U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20256416

Date: MAY 17, 2022

Appeal of Nebraska Service Center 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 he will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the Nebraska Service Center denied the application. The Director also denied the Applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, because the Applicant did not respond to a request for evidence, asking the Applicant to establish whether the Form I-601 was based on either an immigrant visa application filed with the Department of State; or a pending Form I-485, Application to Register Permanent Residence or Adjust Status, or Form I-821, Application for Temporary Protected Status. The Director concluded that, because the Form I-601 was denied, the Applicant would remain inadmissible to the United States even if U.S. Citizenship and Immigration Services (USCIS) were to grant the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. 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. Upon *de novo* review, we will remand the matter to the Director for the entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), 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 reapplying for admission.

The regulation at 8 C.F.R. § 212.2(j) provides that a noncitizen whose departure will execute an order of deportation shall receive a conditional approval depending on the noncitizen's satisfactory departure. However, the grant of permission to reapply under 8 C.F.R. § 212.2(j) does not waive inadmissibility under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), resulting from exclusion, deportation, or removal proceedings which are instituted subsequent to the date permission to reapply is granted. 8 C.F.R. § 212.2(j).

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. *See 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); *see also Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience").

II. ANALYSIS

The record indicates that the Applicant was ordered removed in 2006. He currently resides in the United States and is seeking conditional approval of the Form 1-212 before he departs, as he will be inadmissible under section 212(a)(9)(A) of the Act upon his departure due to his prior removal order. The record includes documentation indicating that the Applicant is the beneficiary of an approved immigrant petition as the spouse of a U.S. citizen.

As noted above, the Applicant concurrently filed a Form I-212 and a Form I-601.[1] The Director denied the Form I-601[2] and then denied the Form I-212 as a matter of discretion, concluding that "[b]ecause

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[1] We note that on the Form I-601, the Applicant self-identified two grounds of inadmissibility for which he preemptively requested a waiver: having been involved in a crime of moral turpitude (other than a purely political offense), *see* section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I); and having been unlawfully present in the United States for one year or more, which will trigger upon subsequently departing the United States. *See* section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). On appeal, the Applicant asserts that the criminal conviction in question, a violation of the State of Washington statute RCW § 9A.48.080, second degree malicious mischief, is not a crime involving moral turpitude. *See Rodriguez-Herrera v. INS*, 52 F.3d 238, 239 (9th Cir. 1995). The Applicant asserts that because he has not been convicted of a crime involving moral turpitude, there is no inadmissibility under that ground for which he would need to request a waiver. Moreover, because the Applicant has not departed the United States after a period of one year or more of unlawful presence, he asserts that he has not triggered that ground of inadmissibility and, therefore, need not request a waiver for that potential ground of inadmissibility before departing the United States.

[2] We note that the Director did not state that he was summarily denying the Form I-601 as abandoned. *See* 8 C.F.R. § 103.2(b)(13)(i).

USCIS has denied [the] Form I-601, [the Applicant] would remain inadmissible to the United States even if USCIS were to grant [the] Form I-212."

On appeal, the Applicant asserts that the Form I-601 was prematurely filed and unnecessary for the adjudication of the Form I-212; therefore, its denial does not preclude the Applicant from requesting conditional approval of Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States. The Applicant further explains that he filed the Form I-601 "as a protective measure, in case he would be eligible for adjustment of status and, in the context of the adjustment process, the agency claimed that a waiver was necessary."

Because the Applicant has indicated that he will depart the United States and apply for an immigrant visa, the U.S. Department of State will make the final determination concerning his eligibility for a visa, including whether he is inadmissible under any section of the Act. Applicants may apply for a conditional Form 1-212 irrespective of whether they will also require a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act for unlawful presence or under section 212(h) of the Act for a crime of moral turpitude.[3] In this case, the denial of the Form I-601 does not preclude the Applicant from requesting conditional approval of Form I-212 before departing the United States. Thus, the Director erred in denying the Form I- 212 based on the denial of the Form 1-601.

Because the Applicant is eligible to apply for a conditional Form 1-212 prior to his departure, we are remanding the matter for the Director to weigh the positive and negative factors in the Applicant's case and evaluate whether he merits permission to reapply for admission as a favorable exercise of discretion.

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

[3] Evidence that the Applicant's departure will trigger inadmissibility under a ground for which no waiver is available is relevant to determining whether a Form I-212 should be approved as a matter of discretion. *See id.* However, the record does not indicate, nor did the Director assert, that the Applicant's departure will trigger inadmissibility under a ground for which no waiver is available.