U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21035283

Date: MAY 27, 2022

Appeal of San Fernando Valley, California 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 San Fernando Valley, California Field Office denied the application as a matter of discretion, finding that adjudicating the Applicant's request for permission to reapply for admission would serve no purpose because she was also inadmissible under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause, a ground of inadmissibility that may not be waived. On appeal, the Applicant submits a brief and additional evidence in support of her application.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter for the entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in pertinent part that any noncitizen 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 a noncitizen 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) 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.

Any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine their inadmissibility or deportability and who seeks admission to the United States within five years of their subsequent departure or removal is inadmissible. Section 212(a)(6)(B) of the Act.

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 record indicates that the Applicant entered the United States without inspection, authorization, or parole in July 2006. In [redacted] 2006, the Applicant was placed into removal proceedings before an Immigration Judge. In [redacted] 2006, the Applicant failed to appear for a hearing and was ordered removed *in absentia*.[1] *See* section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A) (stating that any individual who does not attend a required hearing "shall be ordered removed in absentia if [the Department of Homeland Security (DHS)] establishes by clear, unequivocal, and convincing evidence that . . . written notice was . . . provided and that the [individual] is removable"). The Applicant has not departed the United States.

The Applicant filed the instant Form I-212, Application for Permission to Reapply for Admission (Form I-212), in May 2021, seeking conditional approval of the application prior to her departure from the United States under 8 C.F.R. § 212.2(j) (enabling an applicant whose departure will execute an order of removal to seek conditional approval depending upon their "satisfactory departure"). The Director denied the application, concluding that the Applicant was inadmissible under section 212(a)(9)(A)(ii) of the Act and did not establish that a favorable exercise of discretion was warranted in her case. In the denial, the Director cited the Applicant's failure to attend her removal hearing in [redacted] 2006, concluding that her violation of U.S. immigration laws and failure to comply with the order from the Immigration Judge weighed against approval of her permission to reapply for admission. According to the Director, the Applicant did not demonstrate that she had reasonable cause for failing to attend her hearing.

On appeal, the Applicant contends that she is not inadmissible because (1) she intends to apply for an immigrant visa abroad, and the U.S. Department of State (DOS) will make the final determination regarding her inadmissibility under section 212(a)(6)(B);[2] (2) unlike the mandatory inadmissibility at

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[1] 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 their inadmissibility or deportability, and who seeks admission to the United States within five years of their subsequent departure or removal, is inadmissible. Section 212(a)(6)(B) of the Act is a separate ground of inadmissibility, applicable upon subsequent departure from the United States, that imposes a penalty specifically for failing to attend a removal hearing.

[2] The Applicant cites to an unpublished AAO decision in support of her contention that DOS makes the final determination regarding inadmissibility under section 212(a)(6)(B) of the Act. However, the cited decision was not published as precedent and, accordingly, does not bind USCIS in future adjudications. 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act"). Non-precedent decisions apply existing law and policy to the specific facts of the individual case and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Further, we acknowledge that, as the Applicant intends to depart the United States and apply for an immigrant visa, DOS will make the final determination concerning her eligibility for a visa, including whether the Applicant is inadmissible under section 212(a)(6)(B) of the Act or under any other ground, when she seeks to reenter. However, evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available is relevant to determining whether permission to reapply for admission should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances. *See Matter of Martinez-Torres,* 10 I&N Dec. 776, 776-66 (Reg'l Comm'r 1964) (stating that,

issue in *Martinez-Torres*, she is not currently subject to any ground of inadmissibility for which there is no waiver, (3) she had reasonable cause for failing to attend her removal hearing; and (4) she has demonstrated that she merits a favorable exercise of discretion.

The issue on appeal is whether the Applicant should be granted conditional approval of her application for permission to reapply 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 find 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.

However, the Applicant contends that she is not inadmissible because she has established that she had reasonable cause for failing to attend her removal hearing in [redacted] 2006. She submits new evidence on appeal to support that claim. Specifically, the Applicant contends that she failed to appear for her hearing because she was suffering from the serious medical illness of posttraumatic stress disorder (PTSD) and major depressive disorder with anxious distress in partial remission. The new evidence the Applicant submits on appeal includes an updated statement and an evaluation from a psychotherapist concerning the state of her mental health when she failed to appear for her 2006 hearing. As this new evidence was not before the Director when he made his determination that the Applicant had not established reasonable cause for failing to attend her removal hearing, and it appears material to that claim, we find it appropriate to remand this matter back to the Director so that he may consider this new evidence in the first instance and issue a new decision. We express no opinion as what the outcome of that decision should be.

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

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when the applicant is mandatorily inadmissible to the United States under a provision of the Act, "no purpose would be served in granting" the Form I-212).