U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15920717

Date: MAY 6, 2022

Appeal of New York City Field Office Decision

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

The Applicant has an outstanding removal order against her. She seeks advance consent to reapply for admission so that, if she obtains an immigrant visa abroad, she may legally return to the United States within five years of leaving. *See* Immigration and Nationality Act (the Act) sections 212(a)(9)(A)(i), (iii), 8 U.S.C. § 1182(a)(9)(A)(i), (iii).

The Director of the New York City Field Office denied the application as a matter of discretion. On appeal, the Applicant submits additional evidence. She asserts that the Director disregarded proof that her absence from the United States would cause unusual hardship to her and her family. She also contests the Director's finding that she tried to enter the country by willfully misrepresenting a material fact.

The Applicant bears the burden of establishing admissibility to the United States "clearly and beyond doubt." *See Matter of Bett*, 26 I&N Dec. 437, 440 (BIA 2014). Regarding the requested inadmissibility exception, she must demonstrate eligibility by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that, in determining whether to exercise favorable discretion, the Director considered improper, adverse factors and did not fully credit potential hardship to the Applicant and her family. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. INADMISSIBILITY

Noncitizens who have been ordered removed, deported, or excluded from the United States generally cannot gain admission to the country immediately after leaving. *See* sections 212(a)(9)(A)(i), (ii) of the Act. If ordered removed as "arriving aliens,"[1] noncitizens are generally barred from returning to the country for at least five years after leaving. Section 212(a)(9)(A)(i) of the Act. Noncitizens otherwise ordered removed, deported, or excluded generally cannot return to the United States within 10 years of their departures. Section 212(a)(9)(A)(ii) of the Act. These inadmissibility grounds do

[1] The term "arriving alien" includes an applicant for admission attempting to enter the United States at a port-of-entry. 8 C.F.R. § 1.2.

not apply, however, if U.S. Citizenship and Immigration Services (USCIS) consents to noncitizens' reapplications for admission before the noncitizens return to the United States. Section 212(a)(9)(A)(iii) of the Act.

The record shows that the Applicant, a 62-year-old native and citizen of Albania, sought U.S. admission with her two sons at the international airport in [redacted] New Jersey in [redacted] 1998.[2] U.S. immigration officers denied the family admission, detained them, and placed them in removal proceedings. In [redacted] 1999, an Immigration Judge (IJ) found them inadmissible for lack of valid entry documents under section 212(a)(7)(A)(i) of the Act, denied their applications for relief, and ordered them removed to Albania. The Board of Immigration Appeals (BIA) affirmed the IJ's decision in September 2002. The Applicant and her sons, who were paroled from custody during removal proceedings, have since remained in the country.

The Director found, and the Applicant stated on her Form I-212, that her departure from the United States would render her inadmissible to the country for the following 10 years. *See* section 212(a)(9)(A)(ii)(I) of the Act. The Applicant, however, received a Form I-862, Notice to Appear, charging her with removability as an arriving alien. Also, the IJ's decision states that he ordered her removed based on her inadmissibility as an applicant for admission. Thus, the record demonstrates that the Applicant was ordered removed as an arriving alien and that her departure from the United States would render her inadmissible for only five years. *See* section 212(a)(9)(A)(i) of the Act (applying to "[a]ny alien who has been ordered removed . . . at the end of proceedings under section 240 initiated upon the alien's arrival in the United States"). We will therefore withdraw the Director's contrary finding.

To legally return to the United States within five years of her departure, however, the Applicant would still need an inadmissibility exception under section 212(a)(9)(A)(iii) of the Act.[3]

II. THE DISCRETIONARY DECISION

USCIS may consent to reapplications for admission at its discretion. *See* section 212(a)(9)(A)(iii) of the Act. Thus, successful Form I-212 applicants must demonstrate social and humanitarian factors outweighing adverse evidence of record. *See Matter of Tin*, 14 I&N Dec. 371, 373-74 (BIA 1973).

In determining whether to exercise favorable discretion, USCIS should consider: the basis and recency of an applicant's removal; the length of their U.S. residence; their moral character and respect for law and order; evidence of their rehabilitation; their family responsibilities; their commission of repeated immigration violations; hardship to themself or others; close family ties in the United States; the need for their services in the country; and any other relevant factors. *Id.* at 373.

Here, the Director found that adverse factors outweigh favorable ones. The Director identified the following favorable equities: potential hardship to the Applicant, her sons, her mother-in-law, and her U.S.-citizen sister-in-law; her good moral character since the removal order's issuance; the importance

[2] The Applicant's sons are now 37 and 33 years old.

