U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21884333

Date: JULY 25, 2022

Appeal of Harlingen, Texas 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 Harlingen, Texas Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), as a matter of discretion, concluding 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 she has established eligibility for the benefit sought. We review the questions raised 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 remand the matter to the Director for further proceedings.

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.

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, 373-74 (Reg'l Comm'r 1973). 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).

II. ANALYSIS

The record reflects that on [redacted] 2005, the Applicant, who was 16 years old, was apprehended, detained, and placed into removal proceedings upon attempting to enter the United States without inspection. She was released from detention into the custody of her brother-in-law on [redacted] 2005.[1] She did not attend her removal hearing on [redacted] 2005, and was ordered removed in absentia by an immigration judge on that date. The Applicant has remained in the United States since her entry. In 2015, the Applicant married her U.S. citizen spouse, who then filed a Form I-130, Petition for Alien Relative, on her behalf which was approved in 2020. She and her spouse have two U.S. citizen sons, born in 2016 and 2017, and the Applicant also has a U.S. citizen son, born in 2008, from a prior relationship. The Applicant is seeking conditional approval of her application under the regulation at 8 C.F.R. § 212.2(j)[2] before departing from the United States to seek an immigrant visa at a U.S. consulate abroad, as she will be inadmissible upon her departure under section 212(a)(9)(A)(ii) of the Act.

The Director determined that upon departure, the Applicant will also become inadmissible for five years under section 212(a)(6)(B) of the Act due to her failure to appear at her removal hearing, an inadmissibility for which no waiver is available. Therefore, the Director denied the Form I-212, concluding that no purpose would be served in approving the Form I-212, as the Applicant would remain inadmissible.

On appeal, the Applicant asserts that she could not have been reasonably expected to comply with the Notice to Appear (NTA) because she was 16 years old when she was apprehended and her family controlled all aspects of her life – including the decision to travel from Honduras to the United States with her brother, who was 17 years old at the time. She further asserts that following her release from detention, her family instructed her to not show up for any court dates. She also contends that she did not receive proper notice of the removal proceedings as required by section 239(a) of the Act because

[1] The record reflects that the Applicant traveled to the United States with her 17-year-old brother who was also detained and released into the custody of their brother-in-law.

[2] The regulation at 8 C.F.R. § 212.2(j) provides that a noncitizen whose departure will execute an order of removal may, prior to leaving the United States, seek conditional approval of an application for permission to reapply for admission.

the NTA she received did not include the date and time for her hearing and she never received a Notice of Hearing for the removal hearing on [redacted] 2005.[3]

In this case, the Applicant does not contest that she will be inadmissible under section 212(a)(9)(A)(ii) of the Act upon her departure from the United States. With respect to inadmissibility under section 212(a)(6)(B) of the Act, we need not determine at this time whether the Applicant has demonstrated a reasonable cause for her failure to attend her removal proceedings. As noted above, the record reflects that an immigrant visa petition was approved on the Applicant's behalf, and she intends to apply for an immigrant visa abroad. Accordingly, the U.S. Department of State will make the final determination concerning the Applicant's eligibility for a visa, including whether she is inadmissible under section 212(a)(6)(B) of the Act or under any other ground.

As stated above, when considering whether a request for permission to reapply merits a favorable exercise of discretion, favorable factors may include hardship to the applicant and other U.S. citizen or lawful permanent resident relatives as well as the applicant's moral character, respect for law and order, and family responsibilities. In addition, although immigration violations may be considered as negative factors in a discretionary determination, they must be weighed against the favorable factors presented as well as with other negative factors. We also note that while favorable factors ("equities") acquired after an order of deportation, exclusion, or removal has been entered may be given less weight in assessing favorable factors in the exercise of discretion, they should not be dismissed as such, and they must still be considered and balanced against the adverse factors in the totality of circumstances. See Garcia-Lopez v. INS, 923 F.2d 72, 74 (7th Cir. 1991) (noting 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) (noting 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). Thus, depending on the specific facts, such as the length of time since the removal order, or the number and strength of the equities (e.g., longstanding demonstration of good moral character, family ties, contributions to the community, business ownership, etc.) after-acquired equities may be sufficient to outweigh the unfavorable factors. Garcia-Lopez v. INS, 923 F.2d at 76; Matter of Tijam, 22 I&N Dec. at 417.

Here, the Director denied the Form I-212 based on the Applicant's potential inadmissibility and did not review and weigh all positive and negative factors with consideration to all evidence presented. In light of the foregoing, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence, including that submitted on appeal, and determine whether the Applicant warrants a favorable exercise of discretion.

[3] We note here that the Applicant also cites Pereira v. Sessions, 138 S. Ct. 2105 (2018), Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), Matter of Bermudez-Cota, 27 I&N Dec. 441 (BIA 2018), and Matter of Arambula-Bravo, 28 I&N Dec. 388 (BIA 2021), as support for her contention that she did not receive proper notice of the removal proceedings. However, because the identified basis for the remand is dispositive of the Applicant's appeal, we decline to reach this issue. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (noting that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach); see also Matter of L-A-C-, 26 I&N Dec. 516,526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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