U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27190379

Date: JULY 21, 2023

Appeal of Orlando, Florida Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

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).

The Director of the Orlando, Florida Field Office denied the Form I-212 as a matter of discretion, concluding that a grant of permission to reapply for admission would serve no purpose because the Applicant was ineligible to adjust her status in the United States to that of a lawful permanent resident, and she was also inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation of material facts. The Director further found that the Applicant did not establish that her U.S. citizen spouse would suffer extreme hardship if she were to leave the United States. The matter is now before us on appeal.

On appeal, the Applicant does not dispute that she is ineligible to adjust her status in the United States. She explains that she intends to apply for an immigrant visa abroad and is seeking conditional approval of her Form I-212 before she departs from the United States. The Applicant asserts that the Director erred by finding her inadmissible under section 212(a)(6)(C)(i) of the Act, and by applying the extreme hardship standard in evaluating the impact her departure will have on her spouse.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that a noncitizen who has been ordered removed, or who departed the United States while an order of removal was outstanding, is inadmissible for 10 years after the date of such departure or removal. Noncitizens inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission if prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission. Section 212(a)(9)(A)(iii) of the Act.

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).

The record reflects that the Applicant was admitted to the United States in 2006 as a nonimmigrant crewman (C-1) to work for a cruise line company as a cook. She subsequently applied for asylum and withholding of removal, but U.S. Citizenship and Immigration Services (USCIS) denied the application for failure to comply with the one-year filing deadline requirement, and placed the Applicant in removal proceedings. In 2012 an Immigration Judge granted her withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). The Applicant has been married to a U.S. citizen since 2019, and is the beneficiary of an approved Form I-130, Petition for Alien Relative, her spouse filed on her behalf.

The record includes previously provided marriage, identity, and financial documents, as well as the U.S. citizen spouse's medical records, statements, and affidavits in support of the instant Form I-212.

As stated, the Director determined that the Applicant was ineligible to adjust her status in the United States, and the Applicant does not contest this determination.[1] She explains that she is not seeking to adjust her status in the United States; rather she is requesting conditional approval of her Form I-212 under the regulation at 8 C.F.R. § 212.2(j)[2] in order to seek consular processing of her immigrant visa and be able to return to the United States without having to remain abroad for the entire 10-year period after she departs, thus triggering inadmissibility under section 212(a)(9)(A)(ii) of the Act. In support, she submits evidence that her immigrant visa request is pending before the U.S. Department of State. The Applicant therefore has overcome the Director's determination that approval of permission to reapply was not warranted because of the Applicant's ineligibility for adjustment of status in the United States.

The Director also indicated that the Applicant was inadmissible under section 212(a)(6)(C)(i) of the Act, because she provided inconsistent statements about her intent in applying for the C-1 nonimmigrant visa and admission to the United States; specifically, the Director noted that while the Applicant testified in asylum proceedings that she "absolutely planned on going to the [United States]

[1] The Director's determination was based on the provision in section 245(c) of the Act, 8 U.S.C. § 1255, which generally bars noncitizen crewmen from adjusting status to that of a lawful permanent resident under section 245(a) of the Act; we note, however, that because the Applicant is currently in removal proceedings, USCIS is without jurisdiction to adjust her status. *See* 8 C.F.R. § 245.2(a)(1). Thus, it is irrelevant at this time whether the Applicant would meet the statutory eligibility criteria for such adjustment.

[2] The regulation at 8 C.F.R. § 212.2(j) provides that a noncitizen whose departure will execute an order of exclusion, deportation, or removal may, prior to leaving the United States, seek conditional approval of an application for permission to reapply for admission. The approval of the Applicant's Form I-212 under these circumstances is conditioned upon her departure from the United States and would have no effect if she does not depart.

to join the ship and accept the position as a cook,"[3] in a statement provided with the instant application she stated that "[i]t [was] very difficult for a young single woman in China . . . to obtain a visa to visit the United States." The Director concluded that the Applicant contradicted her claim that she "absolutely planned" to join the ship, by staying in the United States and not joining the ship. The Applicant points out that she previously explained in her 2021 affidavit that while she saw the job offer as an opportunity to see the United States and had every intention of joining the cruise line ship, once she entered the United States she was told that the cruise line workers were poorly treated and she would have to work long hours for little pay, which scared her and made her second-guess her decision to take the job. She states that she did not misrepresent any facts when she sought the C-1 visa, and when she was admitted to the United States with that visa.

In making a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, there must be evidence in the record showing that a reasonable person would conclude that an applicant used fraud or that they willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission to the United States, or any other immigration benefit. *See generally* 8 *USCIS Policy Manual* J.3(A)(1), https://www.uscis.gov/policy-manual. Here the Director did not explain how the Applicant's noncompliance with the terms of her C-1 visa shows that she used fraud or willfully misrepresented material facts to obtain such visa or admission to the United States. Nor is the Applicant's statement that she intended to join the cruise ship in the United States inconsistent with her claims that it was hard for a single young woman like her to obtain a visa to come to the United States and she saw the job offer as an opportunity to visit the United States. The evidence in the record, therefore, is currently insufficient to conclude that the Applicant used fraud or that she willfully misrepresented a material fact to obtain a visa, other documentation, admission to the United States, or another immigration benefit, and that she is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act on that basis. Moreover, as the Applicant is seeking an immigrant visa abroad, the U.S. Department of State will make the final determination concerning her eligibility for a visa, including whether she is inadmissible under section 212(a)(6)(C)(i) or any other provisions of the Act and, if so, will provide her with an opportunity to apply for a waiver of inadmissibility.

Lastly, while the Director determined that the Applicant has not demonstrated *extreme* hardship to her spouse, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission; rather, *any* hardship to the Applicant or her family members is a factor to be considered in the discretionary analysis. *See Matter of Tin*, 14 I&N Dec. at 373 (stating, in part, that a noncitizen who has a bona fide reason for wanting to immigrate to the United States may be granted permission to reapply for admission even though the hardship to their U.S. citizen relative would not be unusual, absent any adverse factors). Here, the record does not indicate that the Director evaluated the claims of general hardships to the Applicant and her spouse if the Applicant is not permitted to return to the United States before the end of her inadmissibility period, or any other positive equities in the case. We will therefore return the matter to the Director to consider those factors.

In conclusion, the Applicant has established that she has a pending immigrant visa request abroad and the U.S. Department of State will be responsible for making a determination of the Applicant's eligibility for such visa, including any inadmissibility grounds that may apply. Because the Director

[3] We note that a review of Applicant's asylum interview testimony does not indicate that she made such a statement; rather this statement is included in the Applicant's April 2021 declaration in support of the instant Form I-212.

did not assess whether the Applicant merits conditional approval of her application under those circumstances, we will remand the matter for the Director to determine whether a grant of permission to reapply for admission is warranted as a matter of discretion when all favorable and unfavorable factors are weighed together.

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