U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18822208

Date: MAY 09, 2022

Appeal of Newark, New Jersey 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).

The Director of the Newark, New Jersey Field Office, 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. Furthermore, the Director evaluated the favorable and unfavorable factors in the Applicant's case and concluded that a favorable exercise of discretion was not warranted.

On appeal, the Applicant concedes that she will become inadmissible under section 212(a)(6)(B) of the Act upon her departure from the United States, but contends that she has established that her Form I-212 merits a favorable exercise of discretion.

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. 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).

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 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).

II. ANALYSIS

The issue raised on appeal is whether the Applicant should be granted conditional approval of her Form I-212 in the exercise of discretion. We agree with the Director's determination that a favorable exercise of discretion is not warranted in her case and conclude that no purpose would be served in approving her Form I-212, as the record indicates that she would become inadmissible upon departure from the United States pursuant to section 212(a)(6)(B) of the Act, a ground for which no waiver is available.

The Applicant entered the United States without inspection on or about [redacted] 2005. She was subsequently apprehended by immigration officials and personally served a Notice to Appear. The Applicant did not attend her removal hearing on [redacted] 2005, and was ordered removed by an immigration judge *in absentia* on that date. 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 is 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.[1]

The Applicant states that she "understands that she has a mandatory 5-year bar due to her inadmissibility under INA 212(a)(6)(B)" and does not claim that she can demonstrate reasonable cause for failing to appear at her 2005 removal proceeding. Rather, she claims that her Form I-212 merits a favorable exercise of discretion notwithstanding her inadmissibility under section 212(a)(6)(B) of the Act. The Applicant contends that she requires an approved Form I-212 to pursue relief for her *in absentia* removal order through consular processing and in order to file a Form I-601A, Application for Provisional Unlawful Presence Waiver.[2] She further states that she "may be eligible for other waivers which will inevitably help her enter the U.S. at a swifter pace after her 5 years of departure."

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 her eligibility for a visa, including whether the Applicant is inadmissible

[1] 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.

[2] Section 212(a)(9)(B)(i)(II) of the Act provides that a noncitizen who has been unlawfully present in the United States for one year or more is inadmissible for ten years from the date of their departure from the United States.

under section 212(a)(6)(B) or under any other ground.[3] 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.

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. The Applicant concedes her inadmissibility under section 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. 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 based on a balancing of those factors. The application will remain denied.

ORDER: The appeal is dismissed.

[3] The record reflects that the Applicant may be inadmissible under section 212(a)(6)(E) of the Act, which provides that any noncitizen who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other noncitizen to enter or to try to enter the United States in violation of law is inadmissible for smuggling. A discretionary waiver is available under section 212(d)(11) of the Act, but only to those noncitizens whose smuggling violations involved aiding a spouse, parent, son, or daughter (and no other individual) to enter the United States unlawfully.

When the Applicant entered the United States without being inspected and admitted or paroled in [redacted] 2005, she was accompanied by a minor who she claimed was her daughter. In his decision denying the Form I-212, the Director observed that the application and supporting documentation indicate that the Applicant has only one child, a daughter born in the United States in 2011. The Director determined the information submitted with this application calls into question "the legitimacy of what you told the border patrol about this minor who was ultimately released into your custody." On appeal, counsel states that the child who accompanied the Applicant at the time of her unlawful entry is her niece. The record does not include civil documents for the individual in question establishing her relationship with the Applicant. If the individual who entered unlawfully with the Applicant is in fact her niece and not her daughter, the Applicant would be ineligible to apply for a discretionary waiver of inadmissibility under section 212(d)(11) of the Act. As the Applicant indicates her intent to apply for an immigrant visa, the U.S. Department of State will make the final determination as to whether the Applicant is permanently inadmissible under section 212(a)(6)(E) of the Act.