U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16288051

Date: APR. 7, 2022

Appeal of New York, New York City Field Office Decision

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

The Applicant will be inadmissible upon her departure from the United States for having been previously ordered deported 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 New York, New York City Field Office denied the application in the exercise of discretion. The Director determined that the Applicant would be inadmissible upon her departure from the United States under sections 212(a)(6)(B), 212(a)(6)(C)(i), and 212(a)(9)(B) of the Act. The Director noted that there is no waiver of inadmissibility under section 212(a)(6)(B) of Act for failing to attend removal proceedings, and denied the application based on the conclusion that the adverse factors in the Applicant's case outweighed the favorable factors.

On appeal, the Applicant asserts that the Director cited to two conflicting dates when discussing her deportation order and incorrectly found that she is inadmissible under section 212(a)(6)(B) of the Act because her deportation proceeding predated the Illegal Immigration Reform and Immigrant responsibility Act (IIRAIRA) of 1996. The Applicant further claims that "exceptional circumstances" prevented her from attending her deportation hearing and contends that the Director did not properly consider the favorable factors in her case.

The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, as explained below, we will remand the matter to the Director for the entry of a new decision.

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 under section 240 or any other provision of law ... 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 continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission."

Section 212(a)(6)(B) of the Act renders inadmissible 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 such noncitizen's subsequent departure or removal.

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 she departs, as she will be inadmissible upon her departure due to her 1997 deportation order.[1]

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 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); *see also Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience.")

Generally, favorable factors that came into existence after a noncitizen has been ordered deported or removed from the United States ("after-acquired equities") are given less weight in a discretionary determination. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (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) (an after-acquired equity, referred to as an after-acquired family tie in *Matter of*

[1] The approval of the application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if she fails to depart.

Tijam, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination).

II. ANALYSIS

The issue presented on appeal is whether the Applicant should be granted conditional permission to reapply for admission to the United States in the exercise of discretion. As explained below, we will remand the matter to the Director for the entry of a new decision.

In the decision to deny the Applicant's request for conditional approval of her application for permission to reapply in the exercise of discretion, the Director determined that the Applicant is inadmissible under section 212(a)(6)(B) of the Act, for failing to attend her deportation proceedings, and noted that there is no waiver for this ground of inadmissibility. The Director then stated that all the factors in the Applicant's case were "carefully considered" and concluded that the Applicant's inadmissibility outweighed the favorable factors she "acquired after the removal order was entered ... on June 29, 2005," noting that the Applicant's spouse had "possible knowledge of the implications" of her deportation order when the couple got married.

We conclude that the Director erred in finding that upon departure from the United States, the Applicant would be statutorily inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act. In the instant case, the Applicant was issued a notice in [redacted] 1996 informing her of an exclusion hearing that was scheduled to take place in [redacted] 1997. The Director's reference to a June 2005 removal order against the Applicant was therefore incorrect. The record also contains an Order of the Immigration Judge notice, which shows that the Applicant did not appear for her scheduled hearing in [redacted] 1997 and that an order of exclusion and deportation was issued. However, section 212(a)(6)(B) of the Act does not apply to an individual placed in exclusion proceedings before April 1, 1997.[2]

As detailed above, when considering whether a request for permission to reapply merits a favorable exercise of discretion, positive factors may include hardship to the applicant and other U.S. citizen or lawful permanent resident relatives, the applicant's respect for law and order, the recency of deportation, the applicant's moral character, and family responsibilities. Here, despite claiming that the Applicant's evidence was "carefully considered," the Director's decision does not specifically reference any of the evidence submitted in support of the application, including the applicant's hardship claims, medical records, a lengthy psychosocial assessment regarding the Applicant and her spouse and oldest child, and personal statements from these individuals. The Applicant has also submitted a brief letter from her church attesting to her and husband's membership, a letter from her sister attesting to her good moral character, and certificates showing the Applicant's completion of various English language courses.

Considering the Applicant is not subject to inadmissibility pursuant to section 212(a)(6)(B) of the Act, we find it appropriate to remand the matter for the Director to reevaluate the submitted evidence and

[2] *See* 22 CFR § 40.62, Failure to attend removal proceedings. "An alien who without reasonable cause failed to attend, or to remain in attendance at, a hearing initiated on or after April 1, 1997, under INA 240 to determine inadmissibility or deportability shall be ineligible for a visa under INA 212(a)(6)(B) for five years following the alien's subsequent departure or removal from the United States."

consider whether the Applicant has established that she merits a favorable exercise of discretion related to section 212(a)(9)(A)(ii) of the Act.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.