U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17739041

Date: APR. 19, 2022

Appeal of Newark, New Jersey 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 (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii).

The Director of the Newark, New Jersey Field Office denied the application as a matter of discretion. Although the Director specifically did not make any formal finding of inadmissibility, the Director cited the negative factor of the Applicant's potential inadmissibility under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), an inadmissibility that cannot be waived and which would occur upon her departure. On appeal, the Applicant asserts that the Director did not weigh positive and negative factors in this case. The Applicant further asserts that the U.S. Department of State has the prerogative to determine whether she is inadmissible under section 212(a)(6)(B) of the Act.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), 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 continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

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.

The regulation at 8 C.F.R. § 212.2(j) states that a noncitizen whose departure will execute an order of removal shall receive a conditional approval depending upon his or her satisfactory departure. However, the grant of permission to reapply does not waive inadmissibility under section 212(a)(9)(A) of the Act resulting from exclusion, deportation, or removal proceedings which are instituted subsequent to the date permission to reapply is granted.

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. *See 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. *See 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").

II. ANALYSIS

Although the Director specifically did not make "any formal findings or decisions regarding [the Applicant's] admissibility to the United States," 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 *in absentia*. The issue raised on appeal is whether the Applicant should be granted conditional approval of her Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, in the exercise of discretion.

The Applicant entered the United States without inspection in or about 2001. She was subsequently apprehended by immigration officials and served a Form I-862, Notice to Appear. The Applicant did not attend her removal hearing on [redacted] 2001, and an immigration judge ordered her removed *in absentia* on that date. Although the Applicant denies having received the Notice to Appear, the record establishes that it was mailed to the address of record provided by the Applicant. Moreover, although the Applicant asserted in support of her Form I-212 that she "had more than sufficient 'reasonable' cause" for not appearing at her removal hearing, she does not reassert that claim on appeal. The record does not indicate that the U.S. Postal Service returned the Notice to Appear as undeliverable. Furthermore, the record establishes that other documents sent to that address by Certified Mail were delivered. The Applicant has remained in the United States, 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 appears to be 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 Applicant claims 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 under section 212(a)(6)(B) of the Act. The Applicant contends that she requires an approved Form I-212 to pursue relief for her *in absentia* order through consular processing. The Applicant states that it is a requirement for a noncitizen with an *in absentia* order to receive a Form I-212 prior to applying for a Form I-601A, Application for Provisional Unlawful Presence Waiver. The Applicant also maintains that it does not fall under the purview of USCIS to determine inadmissibility under section 212(a)(6)(B) of the Act, but rather a U.S. consular officer.

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. *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. Evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available, however, 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 as a matter of discretion because she would remain inadmissible for five years 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. We also note that, contrary to the Applicant's assertions on appeal that the Director neglected to "weigh[] the factors accordingly," the Director specifically discussed how the negative factors in this case—the Applicant's entrance without being admitted or paroled, her failure to appear at her removal hearing, her 19 years of unlawful presence, and her work without authorization during that period—outweigh the after-acquired equity of marrying a U.S. citizen spouse. The application will therefore remain denied.

III. CONCLUSION

The Applicant has the burden of proof in seeking permission to reapply for admission. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Because the record indicates that the Applicant's departure will trigger inadmissibility under a ground for which no waiver is

available, no purpose will be served in grating the application under these circumstances. *See Matter of Martinez-Torres*, 10 I&N Dec. 776.

ORDER: The appeal is dismissed.