U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16807915

Date: MAY 31, 2022

Appeal of Queens, New York 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 Queens, New York Field Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in her case.

The Applicant bears the burden of proof in these proceedings 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). 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 remand the matter to the Director for additional review and the entry of a new decision.

I. LAW

The Applicant is seeking permission to reapply for admission to the United States and has been found inadmissible for having been previously ordered removed.

Section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), provides that any "arriving alien . . . who has been ordered removed under section 235(b)(1) [of the Act, 8 U.S.C. § 1225(b)(1),] or at the end of proceedings under section 240 [of the Act, 8 U.S.C. § 1229a,] initiated upon the arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years 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."

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any alien, 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."

Additionally, a noncitizen who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act, is inadmissible. Section 212(a)(6)(C)(i) of the Act.

Foreign nationals 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 foreign national'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 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 reflects that the Applicant first entered the United States without being inspected, admitted or paroled in December 2006. She departed after seven months, in July 2007. The Applicant again entered the United States without being inspected, admitted or paroled on April 17, 2008 and has not departed. An Immigration Judge ordered the Applicant removed on [redacted], 2011, but granted withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3).

The Applicant is currently in the United States and seeks permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing the United States.[1] Because she has an outstanding order of removal, she will be inadmissible under section 212(a)(9)(A)(ii) of the Act once she departs.

[1] The approval of her application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

In denying the application, the Director reviewed evidence concerning the Applicant's family ties to the United States and other favorable factors and determined that the Applicant's favorable factors did not outweigh the unfavorable factors.

As favorable factors, the Director acknowledged the Applicant's 14 years of residence in the United States and her family ties, including her U.S. citizen spouse and two U.S. citizen children, ages 9 and 11. However, the Director noted that the Applicant's 2013 marriage and the birth of her second child occurred after her 2011 removal order, and stated that equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination).

The Director found that the Applicant's unfavorable factors included her illegal entry to the United States, her unlawful presence under section 212(a)(9)(B)(i) of the Act, and misrepresentations she made on prior applications for immigration benefits. Specifically, the Director stated that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting her dates and manner of entry on prior applications.

The Director noted that the Applicant did not disclose her initial entry without inspection and departure from the United States when she requested withholding of removal. He further noted that the Applicant previously submitted a Form I-140, Immigrant Petition for Alien Worker, requesting immigrant classification as an individual with extraordinary ability under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A). The Form I-140 indicates that the Applicant entered the United States in 2007 as a B-2 nonimmigrant. A copy of a B-1/B-2 visa and a Form I-94 Departure Record in the Applicant's name is included in the record. However, the documents do not appear to be genuine as U.S. Department of State records concerning the foil and control number of this visa and USCIS records concerning the departure number of the Form I-94 do not match the Applicant. A document may be found fraudulent without forensic analysis where the document contains obvious defects or identifiable indicators of fraud, and an opportunity to explain the defects has been provided. *See Matter O-M-O*, 28 I&N Dec. 191 (BIA 2021).

On appeal, the Applicant contends that although she has been ordered removed she remains in the United States lawfully because her removal has been withheld. She reiterates that she intends to apply for an immigrant visa abroad as a spouse of a U.S. citizen to overcome her 2008 entry without inspection. She asserts that the Director erred in declining to favorably exercise discretion in her case based on the past immigration violations alone. She further asserts that the Director did not consider the emotional, psychological and financial hardship that she, her U.S. citizen spouse, and their U.S. citizen children would suffer if she is removed from the United States or if they relocated with her to China.

The Applicant contends that the Director erred by finding her inadmissible for willful misrepresentation. The Applicant does not contest that the information concerning her entry and

nonimmigrant status on the Form I-140 was incorrect and that the supporting visa and I-94 record were not genuine. However, she asserts that she did not prepare or sign the Form I-140 and did not provide any supporting documents for this petition. She further contends that she was a victim of immigration fraud and had no knowledge of the petition's filing until it was brought to her attention during removal proceedings. On appeal she provides a copy of her passport that does not include any U.S. visa, as well as a sample of her signature demonstrating that it does not match the signature on the Form I-140.

As stated above, here the Applicant is seeking advance approval of her Form I-212 to cure her *prospective* inadmissibility under section 212(a)(9)(A)(ii) of the Act. The Applicant has not previously been found inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation. No such determination was made during the Form I-140 adjudication or during her removal proceedings. We note that a U.S. Department of State consular officer will determine her admissibility and eligibility during her immigrant visa interview.

Because the Applicant has not departed from the United States she has not yet triggered the grounds of inadmissibility under sections 212(a)(9)(A)(ii) and 212(a)(9)(B) of the Act. While the Director pointed to the Applicant's unlawful presence in the United States as an adverse factor, the Applicant may seek advance permission to reapply for admission irrespective of inadmissibility under section 212(a)(9)(B) of the Act.[2] Moreover, as a spouse of a U.S. citizen the Applicant may request either a provisional waiver of unlawful presence under section 212(a)(9)(B)(v) of the Act before departure[3] or, in the alternative she may apply for a waiver in immigrant visa proceedings if the U.S. Department of State determines that she is inadmissible on this ground. Under these circumstances, the fact the Applicant may become inadmissible for unlawful presence upon departure should not weigh against her in the discretionary analysis.

Furthermore, although the removal order is a negative factor, there are also mitigating circumstances as the Applicant was granted withholding of removal, a form of relief available only to noncitizens who can demonstrate that their life or freedom would be threatened if they were to be removed. *See* section 241(b)(3) of the Act.

The Director did not identify any unfavorable factors in the case aside from the prospective inadmissibility grounds which, as discussed, do not impact the Applicant's eligibility to seek conditional permission to reapply for admission to the United States and for which she may seek a waiver. However, the Director determined that the positive equities included the Applicant's family ties, to which he attributed less weight as after-acquired equities.

On appeal, the Applicant asserts that the Director also erred in considering her family ties as equity acquired after her 2011 order of removal. She notes that, although she married her spouse in 2013, this was her second marriage to her same spouse. The Applicant and her spouse first married in 2008, before the Applicant was placed into removal proceedings, and divorced in 2012. However, the couple reconciled and remarried in 2013.

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[2] *See* Instructions for Form I-212, https://www.uscis.gov/i-212.

[3] Such a waiver is a separate form of relief and pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver.

Although the Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, he did not fully address the evidence of additional significant favorable factors in the record, including evidence regarding hardship to the Applicant's U.S. citizen spouse and children. For example, the Applicant's spouse states that he and the couple's two children would suffer emotional, psychological and financial hardship if she is removed. The previously submitted evidence includes the Applicant's spouse's statement supported by his medical records and a letter from his neurologist; his statement that he and the Applicant own a business together in the United States and that they pay taxes; and evidence of the Applicant's good moral character and apparent lack of criminal convictions.[4]

In light of the deficiencies noted above, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence and weigh the favorable factors against the unfavorable factors to determine whether the Applicant warrants 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.

[4] The Applicant discloses that she was arrested in 2014 following a domestic dispute and submits evidence that all charges were dismissed.