U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20922719

Date: JUN. 24, 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 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 Newark, New Jersey Field Office determined that the Applicant would be inadmissible upon her departure from the United States under section 212(a)(6)(B) of the Act, for failing to attend deportation proceedings, and there is no waiver for this ground of inadmissibility. The Director also found that the Applicant's adverse factors in her case outweighed the favorable factors. On appeal, the Applicant asserts that the Director incorrectly found that she is inadmissible under section 212(a)(6)(B) of the Act. The Applicant also contends that the Director did not give proper weight to her positive equities.

The Applicant bears the burden of proof to demonstrate eligibility 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). We review 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, we will remand the matter to the Director for further proceedings.

I. LAW

Section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), provides that any "arriving alien . . . who has been ordered removed under section 235(b)(1) [of the Act, 8 U.S.C. § 1225(b)(1),] or at the end of proceedings under section 240 [of the Act, 8 U.S.C. § 1229a,] initiated upon the arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible."

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

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.

II. ANALYSIS

The issue on appeal is whether the Applicant is subject to inadmissibility under section 212(a)(6)(B) of the Act for failing to attend her deportation hearing.

The Applicant, a native and citizen of Ecuador, entered the United States in 1994 without inspection, admission, or parole. In [redacted] 1997, the Applicant was issued an Order to Show Cause and Notice of Hearing. The Applicant did not attend her deportation hearing and was ordered deported by an Immigration Judge in absentia in [redacted] 1997, but has remained in the United States.[1] The Applicant is a beneficiary of an approved immigrant visa petition filed by her U.S. citizen spouse.

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. 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.

On appeal, the Applicant asserts that the Director incorrectly concluded that she is inadmissible under section 212(a)(6)(B) of the Act. We agree that section 212(a)(6)(B) of the Act does not apply to an individual placed in deportation proceedings before April 1, 1997.[2] In the instant case, an Order to

[1] The Applicant's subsequent motion to reopen the Immigration Judge's decision was denied and the appeal was dismissed by the Board of Immigration Appeals.

[2] See 22 C.F.R. § 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."

Show Case was issued to the Applicant in [redacted] 1997; therefore, the Applicant is not inadmissible under section 212(a)(6)(B) of the Act.

The Applicant also contends that the Director did not give proper weight to her positive equities. She asserts that the Director's focus on "extreme hardship" in evaluating her family's financial hardship is not a necessity; rather, it is a factor to consider. We agree that the Director improperly referenced the incorrect standard. Hardship is a factor to consider when exercising discretion, but an applicant is not required to show extreme hardship in the context of an application for permission to reapply for admission. Extreme hardship to a qualifying relative is a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act. Further, the Director erroneously considered the inadmissibility under section 212(a)(6)(B) as an adverse factor when it does not apply to the Applicant. Moreover, the Director dismissed "main positive factors" such as U.S. citizen spouse and children as after acquired equities without properly considering and balancing them against the adverse factors. While favorable factors ("equities") acquired after an order of deportation, exclusion, or removal 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 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 Tijam, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination). 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 negative factors. Garcia-Lopes v. INS, 923 F.2d at 76; Matter of Tijam, 22 I&N Dec. at 417.

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 consider whether the Applicant has established that she merits a favorable exercise of discretion.

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