U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13312920

Date: APR. 14, 2022

Appeal of Johnston, Rhode Island Field Office Decision

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

The Applicant will be inadmissible upon her departure from the United States for having been previously ordered removed and 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 Johnston Field Office in Providence, Rhode Island, denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), as a matter of discretion. The Director concluded that no purpose would be served in granting conditional approval for permission to reapply for admission as the Applicant, upon her departure, would also become inadmissible under section 212(a)(6)(B) of the Act for failure to appear at her removal proceedings. The matter is now before us on appeal.

On appeal, the Applicant contends that her conditional Form I-212 should not have been denied for other possible grounds of inadmissibility, emphasizing that such determination should be reserved for the U.S. consular officer who adjudicates her immigrant visa application. Further, she maintains that she has grounds to reopen her removal proceedings and will not be subject to inadmissibility under section 212(a)(6)(B) of the Act.

We review the questions raised 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 part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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, 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.

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. There is no waiver for this inadmissibility.

The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

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 should be granted conditional approval of her Form I-212 in the exercise of discretion.

The Applicant entered the United States without inspection on or about [redacted] 2003. On that date, she was apprehended by immigration officials and served a Notice to Appear. On [redacted] 2003, the Immigration Court in [redacted] Texas, mailed a notice of hearing to the address the Applicant provided at the time she was apprehended. The Applicant did not attend her removal hearing on [redacted] 2003, and was ordered removed by an immigration judge *in absentia* on that date. She later filed a motion to reopen to request that the *in absentia* order of removal be rescinded, claiming that her failure to appear was due to a lack of notice. The Immigration Judge denied her motion on [redacted] 2015, and the Board of Immigration Appeals (the Board) dismissed her appeal of that decision on November 8, 2016.

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 appears to be seeking conditional approval of her application under the regulation at 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 Applicant claims that her Form I-212 should be granted notwithstanding the possibility that she will become inadmissible under section 212(a)(6)(B) of the Act because U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction to consider her inadmissibility under section 212(a)(6)(B) of the Act. Rather, she emphasizes that a U.S. consular officer will determine whether she is inadmissible under section 212(a)(6)(B) during the adjudication of her immigrant visa application. The Applicant emphasizes that it was never her intention to file the Form I-212 to cure her inadmissibility under section 212(a)(6)(B) of the Act, and states that, notwithstanding the prior *in absentia* removal order, she does in fact have "grounds to reopen her removal proceedings." The Applicant does not acknowledge that both the Immigration Court and the Board have already denied her requests to reopen those proceedings and have considered her claim that she had a reasonable cause for her failure to appear.

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 his eligibility for a visa, including whether the Applicant is inadmissible under section 212(a)(6)(B) or under any other ground. Evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available, however, is relevant to determining whether a Form I-212 should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances. *See id.*

Based upon the evidence provided, the Applicant will become inadmissible upon her departure for a period of five years for failure to appear at her removal hearing under 212(a)(6)(B) of the Act. Under these circumstances, no purpose would be served by determining whether the Applicant merits approval of her application as a matter of discretion because she would remain inadmissible for five years without a possibility to apply for a waiver. Consequently, we find no error in the Director's denial of the application in the exercise of discretion, and we need not address the evidence in the record relating to the positive and negative factors in the case or determine whether a favorable exercise of discretion would be warranted. The application will therefore remain denied.

ORDER: The appeal is dismissed.