U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18677052

Date: MAY 04, 2022

Appeal of Queens, New York Filed 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 Queens, New York Field Office denied the application, concluding that the record did not establish that it warranted a favorable exercise of discretion.

The matter is now before us on appeal. In the appeal, the Applicant states that the Director erred in not giving sufficient weight to the hardships faced by the Applicant's spouse and children were she to be removed, and by assuming that any waiver application filed by her would be denied.

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 withdraw the Director's decision and remand this matter for the entry of a new decision consistent with the following analysis.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any alien, 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 an alien convicted of an aggravated felony) is inadmissible."

Foreign nationals 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 re-embarkation 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 foreign national's reapplying for admission."

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 Applicant has been found inadmissible under section 212(a)(9)(A) of the Act for having been previously ordered removed. Specifically, on [redacted] 2001, she entered the United States without admission or parole, and was served with a Notice to Appear on the same day. On [redacted] 2002, the Applicant's application for asylum was denied and she was ordered removed by the immigration judge. She has not since left the United States. On April 6, 2016, an immigrant visa petition filed on her behalf by her spouse was approved.

In his decision, the Director listed the favorable and unfavorable factors in the Applicant's case to be considered as a matter of discretion. Among the unfavorable factors listed was her unlawful presence since [redacted] 2002, and her "additional grounds of inadmissibility." The Director next stated that in order to re-enter the United States, the Applicant would need an approved Form I-601A, Application for Provisional Unlawful Presence Waiver, to waive her inadmissibility for unlawful presence.[1] After consideration of a psychological evaluation of her spouse, he determined that because the evidence supporting the instant application did not show that her spouse would suffer extreme hardship, the Applicant would be unlikely to qualify for a waiver of her inadmissibility for unlawful presence, and would therefore remain inadmissible even if she was granted permission to reapply for admission. The Director considered this to be a negative factor and denied the application as a matter of discretion.

On appeal, the Applicant asserts that the Director abused his discretion by considering her potential availability for a waiver, as she has not yet had an opportunity to present her application for a waiver. Upon review, we agree with the Applicant and will vacate the Director's decision. Pursuant to the regulation at 8 C.F.R. 212.7(e)(4)(iv), a noncitizen inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver by submitting Form I-601A.[2] Also, as a waiver of the ground of inadmissibility

[1] This form is filed to request a provisional waiver of the unlawful presence grounds of inadmissibility under section 212(a)(9)(B) of the Act.

[2] The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) for unlawful presence will be needed after the Applicant departs and regardless of whether he obtains a provisional waiver. See Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal - Where to File, https://www.uscis.gov/i-212.

for unlawful presence, which will be triggered upon the Applicant's departure from the United States, is available under section 212(a)(9)(B)(v) of the Act, the Director's conclusion that this ground of inadmissibility "in itself supports a denial" of her application as a matter of discretion was in error.[3]

In addition, while the Director listed the favorable factors in the Applicant's case, including a lack of criminal history, the length of time she has lived in the United States and her family ties here, he did not fully address the evidence of additional significant favorable factors, including hardship to herself, her spouse and her two U.S. citizen children, as well as her family responsibilities. *Tin,* 14 I&N Dec. at 373-4. Further, since approval of an application for permission to reapply for permission does not require a showing of extreme hardship to a qualifying spouse, on remand the Director should weigh the unfavorable factors against the favorable ones to determine if approval is warranted as a matter 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.

[3] The Director cited to *Matter of J-F-D-*, 10 I&N Dec. 694 (BIA 1963) is support of this conclusion, but that decision held that no purpose would be served in granting an application for permission to reapply for admission where an applicant is mandatorily excludable from the United States and is ineligible to apply for a waiver of that ground of excludability.