[3] The Applicant hopes to obtain an immigrant visa as the derivative of her spouse, the primary beneficiary of an approved immigrant visa petition as the brother of a U.S. citizen. *See* section 203(a)(4) of the Act, 8 U.S.C. § 1153(a)(4).

of maintaining her family's unity; and poor conditions in her home country of Albania. On the other hand, the Director identified the following adverse factors: the Applicant's noncompliance with the removal order; her "unlawful presence" in the United States;[4] her lack of valid entry documents; and her purported attempt to gain U.S. admission by willfully misrepresenting her identity.

As the Applicant argues on appeal, however, evidence does not support the Director's finding that the Applicant tried to enter the United States by willfully misrepresenting a material fact. The record shows that, upon arrival at the airport in 1998, the Applicant presented a false passport with her photograph substituted for the woman for whom the document was originally issued. But, once U.S. immigration officers obtained an interpreter allowing them to converse with the Applicant, she admitted the passport's falsity and identified herself and her sons. *See Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (holding that noncitizens do not materially misrepresent their identities if they withdraw false testimony "voluntar[ily] and without delay." U.S. immigration officers charged the Applicant with removability/inadmissibility for trying to enter the country by willfully misrepresenting her identity. *See* section 212(a)(6)(C)(i) of the Act. But neither the IJ nor the BIA sustained the allegation. The Director did not explain her contrary finding or cite sufficient evidence supporting it. We will therefore withdraw this adverse factor.

The Director also found that the Applicant did not establish that her "wife and stepchildren would face extreme hardship in the event of [her] departure." The record does not indicate that the Applicant has a wife or stepchildren. But, assuming that the Director expected the Applicant to demonstrate "extreme hardship" to her family members, the Director erred. Form I-212 applicants need not demonstrate "extreme hardship" to qualifying relatives. *See* section 212(a)(9)(A)(iii) of the Act; *Matter of Tin*, 14 I&N Dec. at 374 (listing potential favorable discretionary factors as including "hardship" to an applicant or others). To obtain a provisional waiver of her unlawful presence, the Applicant would need to demonstrate extreme hardship to a U.S.-citizen or lawful-permanent-resident spouse or parent. *See* section 212(a)(9)(B)(v) of the Act; 8 C.F.R. § 212.7(e). But applications for consent to reapply are separate from those for provisional, unlawful presence waivers, and noncitizens needing to file both types of applications must submit their Form I-212 applications first. 8 C.F.R. § 212.7(e)(4)(iv). The Director therefore erred in expecting the Applicant's Form I-212 submission to meet the extreme hardship standard. We will therefore also withdraw this adverse factor.

Additionally, in considering the Applicant's noncompliance with the removal order, the Director should have noted the Department of Homeland Security's 2009 issuance of an "order of supervision" to the Applicant. *See* section 241(a)(3) of the Act, 8 U.S.C. § 1231(a)(3) (allowing U.S. immigration officials to release noncitizens from custody and supervise them if they do not leave the country within the Act's 90-day removal period). The order shows that the Applicant has remained in the United States for most of the time since her removal order became final under the authorization of U.S. immigration officials. The order of supervision therefore mitigates her noncompliance with the removal order.

Also, the record does not indicate the Director's full consideration of potential hardship to the Applicant and her family. The Director listed "hardship" to the Applicant and her relatives as a

[4] The term "unlawful presence" includes presence in the United States after entry without admission. Section 212(a)(9)(B)(ii) of the Act.

favorable factor. But the Director did not discuss the nature or degree of the potential difficulties. The record documents that the Applicant and her sons have chronic, mental illnesses for which they take psychotropic medicines. On appeal, the Applicant submits evidence that in 2009, before doctors prescribed her medications, she was hospitalized with schizoaffective disorder and severe depression "with psychotic features." Her appeal includes evidence of poor mental health care in Albania and unavailability of her medications there. She also submits evidence that she primarily cares for her 93-year-old mother-in-law, whom she says has difficulty standing and has lost control of her bodily functions. *See* 9 *USCIS Policy Manual* B(5)(E)(5) (describing "the continuation of one's existing caregiving duties under new and difficult circumstances" as a potential hardship factor).

Because of the foregoing oversights, we will remand the matter. On remand, the Director should review the entire record, reconsider the discretionary factors, and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.