U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27650820

Date: SEPT. 5, 2023

Appeal of Newark, New Jersey Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

The Applicant seeks advance 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 become inadmissible upon departing from the United States for having been previously ordered removed. Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the Newark, New Jersey Field Office denied the application as a matter of discretion, concluding that the negative factors in the case, including the Applicant's prospective inadmissibility upon departure under section 212(a)(6)(B) of the Act for failure to attend a removal hearing, outweighed the positive factors. The matter is now before us on appeal.

On appeal, the Applicant submits a brief with additional evidence, and reasserts eligibility.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in pertinent part that any noncitizen who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229, 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 a noncitizen convicted of an aggravated felony) is inadmissible.

A noncitizen who is 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 re-embarkation 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.

In addition, section 212(a)(6)(B) of the Act, as in effect since April 1, 1997, renders inadmissible any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine their inadmissibility or deportability and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal. Neither the Act nor the regulations provide for an exception or a waiver of this inadmissibility ground.

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. *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).

II. ANALYSIS

The Applicant, a national of El Salvador, is currently in the United States and seeks permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing from the United States.[1] She does not contest that she has an outstanding order of removal and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once she departs. The only issue on appeal is whether the Applicant has demonstrated that approval of her Form I-212 is warranted as a matter of discretion. We have reviewed the record as supplemented on appeal and, for the reasons explained below, conclude that she has not.

The record reflects that the Applicant entered the United States in March 1998 without inspection and admission or parole. After she was apprehended by U.S. Customs and Border Protection agents the Applicant requested a hearing before an Immigration Judge to determine whether she could remain in the United States, and was personally served with a Form I-862 Notice to Appear in Removal Proceedings under Section 240 of the Immigration and Nationality Act (NTA) on March 29, 1998; she was released on bond two weeks later. Because the Applicant did not appear for her removal hearing in [redacted] 1998, the Immigration Judge ordered her removed in absentia to Guatemala.[2] In 2019 the Applicant filed a motion to reopen the removal proceedings, but the Immigration Judge denied the motion, and the Board of Immigration Appeals (the Board) dismissed her appeal of that decision in 2020.

The Applicant filed the instant Form I-212 indicating that she intended to seek an immigrant visa based on an approved Form I-130, Petition for Alien Relative (visa petition) her lawful permanent resident

[1] An approval of her Form I-212 is conditioned upon departure from the United States and will have no effect if she does not depart.

[2] The Applicant claimed to be a national of Guatemala both at the time she was apprehended and when she was placed in removal proceedings. She also misrepresented her date of birth.

mother filed on her behalf. In support, she submitted a copy of that visa petition's 2002 approval notice,[3] evidence of her family ties, employment, and payment of taxes; residential, financial, and medical records; a crime and safety report for El Salvador; a copy of a completed Form I-601A, Application for Provisional Waiver of Unlawful Presence, and letters of support.

In denying the Applicant's request for permission to reapply for admission, the Director identified the positive factors in the case as the Applicant's lawful permanent resident mother, her U.S. citizen child born in 2005, hardships to the Applicant and her family members, and poor conditions in El Salvador. Nevertheless, the Director determined that the Applicant's initial entry without inspection; her failure to appear at the removal hearing and related inadmissibility under section 212(a)(6)(B) of the Act; and her longtime unlawful residence and unauthorized employment in the United States were significant negative factors that weighed heavily against her. Thus, the Director concluded that the negative factors in the case outweighed the positive ones, such that a favorable exercise of discretion was not warranted.

In the appeal brief, counsel for the Applicant asserts that the Applicant's circumstances have since changed because her daughter recently joined the U.S. Army. Counsel further states that the Applicant will be able to show the requisite extreme hardship to her mother when she applies for a provisional waiver of unlawful presence.[4] Counsel also explains that the Applicant and her mother live together, and while the mother still works, she makes only $400 per week, which will not be enough to maintain even a reduced standard of living without the Applicant's income of $650 per week, and she would struggle to pay rent while also taking care of the Applicant's teenage daughter. Lastly, counsel asserts that although the Applicant failed to appear at her removal hearing, her failure to appear was reasonable and the Director erred by concluding otherwise.

