U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16895933

Date: MAY 10, 2022

Appeal of Tampa, Florida 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), for having been previously ordered deported.

The Director of the Tampa, Florida Field Office denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, concluding that U.S. Citizenship and Immigration Services (USCIS) does not have jurisdiction to adjudicate it.[1] The matter is now before us on appeal.

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; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Except where a different standard is specified by law, an applicant must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). This office reviews 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 dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides, in part, that a noncitizen who has been ordered removed under section 240 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) 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.

[1] The Director concurrently denied the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, noting that she has an outstanding order of deportation from an immigration judge. The Director determined that because the Applicant is a respondent in a deportation proceeding that has not been terminated and is not an "arriving alien," only the Executive Office for Immigration Review (EOIR) has jurisdiction over her adjustment of status application.

The regulation at 8 C.F.R. § 245.2(a)(1) states that USCIS has jurisdiction to adjudicate an application for adjustment of status filed by any noncitizen unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1).

The regulation at 8 C.F.R. § 1245.2(a)(1) states that for any individual who has been placed in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the individual may file.[2]

II. ANALYSIS

The Applicant was placed in deportation proceedings on [redacted] 1994, and ordered deported *in absentia* by an EOIR immigration judge on [redacted] 1994. The record reflects that the Applicant concurrently filed Form I-485 and Form I-212 on September 18, 2019, with the Tampa, Florida Field Office. The Director found that the Applicant is under the jurisdiction of the EOIR, as she is a respondent in a deportation proceeding that has not been terminated and she is not an arriving alien, and only the EOIR has jurisdiction to grant or deny her Form I-485 under 8 C.F.R. § 1245.2(a)(1). Consequently, the Director denied the Form I-485 and Form I-212 due to lack of jurisdiction to review the applications.[3]

On appeal, the Applicant states that the Director's decision is flawed because it "failed to analyze and apply the facts in accordance to the law and regulations" and "arbitrarily fails to consider any discretionary factors." While the Applicant also claims that the Tampa, Florida Field Office had jurisdiction to adjudicate all of her applications, she provides no evidence or arguments to support this claim or to refute the Director's determination that jurisdiction over her adjustment application lay with EOIR and not USCIS.

The Applicant further claims that she is eligible for *nunc pro tunc* approval of her Form I-212 and therefore requests that the application be adjudicated on its merits.[4] However, as discussed, the Director denied the Form I-485 on the grounds that the Applicant is not eligible to adjust her status before USCIS. Thus, no purpose would be served in adjudicating her Form I-212 as it would not result in her adjustment of status to that of a lawful permanent resident[5] We will therefore dismiss the appeal of the denial of her Form I-212 as a matter of discretion.

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[2] Except if the applicant is an "arriving alien," the immigration judge (and not USCIS) has jurisdiction if an applicant is in removal proceedings, even if the proceedings have been administratively closed or if there is a final order of deportation or removal which has not yet been executed. *See* 7 *USCIS Policy Manual* A.3(D), https://www.uscis.gov/policy-manual.

[3] The record reflects that the Applicant also previously filed Form I-485 and Form I-212 applications with the Tampa, Florida Field Office on May 10, 2017. The Director administratively closed the prior Form I-485 and Form I-212 applications due to lack of jurisdiction for the same reasons articulated above.

[4] Board of Immigration Appeals precedent allows *nunc pro tunc* approval in limited circumstances where a grant of permission to reapply for admission would eliminate the only ground of inadmissibility and thereby effect a complete disposition of the case. *See Matter of Garcia-Linares*, 21 I&N Dec. 254 (BIA 1996); *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976).

[5] We recognize that individuals who currently reside in the United States may seek conditional approval of a Form I-212 prior to their departure from the United States under the regulation at 8 C.F.R. § 212.2(j). The record does not establish that the Applicant intends to apply for an immigrant visa abroad and is thus seeking conditional permission to reapply for admission prior to departing the United States.

ORDER: The appeal is dismissed.