U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27861589

Date: SEPT. 28, 2023

Appeal of Newark, New Jersey Field Office Decision

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

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 become 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 Newark, New Jersey Field Office denied the application as a matter of discretion, concluding that the Applicant's departure from the United States would also trigger his inadmissibility under section 212(a)(6)(B) of the Act for failure to appear at a removal hearing without reasonable cause and, as there is no waiver available for this ground of inadmissibility, approval of the Applicant's Form I-212 would serve no purpose.

On appeal, the Applicant submits a brief, and asserts that the Director did not consider his explanation for the nonappearance, and that the overall positive factors in his case outweigh the negative ones, such that he merits a favorable exercise of discretion.

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 in relevant part that a noncitizen who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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, is inadmissible.

A noncitizen who is inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act 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.

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).

In addition, section 212(a)(6)(B) of the Act, as in effect since April 1, 1997, renders inadmissible any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine their inadmissibility or deportability and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal. Neither the Act nor the regulations provide for an exception or a waiver of this inadmissibility ground.

II. ANALYSIS

The Applicant is currently in the United States and seeks advance permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing from the United States to obtain an immigrant visa abroad.[1] He does not contest that he has an outstanding order of removal and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs. The only issue on appeal is whether the Applicant has established that approval of his request for permission to reapply for admission is warranted as a matter of discretion. Upon review of the record, as supplemented on appeal, we conclude that he has not.

The record reflects that the Applicant, a native and citizen of Costa Rica, entered the United States without inspection and admission or parole in [redacted] 2005, when he was 17 years old. He was apprehended and detained by U.S. Customs and Border Protection (CBP) officers in [redacted] Arizona following a document check of passengers aboard a departing bus. The Applicant admitted that he entered the United States illegally; he was transported to a CBP checkpoint for further processing, personally served a Form I-862, Notice to Appear in Removal Proceedings under Section 240 of the Immigration and Nationality Act (NTA), and given a list of free legal service providers in the [redacted] Arizona area. Shortly thereafter, the Applicant retained an immigration attorney, who arranged for him to be released on bond and requested that the removal proceedings be transferred to an Immigration Court in New Jersey, where the Applicant indicated he would go to live with his cousin.

[1] Approval of the Applicant's Form I-212 under these circumstances is conditioned upon departure from the United States and will have no effect if he does not depart.

Because the Applicant did not attend his removal hearing on [redacted] 2005, an Immigration Judge in New Jersey ordered him removed in absentia to Costa Rica.

In 2016, the Applicant married a U.S. citizen, who subsequently filed a Form I-130, Petition for Alien Relative (visa petition) to classify the Applicant as her spouse for immigration purposes. The visa petition was approved and the Applicant intends to travel abroad to seek an immigrant visa on that basis before the U.S. Department of State. In support of the instant Form I-212 the Applicant previously submitted evidence, which included a copy of the in absentia removal order and a personal declaration; statements from his spouse and parents-in-law; employment, tax, and financial documents; education and residential records; Costa Rica country conditions report and travel advisory; and letters of support.

In denying the Form I-212, the Director acknowledged the favorable factors in the case; specifically, the Applicant's marriage, gainful employment, and lack of criminal record. Nevertheless, the Director declined to afford significant weight to these positive equities, noting that they came into existence years after the Applicant had been ordered removed from the United States.[2] Thus, the Director determined that they were not sufficient to outweigh the negative impact of the Applicant's unlawful entry into the United States, failure to attend his removal hearing, as well as his longtime unlawful presence in the United States and unauthorized employment. Lastly, the Director concluded that the Applicant's departure from the United States would trigger his inadmissibility under section 212(a)(6)(B) of the Act, as the record indicated that the Applicant was aware of the removal proceedings but failed to appear at the scheduled removal hearing, and his explanation that he did not receive a hearing notice was not sufficient to establish reasonable cause for the nonappearance. And, because there is no waiver available for this inadmissibility ground, the Director found that the Applicant would remain inadmissible to the United States and granting him permission to reapply for admission at this time would serve no purpose.