As a preliminary matter, counsel's unsubstantiated assertions do not constitute evidence, and we cannot afford them any probative value. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (providing that "statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Here, the evidence on appeal consists of a notice of certification that the Applicant's daughter enlisted with the Army National Guard of the United States in May 2023, a copy of the daughter's identification card, and an enlistment-related high school verification form. But the Applicant does not provide a personal statement or updated statements from her mother and/or her daughter (who is now 18 years of age) explaining how this evidence relates to the hardships they will experience if the Applicant is not granted permission to reapply for admission or to the exercise of discretion in general. Consequently, while we acknowledge the submission of this supplemental documentation, we cannot conclude that it is sufficient to overcome the Director's adverse discretionary determination.

Furthermore, the evidence remains inadequate to establish reasonable cause for the Applicant's failure to appear at her removal hearing. Although there is no statutory definition of the term "reasonable

[3] The record reflects, however, that in 2013 the U.S. Department of State terminated the Applicant's related immigrant visa proceedings pursuant to section 203(g) of the Act, 8 C.F.R. § 1153(g), which provides, in pertinent part that the Secretary of State shall terminate the registration of any noncitizen who fails to apply for an immigrant visa within one year following notification to the noncitizen of the availability of such visa. The record further shows that in January 2023 the Applicant's mother filed another visa petition on her behalf, which is currently pending.

[4] We note that extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission.

cause," as used in section 212(a)(6)(B) of the Act, USCIS policy guidance provides that "it is something not within the reasonable control of the [noncitizen]."[5] The Applicant has not demonstrated that there were circumstances beyond her control that prevented her from attending the removal hearing. Specifically, the certificate of service in the NTA contains the Applicant's signature and fingerprint, confirming that she was provided oral notice in the Spanish language of the time and place of the removal hearing and the consequences of failure to appear. The record also contains a copy of the list of free legal service providers in the [redacted] Arizona area, which was given to the Applicant. Furthermore, in dismissing the Applicant's motion to reopen the Immigration Judge considered her claims that she did not receive a notice of hearing, but found them insufficient to show that "her failure to appear at the hearing was due to the lack of notice and no fault of her own," because at the time she was released from detention she was reminded of the requirement to keep the Immigration Court advised of her current address; she was also given Form EOIR-33, Change of Address, but did not inform the Immigration Court that she subsequently moved to New Jersey. The Board affirmed the Immigration Judge's decision, finding the Applicant's "blanket and conclusory statements that she was not properly notified of her [redacted] 1998, hearing" unpersuasive. We acknowledge the Applicant's claim on appeal that both the Immigration Judge and the Board found only that she had a notice of hearing, and not that she failed to appear at the hearing without reasonable cause; however, as the Applicant does not explain specifically why she did not attend the hearing, we conclude that she has not demonstrated that her departure from the United States will not trigger her inadmissibility under section 212(a)(6)(B) of the Act, for which there is no exception or waiver available.

We recognize that there are favorable factors in the case, including the Applicant's family ties and the hardships she and her mother and daughter will experience if she must remain abroad for the entire inadmissibility period. However, given the specific circumstances in this case, we conclude that those positive equities are not sufficient to overcome the significant adverse factors: the Applicant's initial entry without inspection, lack of evidence that she had reasonable cause for failing to attend the removal hearing, her resulting inadmissibility under section 212(a)(6)(B) of the Act for five years after she departs, and her longtime unlawful residence and employment in the United States. Lastly, as noted, the record does not currently establish that the Applicant is the beneficiary of a valid approved visa petition, with which she may seek an immigrant visa abroad.

Consequently, considering the record as a whole we conclude that the Applicant has not demonstrated at this time that she merits a grant of permission to reapply for admission to the United States in the exercise of discretion when all positive and negative factors are weighed together. Her Form I-212 will therefore remain denied.

ORDER: The appeal is dismissed.

[5] *See* 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).