U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17561526

Date: MAY 2, 2022

Appeal of New York, New York Field Office Decision

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

The Applicant 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), because she will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the New York, New York Field Office denied the application as a matter of discretion. Although the Applicant was previously ordered removed, *see* section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), the Director concluded that the Applicant is inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), because of her continued presence in the United States following her 2006 removal order. On appeal, the Applicant asserts that the equities outweigh the negative factors in this case.

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 remand the matter to the Director for the entry of a new decision.

I. LAW

Section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), 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.

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), 8 U.S.C. § 1182(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 an alien convicted of an aggravated felony) is inadmissible.

Noncitizens found inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), may seek permission to reapply for admission under section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(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 reapplying for admission.

Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), provides that any noncitizen unlawfully present in the United States for a period of one year or more, and who seeks admission within 10 years of the noncitizen's departure or removal from the United States is inadmissible. Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), provides a discretionary waiver if refusal of admission to the noncitizen would result in extreme hardship to a qualifying spouse or parent of the noncitizen.

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

The record establishes that the Applicant entered the United States in or about 2006 without admission. She was placed in removal proceedings and was served a Form I-962, Notice to Appear, but she did not appear. On [redacted] 2006, an Immigration Judge ordered the Applicant removed from the United States *in absentia*. The record does not establish, and the Applicant does not assert, that she has departed the United States after her 2006 removal order *in absentia*.

Although the Applicant specifically filed the Form I-212, Application for Permission to Reapply for Admission, based on her inadmissibility under 212(a)(9)(A)(ii) of the Act, which would be triggered upon her departure from the United States following the 2006 removal order, the Director did not address the Applicant's inadmissibility under that section. Similarly, the Director did not address the Applicant's inadmissibility under section 212(a)(6)(B) of the Act, which would be triggered upon her departure from the United States following the 2006 removal order *in absentia*. Instead, the Director asserted that the Applicant would be inadmissible under section 212(a)(9)(B) of the Act, which would be triggered upon her departure from the United States because she has been unlawfully present in the United States for one year or more.

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 she is inadmissible under any section of the Act. Evidence that the Applicant's departure will trigger inadmissibility under a ground for which no waiver is available, however, is relevant to determining whether a Form I-212 should be approved as a matter of discretion, as no purpose would be served in approving the application under these circumstances. *See id.*

As noted above, the Director did not address the Applicant's inadmissibility under section 212(a)(6)(B) of the Act, which would be triggered upon her departure from the United States following her 2006 removal order *in absentia*. Thus, the Applicant has not the opportunity to address whether she had reasonable cause for not attending her removal hearing.[1] Accordingly, will withdraw the Director's decision and remand the matter to the Director to determine whether the Applicant merits conditional approval of her application for permission to reapply for admission as a matter of discretion. In making a new determination, the Director should consider whether any purpose would be served in approving the application in light of section 212(a)(6)(B) 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.

[1] There is no statutory definition of the term "reasonable cause" as it is used in section 212(a)(6)(B) of the Act, but guiding U.S. Citizenship and Immigration Services policy provides that "it is something not within the reasonable control of the [applicant]." Memorandum from Lori Scialabba, Associate Director for Refugee, Asylum & International Operations Directorate, et al., USCIS, HQ 70/21.1 AD07-18, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators. Revisions to the Adjudicator's Field Manual (AFM) to Include a New Chapter 40.6* (AFM Update AD07-18)(Mar. 3, 2009).