On appeal, the Applicant asserts that the Director did not consider his explanation why he did not attend the removal hearing. He reiterates that he was a minor when he entered the United States and although he initially went to live in New Jersey with his cousin, he left the cousin's house shortly thereafter due to financial issues. He explains that he depended on his cousin to give him the court notice when it came, but he never received it. He further notes that there seems to be a discrepancy about the date of the hearing, as the Director indicated in the denial that the hearing was on September 5th, and the in absentia removal order was not issued until [redacted] The Applicant avers that this inconsistency points to "a strong likelihood that [he] truly did not receive the notice of the correct date." He claims that his nonappearance therefore should not be weighed against him heavily because he not only was a minor who did not speak the language and relied on his family when he entered the United States, but there are also clear discrepancies in the record concerning the actual date of the removal hearing.

[2] 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) (finding that 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) (explaining that 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).

We acknowledge the Applicant's assertions, but conclude that they are not sufficient to overcome the Director's finding of inadmissibility under section 212(a)(6)(B) of the Act.

Although there is no statutory definition of the term "reasonable cause," as used in section 212(a)(6)(B) of the Act, the guiding USCIS policy indicates that "it is something not within the reasonable control of the [noncitizen]."[3] The Applicant has not demonstrated that there were circumstances beyond his reasonable control that prevented him from attending the removal hearing.

As an initial matter, although the Director incorrectly indicated in the denial that the Applicant was scheduled for a removal hearing on September 5, 2005, the in absentia removal order reflects that the Immigration Judge in [redacted] New Jersey "[o]n [redacted] 2005, called the matter for hearing after the time scheduled," and that the Applicant "failed to appear or to explain the failure to appear." The order further provides that the Immigration Judge found that the Applicant was "served properly with notice of the scheduled date, place, and time of hearing . . . mailed to the [Applicant] at the last address provided by [him] to the court in a Motion to Change Venue . . . filed by [his] attorney at the time. Notice of hearing was not returned to the court by Postal Service, and neither the court nor the Department [of Homeland Security] have any other address information from the [Applicant]."

Thus, the in absentia order indicates that the Immigration Judge found that the Applicant was properly served with an NTA, and that he was properly notified of the date, place, and time of the hearing by mail.[4] Furthermore, the Form I-826, Notice of Rights and Request for Disposition, reflects that the Applicant requested a hearing before the Immigration Court to determine whether he could remain in the United States, and the certificate of service in the NTA contains the Applicant's signature and fingerprint, confirming that he received oral notice in Spanish detailing the consequences of failure to appear at the removal hearing.

We acknowledge the Applicant's explanation that he was a minor at the time, and that his cousin did not give him the notice of hearing. However, neither the Applicant's young age, nor his claim that he moved out of his cousin's house shortly after arriving in New Jersey is adequate to show that his failure to attend the removal hearing was not within his reasonable control. *See Matter of Cubor-Cruz*, 25 I&N Dec. 470, 473 (BIA 2011) (holding that personal service of an NTA to a noncitizen who is 14 years of age or older at the time of service is effective, and the regulations do not require that notice also be served on an adult with responsibility for the minor). Moreover, the record reflects that in June 2005, when he was released on bond the Applicant was notified in writing that he would be scheduled for a hearing and a notice of hearing would be mailed to him at his cousin's address in New Jersey. He was also advised that if he changed his address, he should "use the attached Form EOIR-33 (Change of Address) with [his] correct address and/or telephone number at which [he] can be contacted

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[3] *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).

[4] *See* 8 C.F.R. § 1003.26(c) (providing in relevant part that in any removal proceedings in which the respondent fails to appear, the Immigration Judge shall order the respondent removed in absentia if the Department of Homeland Security establishes by clear, unequivocal, and convincing evidence that (1) the respondent is removable and that (2) a written notice of the time and place of proceedings and a written notice of the consequences of failure to appear were provided to the noncitizen or the noncitizen's counsel of record).

regarding [his] case." The Applicant does not claim, and the record does not show that he notified the Immigration Court of his address change after he moved out of his cousin's home. The Applicant's assertions that his cousin failed to give him the notice, or that there is a seeming discrepancy concerning the date of hearing are not sufficient to establish "reasonable cause," within the meaning of section 212(a)(6)(B) of the Act, for his failure to appear in Immigration Court.

The record therefore supports the Director's determination that upon departing from the United States the Applicant will also become inadmissible for five years under section 212(a)(6)(B) of the Act as a result of his failure to attend the removal hearing without reasonable cause. As stated, there is no exception or a waiver of this inadmissibility.

Considering the totality of the circumstances discussed above, we conclude that the Applicant has not established that the favorable factors in his case outweigh the unfavorable ones. Consequently, a favorable exercise of discretion is not warranted at this time, and the application will remain denied.

ORDER: The appeal is dismissed.