U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18957976

Date: MAY 31, 2022

Motion on Administrative Appeals 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 Brooklyn, New York Field Office denied the application, concluding that the record did not establish that a favorable exercise of discretion was merited in the Applicant's case. We then dismissed the Applicant's appeal, finding that the favorable factors in his case did not outweigh the unfavorable ones. 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, 8 U.S.C. § 1182(a)(9)(A)(i), states in relevant part that any noncitizen who has been ordered removed from the United States as an "arriving alien" and seeks admission to the United States within five years of their subsequent 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) 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 noncitizen's reapplying for admission.

Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), states that any noncitizen who has been unlawfully present in the United States for one year or more and seeks admission to the United States within 10 years of their subsequent departure or removal is inadmissible. U.S.

Citizenship and Immigration Services (USCIS) may grant a waiver of this inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in the exercise of discretion.

Section 212(a)(6)(B) of the Act, 8 U.S.C. §1182(a)(6)(B), states that any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the noncitizen's inadmissibility or deportability, and who seeks admission to the United States within five years of the noncitizen's subsequent departure or removal, is inadmissible. There is no waiver for this inadmissibility.

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).

II. ANALYSIS

The Applicant currently resides in the United States and is seeking conditional approval of the application under the regulation at 8 C.F.R. § 212.2(j) before he departs, since he will become inadmissible upon his departure due to his prior removal order. The approval of the application under these circumstances is conditioned upon the Applicant's departure from the United States and will have no effect if he fails to depart.

The issue on motion is whether the Applicant should be granted conditional approval of his Form I-212 in the exercise of discretion. The Applicant does not contest his potential inadmissibility under sections 212(a)(9)(A) or 212(a)(9)(B)(i)(II) of the Act, which is supported by the record. Instead, the Applicant contends that he will not be inadmissible under section 212(a)(6)(B) of the Act once he departs the United States. The Applicant further contends that we incorrectly applied the law when dismissing his appeal because in doing so, we deviated from prior cases and we did not fully consider all of the favorable equities in his case.

A. Procedural History

The record indicates that the Applicant entered the United States without inspection on or about [redacted] 1998, then was apprehended and personally served with a Form I-862, Notice to Appear, charging him with removability. After being held in detention in Texas, he was released on his own recognizance to live with his cousin in [redacted]. On [redacted] 1999,[1] the Applicant conceded removability and applied for and received a change of venue from [redacted], Texas to [redacted] New York.

[1] The record indicates that the Applicant turned 18 in [redacted] 1999.

On [redacted] 1999, the Applicant did not attend his removal hearing and was ordered removed *in absentia* by the Immigration Judge.[2] He remains in the United States, and upon his departure from the United States, he will become inadmissible pursuant to section 212(a)(9)(A)(i) of the Act for having been previously ordered removed. The Applicant seeks conditional approval of his application before departing the United States to apply for an immigrant visa.

B. Inadmissibility Under Section 212(a)(6)(B) of the Act

Under section 212(a)(6)(B) of the Act, a noncitizen who fails to attend their removal hearing and seeks admission to the United States is inadmissible for five years from the date of their subsequent departure or removal, unless they missed that hearing for a reasonable cause. 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 [applicant]."[3] On motion, the Applicant asserts that we incorrectly determined he did not have reasonable cause for missing his removal hearing.

According to the Applicant, when he was released from immigration detention in Texas, he moved in with a cousin in [redacted] The Applicant states that because he could not read English, he never looked at the immigration paperwork provided to him, and gave it to his cousin instead. He further states that he did not know that his immigration proceedings were ongoing because his cousin never informed him of the contents of the paperwork. About two weeks later, he left his cousin's house and had no further contact with him. When the cousin received notice of the Applicant's immigration hearing, the cousin did not inform the Applicant of it, which is why the Applicant asserts that he did not attend.

The record contains an ICE Form I-286, Notice of Custody Determination, dated [redacted], 1998, which refers to the Applicant's scheduled hearing while in immigration custody. The form states that the Applicant "was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act" and is signed by the Applicant. This indicates that the Applicant had the consequences of a failure to appear explained to him orally in Spanish at least once while he was in custody.

The record further contains a form titled "Notification Requirement for Change of Address," which states in English and Spanish that any address change must be reported to the Executive Office for Immigration Review (EOIR) and the former Immigration and Naturalization Service (now USCIS), and explains that failure to do so could result in a removal hearing being held without the Applicant's presence, the entry of a removal order, and/or issuance of a warrant for his arrest and removal. The Applicant signed this form on [redacted] 1998, indicating that he was informed in written Spanish

[2] The regulation at 8 C.F.R. § 1003.26(c)(1) states that an Immigration Judge shall enter an *in absentia* order in removal proceedings where the noncitizen fails to appear and it is established by clear, unequivocal, and convincing evidence that the noncitizen or the noncitizen's counsel of record was provided with written notice of the time and place of proceedings and the consequences of a failure to appear.

[3] 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).

of the requirement to report any change of address. The Form I-830, Notice to EOIR: Alien Address, contained in the record states that the Applicant was provided with a copy of EOIR-33, the EOIR change of address form, before being released from custody and sent to [redacted]

The record also contains a Form I-220, Release on Recognizance, dated [redacted] 1998, which states that the Applicant was in ongoing removal proceedings and being released on his own recognizance, provided he comply with conditions including attending all hearings and not changing his place of residence without first obtaining written permission from a deportation officer. The form includes an acknowledgement that the terms were explained to the Applicant in Spanish, which was signed by the Applicant on [redacted] 1998.

The totality of the evidence indicates that the Applicant was repeatedly informed in Spanish that he was in ongoing removal proceedings, that he was required to attend his removal hearings and report any change in address, and of the consequences of failing to do so. His decision to move out of his cousin's house without reporting his change of address is therefore not considered a circumstance beyond his reasonable control.

There is insufficient evidence in the record to establish that the Applicant qualifies for the "reasonable cause" exception to inadmissibility under section 212(a)(6)(B) of the Act. Therefore, we find that upon departing the United States, he will become inadmissible under this section of the Act for five years, with no available waiver.

C. Discretion

On motion, the Applicant cites to several non-precedent cases from the AAO as support for his contention that we weighed the favorable and unfavorable equities in his case incorrectly. The cited decisions were not published as precedent and, accordingly, do not bind USCIS in future adjudications. *See* 8 C.F.R. §103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and the applicable law and policy. Crucially, in this instance there is no indication that any of the noncitizens in the cited cases were inadmissible under section 212(a)(6)(B) of the Act or under any other section of law that does not have a waiver.

An application for permission to reapply for admission is denied, in the exercise of discretion, to a foreign national who is mandatorily inadmissible to the United States under another section of the Act. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). As noted above, upon departing the United States, the Applicant will become inadmissible for five years with no possibility of a waiver. Therefore, no purpose would be served by approving the conditional Form I-212, and the application will remain denied as a matter of discretion.

III. CONCLUSION

The Applicant has not demonstrated that our 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). Accordingly, the motion is dismissed.

ORDER: The motion to reconsider is dismissed.