



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 23053799

Date: NOV. 8, 2022

Appeal of Omaha, Nebraska Field Office Decision

Form I-212, Application for Permission to Reapply for Admission

The Applicant seeks advance permission to reapply for admission, as her departure from the United States would execute a removal order and render her inadmissible to the country for the following five years. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(A)(i), (iii) 8 U.S.C. § 1182(a)(9)(A)(i), (iii).

The Director of the Omaha, Nebraska Field Office denied the application as a matter of discretion. On appeal, the Applicant argues that the Director disregarded discretionary factors in her favor and misunderstood her lawful permanent resident spouse's fear of returning to their home country.

The Applicant bears the burden of establishing eligibility for the requested benefit. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we agree that the Director overlooked positive, discretionary factors and improperly faulted a trip by the Applicant's spouse to their home country. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Noncitizens ordered removed upon arriving in the United States generally cannot gain admission to the country within five years of the departures executing their removal orders. Section 212(a)(9)(A)(i) of the Act; *see also* section 101(g) of the Act, 8 U.S.C. § 1101(g). U.S. Citizenship and Immigration Services (USCIS), however, may grant exceptions to this inadmissibility ground if, before noncitizens' return to the United States, the Agency approves their applications for permission to reapply. Section 212(a)(9)(iii) of the Act.

As in this case, noncitizens may apply for permission to reapply for admission before leaving the United States. 8 C.F.R. § 212.2(j). Advance approvals, however, do not take effect unless the applicants leave the country. *Id.*

II. ANALYSIS

A. Inadmissibility

The Applicant concedes, and USCIS records confirm, her inadmissibility to the United States under section 212(a)(9)(A)(i) of the Act. U.S. immigration authorities found her near the U.S.-Mexican border outside [] Texas in [] 2013. She told authorities that she had rafted across the Rio Grande from Mexico and sought to live and work in Nebraska. The Applicant lacked a visa or other entry documents allowing her to legally enter the United States. Authorities therefore found her inadmissible under section 212(a)(7)(A)(i)(I) of the Act and ordered her removed from the country on an expedited basis. *See* section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).

Immigration authorities released the Applicant from custody on an order of supervision. *See* section 241(a)(3) of the Act, 8 U.S.C. § 1231(a)(3). After her entry, she expressed a fear of persecution in her home country of Guatemala, and an asylum officer interviewed her. *See* section 235(b)(1)(A)(ii) of the Act. The officer found her ineligible to apply for asylum, and an Immigration Judge affirmed the officer's decision. *See* section 235(b)(1)(B)(iii)(I, III) of the Act. The Applicant has remained in the United States since her entry. Beginning in [] 2020, authorities have granted her applications for stays of removal. *See* section 241(c)(2)(A) of the Act.

The Applicant has the unexecuted, expedited removal order against her and, upon leaving the United States, would execute the order and render herself inadmissible. *See* section 212(a)(9)(i) of the Act. To legally return to the country within five years of her removal, she needs an approved application for permission to reapply for admission. *See* section 212(a)(9)(A)(iii) of the Act.

B. The Application for Permission to Reapply for Admission

USCIS may approve applications for permission to reapply at the Agency's discretion. Section 212(a)(9)(A)(iii) of the Act. Thus, applicants must demonstrate that favorable social and humanitarian considerations outweigh adverse evidence in their records. *Matter of Tin*, 14 I&N Dec. 371, 373-74 (BIA 1973). Relevant discretionary factors include: the basis and recency of applicants' removals; the length of their U.S. residences; their moral characters and respect for law and order; evidence of their rehabilitations; their family responsibilities; commissions of repeated immigration violations; hardships to themselves or others; close family ties in the United States; needs for their services in the country; and any other relevant factors. *Id.*

The Director found that the following discretionary factors favor the Applicant:

- Her marriage to a U.S. lawful permanent resident;
- Her spouse's approved immigrant visa petition for her; and
- The couple's two, U.S. citizen sons, ages 7 and 6.

In contrast, the Director considered the following negative factors:

- The Applicant's "illegal presence" in the United States since [] 2013; and
- The unexecuted removal order against her.

The Applicant argues that the Director disregarded discretionary factors in her favor. We agree that the Director should have considered: evidence that she has no criminal record; statements from people attesting to her good character; the potential termination of her spouse's U.S. business; and poor country conditions in Guatemala.

