U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26925796

Date: JUN. 2, 2023

Appeal of Fort Smith, Arkansas Field Office Decision

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

The Applicant, a native and citizen of the Gambia, seeks permission to reapply for admission to the United States. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). Permission to reapply for admission to the United States is an exception to inadmissibility due to being removed from the United States, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the Fort Smith, Arkansas Field Office denied the Form I-212, Application for Permission to Reapply for Admission (application for permission to reapply), concluding the record lacked an underlying issue that could be addressed by its filing. The matter is now before us on appeal. 8 C.F.R. § 103.3. 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 dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a foreign national who has been ordered removed under section 240 or any other provision of law, or who 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, is inadmissible. 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.

II. ANALYSIS

The Applicant was admitted to the United States in B-2 nonimmigrant visitor status in November 2000. She filed an asylum application in April 2007, she was referred to immigration court in June 2007, her asylum application was denied and she was granted voluntary departure for 60 days by an

Immigration Judge in May 2008, and she filed an appeal with the Board of Immigration Appeals (the Board) in June 2008. The Applicant's case was remanded to the Immigration Judge by the Board in August 2009, and she was ordered removed in [redacted] 2010 to the Gambia. However, her removal was deferred based on a grant of withholding of removal on the same date.

The Applicant is the beneficiary of a Form I-130, Petition for Alien Relative, filed by her then lawful permanent residence spouse (now U.S. citizen spouse), and it was approved in August 2011. The Applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status, in August 2014 and it was administratively closed by Director of the Atlanta, Georgia Field Office. The Notice of Administrative Closure provides "only an Immigration Judge has jurisdiction to grant or deny your Form I-485 because you are not an arriving alien . . . [s]ince the Immigration Judge granted you Withholding of Removal, you must move [the Executive Office for Immigration Review (EOIR)] to reopen the proceedings in order for you to apply for adjustment of status. If the removal proceedings are terminated and your Form I-485 has not been adjudicated, you may submit a copy of the termination order to this office and a written request for USCIS to reopen your Form I-485." The Applicant then filed her application for permission to reapply in August 2020, and she listed "N/A" under the location of where her immigrant visa is or will be made, listed "No' under the four inadmissibility filing categories, and provided her reason for filing as "[t]o live with my husband and children." If the Applicant were to depart the United States, then she would execute the removal order and become inadmissible under section 212(a)(9)(A)(ii) of the Act.

The Director detailed the above immigration history, determined the Applicant has not been removed from the United States, and concluded she does not intend to depart from the United States and seek readmission. The Director therefore denied the application for permission to reapply as the record lacked an underlying issue that could be addressed by its filing.

On appeal, the Applicant acknowledges she is not inadmissible under section 212(a)(9)(A) or (C) of the Act since she has not actually been removed from or departed the United States, and states that there is not an actual category on the application for permission to reapply that fits her unique condition. However, she asserts her eligibility to apply for permission to reapply under 8 C.F.R. § 212.2(e), which states, in part, "[a]n applicant for adjustment of status under section 245 of the Act . . . must request permission to reapply for entry in conjunction with his or her application for adjustment of status." The regulations at 8 C.F.R. § 212.2, however, apply specifically to "[a]ny [noncitizen] who has been deported or removed from the United States." 8 C.F.R. § 212.2(a). The Applicant has not shown that the cited provision applies to an adjustment applicant who has not departed the United States following a removal order, and who does not intend to do so. Rather, the regulations presume that the noncitizen has either departed and returned[1] or will depart.[2]

Next, the Applicant contends she is eligible to file an application for permission to reapply based on the final rule published in *Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*, 81 Fed. Reg. 50244 (July 29, 2016). The content of this rule applies to individuals seeking an immigrant

[1] If the individual filed an application for permission to reapply in conjunction with an application for adjustment of status under section 245 of the Act, the approval of the application shall be retroactive to the date on which the noncitizen embarked or reembarked at a place outside the United States. 8 C.F.R. § 212.2(i)(2).

[2] An individual whose departure will execute an order of removal shall receive a conditional approval depending upon their satisfactory departure. 8 C.F.R. § 212.2(j).

visa abroad. In this case there is no indication the Applicant is seeking to apply for an immigrant visa abroad and therefore it is not applicable.

The record does not reflect that the Applicant intends to depart the United States and execute her removal order, which would render her inadmissible under section 212(a)(9)(A)(ii) of the Act. As such, we agree with the Director's determination that the application for permission to reapply lacks an underlying issue that could be addressed by its filing. Therefore, we will dismiss the appeal.

ORDER: The appeal is dismissed.