U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16032921

Date: APR. 8, 2022

Appeal of Baltimore 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 removed and seeks permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The Director of the Baltimore, Maryland Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), as a matter of discretion. The Director concluded that no purpose would be served in granting conditional approval for permission to reapply for admission as the Applicant, upon her departure, would also become inadmissible under section 212(a)(6)(B) of the Act for failure to appear at her removal proceedings.

On appeal, the Applicant contends that a determination of her inadmissibility falls under the purview of the consular office abroad and argues that the Director's decision is inconsistent with prior unpublished decisions issued by the AAO. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," 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. 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) 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. The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

Section 212(a)(6)(B) of the Act provides that 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 the noncitizen's subsequent departure or removal, is inadmissible. There is no waiver for this inadmissibility.

II. ANALYSIS

The record indicates that the Applicant will become inadmissible upon departing the United States pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The issue raised on appeal is whether the Applicant should be granted conditional approval of her Form I-212 in the exercise of discretion.

The Applicant entered the United States without inspection on or about May 15, 1998. In [redacted] 2004, she was issued a Notice to Appear and placed in removal proceedings pending a hearing that was scheduled to take place on [redacted] 2004. The Applicant did not attend her removal hearing and was ordered removed by an immigration judge *in absentia*.[1] Because the Applicant has remained in the United States since 1998, and upon her departure, she will become inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The Applicant is seeking conditional approval of her application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if she fails to depart.

The Director in this instance declined to address the merits of the application, concluding that the Applicant's inadmissibility under section 212(a)(6)(B) of the Act will preclude her from being able to seek admission to the United States for five years from time of her departure or removal and that an approval of this application, related to section 212(a)(9)(A)(ii), even if warranted, would serve no purpose.

On appeal, the Applicant asserts that her Form I-212 should be granted notwithstanding her inadmissibility under section 212(a)(6)(B) of the Act because U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction to consider her inadmissibility on this ground. The Applicant further argues that she had reasonable cause for failing to appear at her removal hearing and that the Director's decision is inconsistent with the AAO's prior decision in a case with similar circumstances. We disagree. First, we note that the decision cited by the Applicant was not published as precedent and, accordingly, as a non-precedent decision, does not bind USCIS in future adjudications. *See* 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act"). Furthermore, the facts in this matter are substantially different from those in the unpublished decision. Namely, the applicant in the unpublished decision was deemed inadmissible under section 212(a)(6)(C)(i) of the Act for which a waiver is available under section 212(i) of the Act. The same is not true with respect to this Applicant's inadmissibility under section 212(a)(6)(B) of the Act for which there is no waiver.

An application for permission to reapply for admission is denied, in the exercise of discretion, to a noncitizen who is mandatorily inadmissible to the United States under another section of the Act.

[1] The Applicant subsequently filed a motion to reopen with the Executive Office of Immigration Review, where the circumstances of her failure to appear at her removal hearing were addressed and the motion was denied based on the determination that the Applicant "never advised the Court of her correct address, even though she apparently knew that the address shown on her [Notice to Appear] was not her address." Although the Applicant appealed that decision with the Board of Immigration Appeals (BIA), the appeal was dismissed and the decision to deny the motion to reopen was affirmed. The BIA then denied the Applicant's subsequent motion to reconsider its prior decision to dismiss the appeal.

Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg'l Comm'r 1964). Because the Applicant will depart the United States and apply for an immigrant visa, the U.S. Department of State will make the final determination concerning her eligibility for a visa, including whether the Applicant is inadmissible under section 212(a)(6)(B) or under any other ground and whether there was reasonable cause for the Applicant's failure to appear at her removal hearing. However, evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available is relevant to determining whether a Form I-212 should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances. *See id.*

Based upon the evidence provided, the Applicant will become inadmissible upon her departure for a period of five years for failure to appear at her removal hearing. Under these circumstances, no purpose would be served by determining whether the Applicant merits approval of her application related to section 212(a)(9)(A)(ii) as a matter of discretion because she would remain inadmissible for five years under section 212(a)(6)(B) without a possibility to apply for a waiver. Consequently, we find no error in the Director's denial of the application in the exercise of discretion, and we need not address the evidence in the record relating to the positive and negative factors in the case or determine whether a favorable exercise of discretion would be warranted. The application will therefore remain denied.

ORDER: The appeal is dismissed.