U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 15941741

Date: MAY 10, 2022

Motion on Administrative Appeals Office Decision

Form I212, 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 from the United States for having been previously ordered removed.

The Director of the Holtsville, New York field office denied the application, concluding that the record did not establish that a favorable exercise of discretion was warranted. On appeal, while we noted several factors in the Applicant's favor, we dismissed the appeal because these were outweighed by his immigration violations, including his failure to appear at his removal hearing.

The matter is now before us on combined motions to reopen and reconsider. In the motion, the Applicant submits additional evidence and asserts that he had reasonable cause for his failure to appear.

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 motions.

## I. LAW

A motion to reconsider is based on an incorrect application of law or policy to the prior decision, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 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.

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any alien, 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 re-embarkation 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. *See 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. *See 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").

## II. ANALYSIS

The Applicant is currently in the United States and seeks permission to reapply for admission pursuant to 8 C.F.R. § 212.2(j) before departing the United States.[1] The record indicates that the Applicant will become inadmissible under section 212(a)(9)(A)(ii) of the Act upon departing the United States.

In our decision on appeal, we noted that the factors in the Applicant's favor include his family members in the United States, length of residence in the country, and apparent lack of a criminal history. While we acknowledged his claims to emotional, financial, and medical hardship to his parents, spouse and children in the United States if he were to relocate to El Salvador, we advised that as these hardships were largely based upon events that occurred after he was ordered removed *in absentia* in 2005, they would have diminished weight for purposes of assessing favorable factors in the exercise of discretion. In addition, the record lacked evidence to support some of the hardship claims made by the Applicant. We concluded that he had not established that the non-favorable factors, including his failure to attend his removal hearing, non-compliance with the removal order, unlawful presence since 2005, and unauthorized employment outweigh the positive factors in the Applicant's case.

On motion, the Applicant first refers to new evidence in support of favorable discretionary factors, including a doctor's letter about his spouse's pregnancy with their second child, a 2019 article about malnutrition in El Salvador, information about their older child's attendance in preschool programs, copies of the couple's federal tax return and W-2 statements for 2019, and letters from the Applicant's spouse and parents.

[1] The approval of his application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart.

The Applicant's spouse confirms that she was expecting their second child in [redacted] 2021 and reiterates that he is the main wage earner for the family, as she lacks skills and will be unable to work due to her pregnancy and caring for their new child. The tax documentation confirms what the previously submitted documentation also showed, that the Applicant earns more income than his spouse. As we stated in our previous decision, equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination). While we acknowledge that his spouse would face additional burdens due to caring for an infant, including financial difficulties, were the Applicant to return to El Salvador, the record still lacks complete information regarding the family's financial situation, including monthly expenses. It is therefore insufficient to provide a complete picture of the financial hardships they would experience.

The Applicant's parents state that in their letter that they would be limited in the help that they could provide to their daughter-in-law and grandchildren if he were to be removed from the United States, as both are over 60 and "don't not [*sic*] have the energy and patience to care for an infant and young child." They also state that they depend on their son for financial help and to take them to medical appointments and other errands, as neither drive. However, the lack of financial evidence to support their dependency on the Applicant that was noted in our previous decision remains. Further, no additional documentary evidence was submitted regarding the Applicant's parent's medical appointments or the need for his assistance. As we stated in our decision on appeal, the record does not show that his father would be unable to continue his treatment for hypertension without help from the Applicant.

Turning to the new evidence of conditions in El Salvador, it consists of statistics from UNICEF which show that the "under-five mortality rate" is twice that of the United States, and a November 2019 article from Voice of America website which indicates that the country's problems with child malnutrition and adult obesity have contributed to its economic struggles. However, the Applicant was born in El Salvador and lived there until 2005, and his spouse, a United States citizen with family in Mexico, does not indicate that she and her children would relocate there with the Applicant. After consideration of the new facts presented on motion, we conclude that they do not sufficiently add to the favorable factors in the Applicant's case to outweigh the unfavorable factors.

In addition to the new evidence submitted in support of his motion to reopen, the Applicant asserts that our previous decision weighed his history of immigration violations too heavily against the favorable factors discussed above, particularly concerning his *in absentia* order of removal. He notes that the Notice to Appear (NTA) he was served with did not include the date and location of his hearing and that he was unable to provide an address at the time of his release from custody, and asks that we grant a reasonable cause exception as provided under section 212(a)(6)(B) of the Act.[2] He also cites

[2] As noted in our previous decision, because the Applicant was ordered removed *in absentia* on [redacted] 2005, he may

to *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) and several decisions from the Board of Immigration Appeals (the Board) regarding the issue of whether such a Notice to Appear is defective, and requests that this defect be accounted for in the weighing of discretionary factors. Finally, while acknowledging his duty to notify the court of his new address, the Applicant asserts that his status as a minor at the time (he was 17 years old) should be a mitigating discretionary factor.

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 U.S. Citizenship and Immigration Services (USCIS) policy provides that "it is something not within the reasonable control of the [applicant]."[3] Regarding the Supreme Court's decision in *Pereira*, we note that this decision is limited to the narrow issue of whether the "stop-time" rule related to accruing continuous presence can be triggered by an NTA that omits the time and place of the initial hearing. We do not find the holdings in *Pereira* applicable to the Applicant's case. In addition, *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019), as noted by the Applicant, found that neither rescission of an *in absentia* order of removal nor termination of removal proceedings is required where a subsequent notice included the missing time and place information for the initial hearing which was missing from the NTA. The Applicant argues that he is not seeking recission of the removal order, only that the defect in the order be considered as a mitigating discretionary factor.

However, as we noted in our previous decision, the Applicant was properly served an in-person Notice to Appear, including oral notice in Spanish, which notified him of the consequences of failing to appear for his removal hearing, and he was aware of his duty to notify the court of his new address. In addition, the record includes Form I-220A, signed by the Applicant on the date of his release from custody, which notified him of the date and place to report to a deportation officer on a monthly basis, and that he must attend all hearings and not change his place of residence without permission from an officer. We recognize that the Applicant was a minor at the time, but we also must consider his statement that he purposely misrepresented his age (as 22 years old) so that he could be released without a guardian, which is documented in the record. In short, there is nothing in the record to suggest that he was unaware of the consequences of his actions, and the caselaw cited by the Applicant does not support his contention that we weighed the unfavorable value of his failure to appear too heavily.

## III. CONCLUSION

The new facts presented on motion do not add sufficient favorable factors to outweigh the unfavorable factors in the Applicant's case, and thus do not overcome the basis for our previous decision. In addition, the Applicant was not shown that our previous decision was based on an incorrect application of law or policy, and that it was incorrect based upon the evidence of record at the time of the decision.

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also be inadmissible upon his departure from the United States under section 212(a)(6)(B) of the Act, for which there is no waiver.

[3] 8 *USCIS Policy Manual* I, retired *Adjudicator's Field Manual* Chapter 40.6, https://www.uscis.gov/policymanual.

**ORDER:** The motion to reopen is dismissed.

**FUTHER ORDER:** The motion to reconsider is dismissed.