsequently departs or is removed from the United States and "seeks admission to the United States within five years of . . . [that] departure or removal." The reference to "removal" in the statute is not synonymous with a "removal order," and section 212(a)(6)(B) does not refer to a "removal order" or otherwise indicate that the issuance of a removal order by itself without a subsequent departure or removal from the United States is sufficient to start the five-year time period of inadmissibility, as the Applicant maintains. He cites no authority for his assertion that USCIS' interpretation of inadmissibility under section 212(a)(6)(B) of the Act is incorrect. The Applicant therefore has not shown that our finding that he will be inadmissible for five years upon departing the United States was in error.

We also acknowledge the Applicant's assertion that he failed to appear for his removal proceedings due to the ineffective assistance of former counsel and was therefore eligible for the reasonable cause exception. However, we considered this claim on appeal and the Applicant has not identified legal or factual error in our previous finding that he had not satisfied the requirements for such a claim. Although the Applicant has submitted a new affidavit on motion attesting to relevant facts in support of his ineffective assistance of counsel, as well as additional evidence regarding the disbarment of his former counsel, he still has not complied with all the documentary requirements to establish such claims as laid out in *Matter of Lozada,* 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)[1]. Most notably, he has not provided documentary evidence of the agreement entered into with

[1] In *Matter of Lozada*, the Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. The Board set forth the following documentary requirements for asserting a claim of ineffective assistance: a written affidavit of the applicant attesting to the relevant facts, including a detailed description of the agreement entered into with counsel; evidence that former counsel was informed of the allegation of ineffective assistance and was given an opportunity to respond; and if the applicant asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that a complaint was filed with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why it was not.

former counsel and evidence that counsel was informed of the allegation of ineffective assistance and was given an opportunity to respond. *See id.* at 639. The lack of such evidence was also the reason for the immigration court's dismissal of the Applicant's 2001 motion to reopen his removal proceedings, as we noted in our appeal decision.

Further, as our prior decision noted, despite the alleged misinformation provided to the Applicant by former counsel, the record shows that he was properly served with a Notice to Appear and personally informed of the consequences of failing to appear for his removal hearing. He has not demonstrated that, after receiving such notice, his failure to attend his hearing was not within his reasonable control. *See Adjudicator's Field Manual* 40.6.2 (b)(3)(i), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (defining "reasonable cause" for purposes of section 212(a)(6)(B) of the Act as "something not within the reasonable control of the alien.")

On motion, the Applicant has not identified any legal or factual error in, or presented any new evidence or facts overcoming, our previous determination that he would become inadmissible under section 212(a)(6)(B) of the Act upon his departure from the United States and because there is no waiver for this ground of inadmissibility, no purpose would be served in approving the Applicant's instant application for permission to reapply for admission to waive his inadmissibility under section 212(a)(9)(A)(ii). Accordingly, we will dismiss the combined motion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.