U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26481082

Date: JUNE 2, 2023

Appeal of Charlotte Amalie Field Office Decision

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

The Applicant, who has requested an immigrant visa abroad 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 Charlotte Amalie Field Office in St. Thomas, U.S. Virgin Islands determined that the Applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, because she was deported from the United States and thereafter reentered the country without inspection and admission or parole. The Director then denied the Form I-212 as a matter of discretion, concluding that the Applicant was currently ineligible to seek an exception to this inadmissibility and granting her request permission to reapply for admission would therefore serve no purpose. The matter is now before us on appeal.

On appeal, the Applicant asserts that the Director erred by finding her inadmissible under section 212(a)(9)(C)(i) of the Act, and renews her request for permission to reapply for admission before she departs from the United States to seek an immigrant visa.

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.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides in relevant 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 an alien convicted of an aggravated felony) is inadmissible.

Noncitizens 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 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.

A noncitizen whose departure from the United States will execute an order of removal may apply for conditional approval of Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States.

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) (discussing the different factors to be considered in the discretionary determination of whether an applicant merits approval of an application to permission to reapply). 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, 373-74 (Reg'l Comm'r 1973).

Lastly, a noncitizen who has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible. Section 212(a)(9)(C)(i)(II) of the Act. To seek an exception to this inadmissibility the noncitizen must depart and thereafter remain outside of the United States for at least 10 years.

II. ANALYSIS

The issues on appeal are whether the Applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and, if not, whether she is otherwise eligible for a discretionary grant of permission to reapply for admission to the United States. We have reviewed the entire record, and conclude that the Applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act. We will therefore return to matter to the Director to determine whether approval of the Applicant's request for permission to reapply for admission to the United States is warranted in the exercise of discretion.

The record reflects that the Applicant initially entered the United States without inspection in August 1993. She was deported[1] to Mexico in [redacted]1993 pursuant to an Immigration Judge's order. The Applicant indicated that she reentered the United States in November 1993 without being inspected and admitted or paroled, and has been residing in the United States since that time. The Applicant represented on the instant Form I-212 that she will apply for an immigrant visa abroad and is seeking consent to reapply for admission under the regulation at 8 C.F.R. § 212.2(j) before she departs from the United States.

As stated, the Director denied the Form I-212, concluding that the Applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act because she returned to the United States without inspection after

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996), which took effect on April 1, 1997, eliminated the distinction between deportation and exclusion proceedings by merging them into removal proceedings for all noncitizens regardless of whether they were charged as being inadmissible or deportable from the United States.

she was deported. The Applicant asserts, referencing Form I-212 instructions[2] that only individuals who were ordered removed and then reentered the United States without inspection after April 1, 1997, are subject to this inadmissibility ground. We agree.

Section 212(a)(9)(C) inadmissibility applies to noncitizens who were ordered removed before or after its effective date, April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997. *See* Memorandum from Paul Virtue, Acting Executive Associate Commissioner, INS, HQIRT 50/5.12, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)* (June 17, 1997). Here, the Applicant attested that following her deportation in [redacted] 1993, she illegally reentered the United States in [redacted] 1993 and has been residing in the United States since that time. The evidence, which includes a copy of the Applicant's 1995 Texas marriage certificate and her child's birth record, as well as affidavits attesting to her longtime residence in Texas, is consistent with this testimony. Furthermore, there is nothing in the record of proceedings before us to suggest that the Applicant left the United States at any time after April 1, 1997, and thereafter reentered the country. Thus, the record considered as a whole does not support a conclusion that the Applicant is inadmissible under section 212(a)(9)(C) of the Act, and we withdraw the Director's determination to the contrary.

Nevertheless, as the Applicant was deported in [redacted] 1993 and reentered the United States without inspection a month later, she will remain inadmissible under section 212(a)(9)(A)(ii) of the Act for a period of 10 years after she departs from the United States and, if she wishes to return to the United States within this inadmissibility period, she must obtain permission to reapply for admission to the United States.

We will therefore remand the matter to the Director to weigh the positive and negative factors in the Applicant's case and to determine in the first instance whether approval of the Applicant's request for permission to reapply for admission to the United States is warranted in the exercise of discretion.

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

[2] *See Instructions for Form I-212*, page 7, https://www.uscis.gov/i-212 (specifying that inadmissibility under section 212(a)(9)(C)(i)(II) of the Act applies to individuals who were ordered removed from the United States under any provision of the Act or any other provision of law before, on, or after April 1, 1997, and enter or attempt to reenter without admission on or after April 1, 1997).