U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19227256

Date: MAY 09, 2022

Appeal of Los Angeles, California 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). She intends to apply for an immigrant visa abroad and will be inadmissible upon departing the United States under section 212(a)(9)(A)(ii) of the Act because she was previously ordered removed.

The Director of the Los Angeles, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission into the United States, as a matter of discretion. The Director 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 her deportation proceeding. Because there is no waiver for this ground of inadmissibility, the Director concluded that no purpose would be served in determining whether the Form I-212 merits approval as a matter of discretion based on an analysis of the favorable and unfavorable factors presented. The Director also briefly addressed some of the favorable and unfavorable factors in the Applicant's case.

On appeal, the Applicant asserts that the Director incorrectly determined that she is inadmissible under section 212(a)(6)(B) of the Act because she can demonstrate that she had reasonable cause for not appearing at her deportation proceeding. The Applicant also contends that the Director did not properly weigh the positive factors in her case.

The Applicant bears the burden of proof to establish eligibility for the requested benefit 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). This office reviews 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, as explained below, we will remand the matter to the Director for the entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act 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)(ii) of the Act may seek permission to reapply for admission under section 212(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'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 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). However, when an applicant will remain mandatorily inadmissible or excludable from the United States, no purpose would be served in granting the application for permission to reapply. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964); *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg'l Comm'r 1963).

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.

II. ANALYSIS

The issue presented on appeal is whether the Applicant should be granted conditional approval of her application for permission to reapply in the exercise of discretion. As explained below, we will withdraw the Director's decision and remand the matter to the Director for the entry of a new decision.

The Applicant is the subject of an unexecuted *in absentia* deportation order, dated [redacted] 1994, and will be inadmissible upon her departure from the United States under section 212(a)(9)(A)(ii) of the Act. The Applicant is seeking conditional approval of her Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa abroad. She has not departed the United States since entering without inspection in 1992.

In the decision to deny the Applicant's Form I-212 in the exercise of discretion, the Director determined that the Applicant is inadmissible under section 212(a)(6)(B) of the Act, for failing to attend her [redacted] 1994 deportation proceeding, and noted that there is no waiver for this ground of inadmissibility. The Director emphasized that, because the Applicant would be inadmissible for a period of five years following her departure, "no purpose is served" in determining whether her Form I-212 merits approval as a matter of discretion. While the decision addressed some of the favorable and unfavorable factors in the Applicant's case, the Director's discretionary denial placed considerable weight on the determination the Applicant would become inadmissible under section 212(a)(6)(B) of the Act.

We conclude that the Director erred in finding that upon departure from the United States, the Applicant would be statutorily inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act. In the instant case, an Order to Show Case was issued to the Applicant in [redacted] 1994. Section 212(a)(6)(B) of the Act does not apply to a noncitizen placed in deportation proceedings before April 1, 1997.[1]

As detailed above, when considering whether a request for permission to reapply merits a favorable exercise of discretion, positive factors may include hardship to the applicant and other U.S. citizen or lawful permanent resident relatives, the applicant's respect for law and order, the recency of deportation, the applicant's moral character, and family responsibilities. Here, while the Director's decision referenced the Applicant's family and community ties, her approved family-based immigrant petition, and her lack of a criminal record, the Director did not fully address the submitted evidence because she concluded that no purpose would be served in determining whether the Form I-212 merits approval.

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, (including the brief and evidence submitted on appeal) 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.

[1] *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."