Adjudicators have long recognized good moral character and respect for law and order as positive factors supporting an application for permission to reapply. *See Matter of Tin*, 14 I&N Dec. at 373-74. Also, the instructions to Form I-212, Application for Permission to Reapply for Admission, advise applicants to submit "[e]vidence of respect for law and order" and "good moral character." *See* USCIS, "All Forms," <https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf>; *see also* 8 C.F.R. § 103.1(a)(1) (incorporating form instructions into the regulations). The Applicant submitted a March 2021 criminal history record from Nebraska, where she has lived since entering the United States. The document indicates that she has no criminal record in the state. She also submitted sworn statements from three people indicating that she has good moral character and is honest. Despite this evidence, the Director stated: "No other favorable factors were submitted for consideration."

Evidence also shows that the Applicant's spouse operates his own home-remodeling business. A copy of the couple's 2020 federal income tax return indicates that the business that year generated profits of \$33,776, almost all the family's income. Thus, upon the family's relocation to Guatemala, termination of the business and its income would likely cause hardship to them and the Applicant's disabled father in Guatemala, for whose care the couple usually sends at least \$100 a month. The Director therefore should have considered the potential termination of the spouse's business.

The Applicant also submitted reports from credible organizations of poverty, low wages, and illiteracy in Guatemala. The Director should have considered these materials, as the Applicant claims that these problems could affect her and her family if they relocate to the country.

The Director found that evidence of emotional and financial hardship to the Applicant's family "appears to be that which would normally be expected when one's relative is removed from the United States." But the hardships of the Applicant and her family need not be unexpected. The requested exception does not require a showing of "extreme hardship." *Compare* section 212(a)(9)(A)(iii) of the Act (requiring discretionary consent to an application for permission to reapply) *with* sections 212(h)(1)(B), (i) of the Act (requiring noncitizens inadmissible on other grounds to demonstrate extreme hardship to qualifying relatives). The Applicant need only demonstrate that discretionary factors - including hardships to her and her family - weigh in favor of an exception. The Director therefore must consider all hardships to the Applicant and her family, even if they are expected or common. *See* 9 *USCIS Policy Manual* S, retired *Adjudicator's Field Manual*, Chapter 43.2(e)(1), <http://www.uscis.gov/policymanual> ("section 212(a)(9)(iii) of the Act does not specify particular . . . hardship threshold requirements which must be met").

Also, as the Applicant argues, the Director erred in faulting the 22-day trip of the Applicant's spouse to Guatemala, which began in December 2020 and ended in January 2021. The Director found that, in a later affidavit, the Applicant's spouse attested "that he would fear for [his] family's life if [his] family has to live in Guatemala." The Director described the spouse's trip as "a direct contradiction" to his stated fear of returning to Guatemala.

Contrary to the Director's finding, however, the Applicant's spouse did not state that he *would fear for his family's life* in Guatemala. Rather, he stated: "*I fear for the life my family would have* in Guatemala. I have no place to go. And I have no education. I would return to a life of poverty." (emphasis added). Thus, the affidavit of the Applicant's spouse indicates his fear of the family's poverty in Guatemala, not of their deaths. The brief trip to Guatemala therefore does not contradict the spouse's statement.

Further, as discussed above, the record contains an order of supervision indicating immigration authorities' release of the Applicant from custody in [] 2013 upon condition that she periodically report to officers and comply with other restrictions. *See* section 241(a)(3) of the Act. In light of this evidence of government authorization, the Director should reconsider his finding of the Applicant's "illegal presence" in the United States since [] 2013.

The record also discloses another potential negative discretionary factor that the Director omitted. The copies of the couple's 2020 federal income tax return include an IRS Form W-2 for the Applicant, and USCIS records do not indicate her authorization to work that year. Evidence therefore suggests that she worked in the United States without authorization.

III. CONCLUSION

The Director erred in faulting the trip of the Applicant's spouse to Guatemala. The Director also overlooked the Applicant's release on an order of supervision and discretionary factors favoring her. We will therefore withdraw the Director's decision and remand the matter. On remand, the Director should review the entire record and reassess the discretionary factors. The Director should then issue a new decision.

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