U.S. Citizenship and Immigration Services

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

In Re: 28233599

Date: OCT. 26, 2023

Appeal of Cleveland, Ohio Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

The Applicant, who currently resides abroad and seeks an immigrant visa, requests 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 is inadmissible for having been previously ordered removed. *See* section 212(a)(9)(A)(ii) of the Act.

The Director of the Cleveland, Ohio Field Office denied the application, concluding that the Applicant is ineligible for admission because he was convicted of an aggravated felony after admission to the United States as a lawful permanent resident (LPR). The matter is now before us on appeal. 8 C.F.R. § 103.3.

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

## I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that any noncitizen, 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 a noncitizen convicted of an aggravated felony) 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 contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission."

Under section 212(h)(2) of the Act, a waiver of inadmissibility is not available to a noncitizen who has previously been admitted to the United States as lawfully admitted for permanent residence if since the date of such admission the noncitizen has been convicted of an aggravated felony.

Section 101(a)(43) of the Act, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, provides, in relevant part, that the term "aggravated felony" includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 . . . ."

## II. ANALYSIS

The record reflects that the Applicant was admitted to the United States in 2005 as an LPR. In 2015, the Applicant pled guilty to and was convicted of Trafficking in Counterfeit Merchandise in violation of 18 U.S.C. § 2320(a), sentenced to five years of probation, and required to pay a $2,000 fine. Based upon his conviction, the Applicant was placed in removal proceedings. The immigration judge ordered him removed from the United States in [redacted] 2015, then granted withholding of removal. According to the Form I-212, the Applicant departed the United States in 2019 and has not returned.

The Director acknowledged the Applicant is seeking an immigrant visa through consular processing abroad and that his counsel indicated a Form I-601, Application for Waiver of Grounds of Inadmissibility, will be filed in the future. In denying the Form I-212, the Director referred to the Applicant's criminal and immigration history in the record and found that his 2015 conviction constituted an aggravated felony. The Director noted that no waiver is available for this inadmissibility under section 212(h)(2) of the Act because he entered the United States as an LPR and subsequent to his admission was convicted of an aggravated felony. The Director concluded that a Form I-212 may be denied as a matter of discretion if no purpose would be served in granting an application for permission to reapply.

On appeal, the Applicant asserts that the Director erred by basing the denial on a generalized statement that his conviction constituted an aggravated felony and failed to provide a detailed statutory analysis. He contends that his crime differs from other more serious aggravated felonies, trafficking in counterfeit goods is very common in the United States, and he has paid for his mistake. The Applicant argues that the U.S. Court of Appeals for the Ninth Circuit (the Ninth Circuit) has ruled that Trafficking in Counterfeit Merchandise in violation of 18 U.S.C. § 2320(a) is not an aggravated felony and though he resides in the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit, we must abide by the Ninth Circuit ruling because the Sixth Circuit has not ruled on this issue.

Here, the record in its totality reflects that the Applicant's 2015 conviction does constitute an aggravated felony under section 101(a)(43)(M)(i) of the Act. As noted by the Director in the denial, the Applicant was placed in removal proceedings pursuant to section 237(a)(2)(A)(iii) of the Act due to his aggravated felony conviction. Further, the Form I-862, Notice to Appear, and the Applicant's criminal indictment and judgment documents, support the Director's determination that the conviction constituted an aggravated felony because the offense involved fraud or deceit in which the loss to the victim(s) exceeds $10,000. The indictment specifies that the Applicant "traffic[ked] in, and attempt[ed] to traffic[k] in goods, specifically counterfeit apparel which, if genuine, would be valued at approximately $107,808" and "the use of said counterfeit marks being likely to cause confusion, mistake and to deceive in violation of Title 18, United States Code, Section 2320(a)."

Regarding the Applicant's assertion that we must abide by the Ninth Circuit determination in a separate case,[1] we first note that he has not established the legal authority to support this argument nor has he shown that the cases are not distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Further, though the Applicant asserts the Ninth Circuit ruled that Trafficking in Counterfeit Merchandise in violation of 18 U.S.C. § 2320(a) is not an aggravated felony, the Ninth Circuit instead found that a conviction under 18 U.S.C. § 2320(a) does not necessarily involve fraud or deceit, and therefore is not necessarily an aggravated felony, because a defendant can be convicted of trafficking in counterfeit goods for conduct that is merely likely to cause mistake or confusion. In the instant case, however, the evidence in the record shows the offense did involve deceit, as noted in the criminal indictment. Moreover, section 101(a)(43)(M)(i) of the Act defines an offense—like the one to which the Applicant pled guilty—that involves fraud or deceit in which the loss to the victim(s) exceeds $10,000 as an aggravated felony, without any other qualifying terms. He is thus ineligible for a waiver because his conviction, which involved deceit and a loss to the victim(s) exceeding $10,000, was an aggravated felony under the Act.

Though the U.S. Department of State will make the final determination concerning the Applicant's eligibility for a visa, an application for permission to reapply for admission is properly denied, in the exercise of discretion, to an applicant who is mandatorily inadmissible to the United States under another section of the Act, as no purpose would be served in granting the application. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). A review of the record supports the Director's determination that the Applicant is not eligible for admission to the United States because he entered the United States as an LPR and subsequent to his admission was convicted of an aggravated felony. We will dismiss the appeal of the denial of his application for permission to reapply for admission as a matter of discretion.

**ORDER:** The appeal is dismissed.

[1] *Lifeng Wang v. Rodriguez*, 830 F.3d 958 (9th Cir. 2016).