U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16295325

Date: MAY 6, 2022

Appeal of New York, 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), because she will be inadmissible upon departing from the United States for having been previously ordered removed. *See* section 212(a)(9)(A)(ii) of the Act. 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 New York, New York Field Office denied the application as a matter of discretion. On appeal, the Applicant asserts that the Director erred by misstating facts, and by not considering the positive factors in her case. She contends that a favorable exercise of discretion is warranted.

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. 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 sustain the appeal because the Applicant has met her burden.

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) 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 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. *See Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973).

II. ANALYSIS

The Applicant requested permission to reapply for admission to the United States because she will be inadmissible upon departing from the United States for having been previously ordered removed.[1] *See* section 212(a)(9)(A)(ii) of the Act. The record reflects that the Applicant entered the United States without being inspected, admitted, or paroled in or about January 1990. In 1996, the Applicant applied for asylum expressing a fear of returning to El Salvador. She was interviewed by an asylum officer, and then referred to the immigration court because there was a lack of details and evidence in her asylum application. In [redacted] 1996, an Immigration Judge granted the Applicant voluntary departure, requiring her to return to El Salvador before [redacted] 1997. However, the Applicant never departed. Government records indicate that after El Salvador was designated for Temporary Protected Status (TPS), the Applicant filed a TPS application and was approved in September 2001. She has maintained her TPS since that time.

In denying the application, the Director determined that the unfavorable factors in the Applicant's case included her unlawful entry into the United States, her noncompliance with her 1996 voluntary departure order, and her unlawful presence in the United States. The Director's denial acknowledged the Applicant's favorable factors, including maintaining family ties in the United States, "unusual hardship" to her U.S. citizen spouse and children, "unusual hardship" to herself, her good moral character after her removal order was issued, and unfavorable conditions in her home country. The Director did not provide any analysis of the evidence, but determined that the favorable factors did not outweigh the unfavorable factors and that the Applicant did, therefore, not merit a favorable exercise of discretion.

On appeal, the Applicant asserts that the Director misstated pertinent facts in the decision, and did not consider pertinent evidence she submitted. In particular, she asserts that evidence such as her payment of taxes, community ties, and that she sought to legalize her status and maintained her immigration status through TPS was not considered. She also asserts that her failure to depart the United States under the voluntary departure order was because her son's father (with whom she was in a long-term committed relationship) was an alcoholic and violent towards her and her son, and threatened to harm her if she abandoned him and returned to El Salvador. As explained below, the record supports a finding that the balancing of the positive equities in this case against the unfavorable factors warrants a favorable exercise of discretion.

[1] The approval of her application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart.

The Director's decision did not contain any analysis of the evidence and also included factual errors, which reflects that the Director erred in denying the Applicant's application for permission to reapply for admission. For instance, the Director stated that the Applicant's removal order was issued less than 10 years ago. That statement is factually incorrect because the Applicant was granted voluntary departure until [redacted] 1997 and failed to depart, thereby converting her voluntary departure order into a removal order. However, because that occurred more than 23 years before the Director's decision, the Director erred in stating her removal order was issued less than 10 years ago. Furthermore, we agree with the Applicant that the Director did not appear to consider her affidavit (or corroborating statements from her brother) addressing the reason she did not depart the United States under her voluntary departure order. The Applicant claims, credibly, that at the time of her voluntary departure order, she lived with an abusive and alcoholic domestic partner who threatened to harm her, and their son, if she abandoned him. Thus, while we consider the Applicant's lack of compliance with her voluntary departure order to be a significant unfavorable discretionary factor, she has provided credible statements establishing that she feared for her safety and her son's safety if she abandoned her abusive partner. This evidence substantially mitigates the impact of her lack of compliance with the voluntary departure order and outstanding removal order.

Moreover, the Director cites to the unlawful presence inadmissibility ground as an unfavorable factor. However, the Director does not appear to have considered that the Applicant expressed an intent to file a provisional waiver application, which includes an extreme hardship requirement to waive her inadmissibility for unlawful presence. This is a separate application for relief, and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed, must obtain permission (or consent) to reapply for admission before applying for a provisional unlawful presence waiver. Thus, it appears the Director considered the Applicant's unlawful presence as an unfavorable factor without considering that a waiver is available to her, and that she expressed an intent to pursue a provisional unlawful presence bar waiver.

The Director also failed to properly address evidence of additional significant positive equities in the record, including evidence regarding the claimed emotional hardship to the Applicant, and her immediate family members, her work history, payment of taxes, and her good moral character. For example, the Applicant married her spouse in [redacted] 2000, and has two U.S. citizen sons. She provided evidence establishing the emotional and financial burdens the family will experience if she is removed. When considering whether the Applicant's request for permission to reapply for admission to the United States merits a favorable exercise of discretion, positive factors may include the Applicant's moral character, her respect for law and order, length of lawful residence, and hardship involved to the Applicant, and family members. *See Matter of Tin*, 14 I&N Dec. at 373. Here, all those factors weigh in favor of granting the Applicant's application.

The Applicant, who has lived in the United States for over 30 years, has no apparent criminal history and has been married to her spouse since 2000, states that she would suffer hardship if she was removed in light of her close family ties in the United States, her family's need for her financial and emotional support, her involvement in her Christian religious community as a deacon, and because she has experienced past trauma due to abuse by an alcoholic and abusive domestic partner. The record contains affidavits from the Applicant, her spouse, her sons, her daughter-in-law, several business clients and partners, as well as her brother, credibly addressing the multiple hardships the Applicant will experience if she is denied admission, and attesting to her good moral character. We

also note that country conditions information indicates that El Salvador suffers from significant internal problems that have led to public safety concerns for individuals living there. *See* https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/el-salvador/ (last visited May 6, 2022).

In light of the statements and supporting evidence submitted by the Applicant, we conclude that the Director erred by incorrectly requiring the Applicant to establish extreme hardship to her spouse, and by not fully addressing the combined emotional and financial hardships to the Applicant and her spouse if she is denied admission. Moreover, the Director did not properly address the Applicant's additional positive factors, such as her lawful presence in the United States, employment record, and good moral character. Finally, the denial identified and gave significant weight to negative equities, including the Applicant's failure to heed her removal order and period of unlawful presence in the United States, and did not appear to consider the fact that she has been lawfully present in Temporary Protected Status since September 2001, a period of more than 20 years.

As the record supports a finding that the balancing of the positive equities in this case against the negative factors warrants a favorable exercise of discretion, the Applicant's request for permission to reapply for admission merits approval, and we hereby withdraw the Director's decision.

ORDER: The appeal is sustained.