U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24025970

Date: MAR. 20, 2023

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 from 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 Manchester, New Hampshire Field Office denied the application, concluding that the Applicant would 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 without reasonable cause, and there is no waiver for this ground of inadmissibility. The Applicant later filed an appeal that we dismissed. The matter is now before us again on a motion to reconsider.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion to reconsider.

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.

In denying the appeal, we agreed with the Director's denial of the application and their conclusion that the Applicant would become inadmissible under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause, an inadmissibility for which there is no waiver. We determined the Applicant did not demonstrate that he had reasonable cause[1] for not attending his

[1] 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]." 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).

removal hearing. We pointed to the fact that the record did not contain a Form EOIR-33, Change of Address/Contact Information Form, to establish that the Applicant notified the Immigration Court of his address as required. We further acknowledged the Applicant's February 2019 motion to reopen his removal proceedings, but highlighted that the Immigration Judge denied the motion and rejected the Applicant's claim that his *in absentia* removal order should have been rescinded because he did not receive proper notice of his hearing. In addition, we emphasized that the Applicant did not submit evidence to support his claim that he was unaware of his scheduled hearing, or that there were any circumstances beyond his reasonable control preventing him from attending the hearing.

On motion, the Applicant points to his sworn testimony submitted to the Immigration Judge in conjunction with his motion to reopen, asserting that he submitted a new address to the Immigration Court prior to his removal *in absentia* in 2004. The Applicant additionally refers to a U.S. Supreme Court decision, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and a Board of Immigration Appeals (the Board) decision, *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022), contending this caselaw establishes that he was prejudiced by defective notice, causing him to not appear for his removal hearing. The Applicant states that the defective notice prevented him from appearing and asserting a claim for immigration relief and was "an egregious due process violation."[2]

This is our second review of the Applicant's application for permission to reapply for admission and we incorporate our prior decision by reference. We further 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 the prior appeal was based on an incorrect application of law or USCIS policy.

With respect to the Applicant's assertion on motion that the Form I-862, Notice to Appear (NTA), issued in 2004 was defective, we again note that an Immigration Judge considered and rejected the Applicant's claim that his *in absentia* removal order should be rescinded because he did not receive sufficient notice of the hearing in 2004. In an order issued in [redacted] 2019, the Immigration Judge indicated that the Immigration Court was unable to mail the Applicant an updated NTA, including a time and date for the hearing, because he refused to provide an address or telephone number when he was apprehended in [redacted] 2004. The Immigration Judge noted that the Applicant's refusal to provide an address and telephone number was recorded in the NTA, as well as the Form I-213, Record of Deportable/Inadmissible Alien, both of which are included in the Applicant's record of proceedings. The Immigration Judge also acknowledged the Applicant's assertion that he sent a letter to the Immigration Court informing them of his address but indicated that there was no record of this letter nor other documentary evidence to substantiate his claim that he informed the Immigration Court of his address. The Immigration Judge concluded that the Applicant was served with proper notice, since he refused to provide an address and did not subsequently follow up and provide one as instructed in the NTA.[3]

[2] The Applicant additionally submits evidence in support of his assertions that the positive equities present in his case outweigh the negative. However, as noted in our prior decision and affirmed on motion, approving the Form I-212 would serve no purpose as the record indicates that the Applicant will become inadmissible under section 212(a)(6)(B) of the Act upon his departure and remain inadmissible for a period of five years.

[3] In August 2018, the Immigration Court also denied another motion to reopen filed by the Applicant.

We defer to the order of the Immigration Judge, who concluded that the Applicant's notice to appear was not defective. Moreover, we note that the current matter is distinguishable from the caselaw cited by the Applicant. In each cited case, the respondent did not refuse to provide a proper address to the government or the Court, thereby frustrating the Government's and the Court's ability to serve process. Further, each matter is specifically related to the time and place requirement in section 239(a)(1) of the Act, 8 U.S.C. § 1229(a)(1) (2018), which is not applicable in this matter. *See Niz-Chavez v. Garland*, 141 S. Ct. at 1479; *Matter of Fernandes*, 28 I&N Dec. at 606. Finally, the Fifth Circuit recently upheld the Board's denial of the noncitizen's motion to reopen proceedings to rescind an *in absentia* removal order. *Gudeil-Villatoro v. Garland*, 40 F.4th 247 (5th Cir. 2022). In denying the petition, the Court observed the noncitizen did not provide a viable address to the government, and therefore may not reopen removal proceedings on the ground that the date and time of his removal proceeding were not included in his notice to appear. The Court also indicated that *Spagnol-Bastos v. Garland*, 19 F.4th 802, 806 (5th Cir. 2021), makes clear that both the viable-address requirement and the forfeiture-of-notice effect survive *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). *Id.*

Further, the Applicant does not address our determination that the record did not contain a Form EOIR-33 or any other relevant corroborative evidence to establish that the Applicant notified, or attempted to notify, the Immigration Court of his address as required. Beyond the unsupported contention that he mailed a letter to the Immigration Court containing his address, the Applicant provides no evidence to support a conclusion that he was deprived of proper notice of his scheduled hearing, or that there were any circumstances beyond his reasonable control preventing him from attending the hearing.

Again, the record reflects that the Applicant was ordered removed *in absentia* in [redacted] 2004, and this order has been upheld by an Immigration Court on two occasions. Therefore, the Applicant has not established that our prior dismissal of his appeal was inconsistent with applicable law or USCIS policy.[4]

ORDER: The motion to reconsider is dismissed.

[4] 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. 776-7 (Reg'l Comm'r 1964). Approving the Form I-212 would serve no purpose as the record indicates that the Applicant will become inadmissible under section 212(a)(6)(B) of the Act upon his departure and remain inadmissible for a period of five years.