U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22684122

Date: JAN. 5, 2023

Motion on Administrative Appeals Office Decision

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

The Applicant 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). 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 Newark, New Jersey Field Office denied the application as a matter of discretion because, upon departure, the Applicant will also become inadmissible under section 212(a)(6)(B) of the Act. Thus, the Director concluded no purpose would be served in approving his application because he would remain inadmissible. 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.

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.

This is our second review of the Applicant's application for permission to reapply for admission. We note that the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(l)(i). Thus, the issue before us is whether the Applicant has established that our decision to dismiss his appeal was based on an incorrect application of law or USCIS policy. This motion does not entitle the Applicant to a reconsideration of the denial of the application, and he cannot use the present filing to make new allegations of error at prior stages of the proceeding.

On motion, the Applicant argues that we erred in our prior decision by ignoring evidence, which is in violation of 5 U.S.C. § 706(2)(A) (the federal statute giving a reviewing court the authority to set aside an agency decision that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law). We analyzed whether the Applicant had provided "reasonable cause" for failing to

appear for his immigration court hearing and concluded that he had not.[1] We noted that the record contained a Form I-862, Notice to Appear (NTA) that indicated a time and date "to be set" and that the Applicant was provided a Spanish-language Form I-826, Notice of Rights, which he signed. The record also indicates that the Applicant was released on bond on [redacted] 2002, and that he reported a [redacted] address where he would live when released. When the Immigration Court ordered his removal on [redacted], 2003, he was served notice of that hearing at the address he provided. We determined that, although the Applicant claims he never received notice, he did not provide evidence to demonstrate he meets the requirements for an exception to inadmissibility under section 212(a)(6)(B) of the Act based on "reasonable cause" for failure to attend his removal hearing.

On motion, the Applicant's arguments are three-fold. First, he argues that USCIS is substituting its judgment for that of a consular officer since a section 212(a)(6)(B) inadmissibility is only triggered upon leaving the United States. He states that by considering this ground of inadmissibility in our discretionary analysis, we are finding him presumptively inadmissible, which he argues is improper and contrary to the law. While we acknowledge that this inadmissibility is only triggered once an individual departs the United States, we addressed this argument in our prior decision, which we incorporate here. To reiterate, an application for permission to reapply for admission can be 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). The Applicant argues that we cannot use his section 212(a)(6)(B) inadmissibility in our discretionary determination, but provides no legal support for this. In fact, the plain language of section 212(a)(6)(B) of the Act shows that the inadmissibility is mandatory once the Applicant departs the United States. Thus, section 212(a)(6)(B) would render the Applicant inadmissible for five years following his departure from the United States.

Second, he argues that a section 212(a)(6)(B) inadmissibility is not a mandatory ground of inadmissibility, and that an applicant could "convince a consular officer during the interview that he had good cause not to appear." Our prior decision examined the record and considered the Applicant's arguments to determine his ability to demonstrate "reasonable cause" for failing to appear. We also noted 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 alien." *See* Memorandum from Lori Scialabba, Associate Director for Refugee, Asylum & International 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). As we determined (and incorporate by reference here), the Applicant did not demonstrate reasonable cause for his failure to appear at his removal hearing, and his arguments on motion do not establish that our prior decision was in error.

Lastly, the Applicant argues that we have inconsistently analyzed appeals of Form I-212s involving section 212(a)(6)(B) of the Act inadmissibility. The Applicant cites to numerous nonprecedent decisions to argue that our approach to these cases lacks consistency and is therefore arbitrary and

[1] 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.

capricious. However, the Applicant does not contend with the legal precedent cited in our original decision, namely, *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). Regardless, our nonprecedent decisions are decided on the facts of the individual cases, and do not provide legal precedent for broader application in all cases. Moreover, as stated earlier, our prior decision carefully analyzed the record and the Applicant's explanation for why he failed to attend his removal hearing.

The documentation on motion does not establish that our dismissal of the Applicant's appeal was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceeding 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.