U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15763985

Date: May 17, 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), because she will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the Newark Field Office, New Jersey denied the Form 1-212 as a matter of discretion, concluding that favorable factors did not outweigh the unfavorable factors in the case. On appeal, the Applicant claims that the Director did not properly weigh all the positive factors in her case, and that she merits a favorable exercise of discretion.[1]

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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 foreign national, other than an arriving foreign national, 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. A foreign national 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 re-embarkation 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 Applicant also contends that she is not inadmissible under section 212(a)(6)(B) of the Act, in that her removal order was invalid because she was a minor, at the time of the issuance of her Notice to Appear (NTA), and thus did not understand the information provided in the NTA regarding her removal hearing. She did not attend the hearing, and the removal order was issued *in absentia;* however, we have no jurisdiction over this matter. Jurisdiction over motion to reopen in absentia orders lie with the Immigration Court. *See* section 240(b)(5)(C) of the Act, 8 U.S.C. § 1229a(b)(5)(6); and 8 C.F.R. § 1003.23(b)(4)(ii). While we agree with the Director that the Applicant may become inadmissible for five years upon departure/removal pursuant to section 212(a)(6)(B) of the Act, because the Applicant intends to apply for an immigrant visa, the Department of State will make the final determination regarding her inadmissibility with respect to the visa.

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. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee, supra*, at 278.

II. ANALYSIS

The record reflects, and the Applicant does not dispute, that she entered the United States without inspection, admission, or parole around [redacted] 2005; she was placed into removal proceedings and was ordered removed *in absentia* in [redacted] 2005 and she did not depart the country. The record thus reflects that upon departure from the United States, the Applicant will become inadmissible for ten years under section 212(a)(9)(A)(ii) of the Act, for having been previously ordered removed. Approval of her application under these circumstances is conditioned upon the Applicant's departure from the United States and it will have no effect if she fails to depart. The issue on appeal is whether the Applicant has established that she merits conditional approval of her application for permission to reapply for admission in the exercise of discretion.

The Director determined that the Applicant did not establish the positive factors outweighed the negative factors in her case, or that she merited a favorable exercise of discretion. On appeal, the Applicant indicates that the Director did not properly weigh the favorable factors, and that her conditional application should be approved. Upon review, we agree with the Director's determination that the Applicant has not established the positive factors outweigh the negative factors in her case, or that a favorable exercise of discretion is warranted.[2]

The unfavorable factors in the Applicant's case include the following serious immigration violations: her entry into the United States without inspection or parole in or around [redacted] 2005; her failure to appear at her removal hearing and her failure to depart the country after being ordered removed in [redacted] 2005, and her unlawful presence in the United States since 2005.

The favorable factors in the Applicant's case include her 2015 marriage to a U.S. citizen, and any hardships the Applicant and her spouse will experience if she is denied permission to reapply for admission into the country. The record does not contain a personal statement from the Applicant's spouse. In part 6 of the Form I-212, the Applicant indicates that upon separation, her husband would be left alone as she is his only family in the United States, and that he would also experience financial hardship upon separation because he would have to provide financial support to her in Guatemala as well as take on their collective debt obligations in the United States. She further indicates that her husband would undergo financial hardship if he relocated with her as he would be unable to find lucrative employment and would still have to meet their collective debt obligations in the United States. While the Applicant appears to rely on financial documentation offered in support of her

[2] While we may not discuss every document submitted, we have reviewed and considered each one.

previous Form I-212 conditional application (which was filed in January 2017 and denied in August 2018), the record lacks evidence of the couple's current financial situation sufficient to establish the asserted financial hardships.

The Applicant also indicates that she suffers from diabetes and severe allergies for which she sees a doctor every few months and asserts that she will need to take medication for her medical conditions for the rest of her life. As noted by the Director, the Applicant has not provided evidence that details the severity of her medical conditions, the prognoses, or required treatments, such that we can determine the medical hardship that the Applicant would incur should this application remain denied.

After carefully considering all of the evidence in the record, we conclude that the Applicant has provided insufficient evidence to establish that the positive factors in her case (such as her marriage to a U.S. citizen spouse and her lack of a criminal record) outweigh the negative factors in her case (her entry into the United States without inspection or parole; her failure to appear at her removal hearing, and failure to depart the country after being ordered removed; and her presence in the United States without status since 2005), or that a favorable exercise of discretion is warranted.

ORDER: The appeal is dismissed.