U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17801612

Date: MAY 5, 2022

Appeal of Queens, 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). The Director of the Queens, New York Field Office denied the application, concluding that she was ineligible to apply for permission to reapply for admission because she was not a beneficiary of an approved immigrant visa petition filed on her behalf. The matter is now before us on appeal.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; 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 additional review and the entry of a new decision.

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 an alien 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) 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.

II. ANALYSIS

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. The issue

on appeal is whether the Applicant is eligible to apply for conditional approval of the Form I-212 prior to departure.

The record shows that the Applicant, a native and citizen of China, entered the United States without inspection on or about April 5, 1997. On [redacted] 1998, an Immigration Judge denied the Applicant's application for asylum and related relief and ordered her removal to China.[1] However, 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 states that she is seeking conditional approval of her application under 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 Director denied the application, concluding that the Applicant was not eligible to apply for permission to reapply for admission because she was not a beneficiary of an approved immigrant visa petition filed on her behalf.

On appeal, the Applicant asserts that neither the pertinent regulations nor the Form I-212 or its instructions state that an approved immigrant visa petition is a prerequisite for approval of a Form I-212. She further states that two prior immigrant visa petitions filed by her U.S. citizen spouse on her behalf were denied because of their failure to attend scheduled interviews and the third petition is currently pending with U.S. Citizenship and Immigration Services.

The regulation at 8 C.F.R. § 212.2(j) pertains to advance approval of a Form I-212, and provides in pertinent part that a noncitizen whose departure will execute an order of deportation may receive conditional approval depending upon their satisfactory departure. Here, the Applicant expresses her intention to complete her immigration process through consular processing. Upon her departure, the Applicant will become inadmissible under section 212(a)(9)(A) of the Act and therefore, she may apply for conditional approval of her Form I-212 application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States. Again, 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.

As the Director did not assess whether the Applicant merits conditional approval of her application as a matter of discretion, we remand the case to the Director to review the record, weigh all favorable and unfavorable factors, and determine whether the Applicant merits a conditional approval of her Form I-212 in the 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.

[1] On June 30, 1998, the Board of Immigration Appeals found the Applicant's appeal of the Immigration Judge's decision was untimely. Consequently, the Immigration Judge's removal order had become final.