



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

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

In Re: 17740453

Date: APR. 19, 2022

Appeal of Newark, New Jersey Field Office Decision

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

The Applicant will be inadmissible upon her departure from the United States for having been previously ordered removed and 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 Newark, New Jersey Field Office denied the application as a matter of discretion. Although the Director specifically did not make any formal finding of inadmissibility, the Director cited the negative factor of the Applicant's potential inadmissibility under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), an inadmissibility that cannot be waived and which would occur upon her departure. On appeal, the Applicant asserts that the Director did not weigh positive and negative factors in this case. The Applicant also asserts she may be inadmissible under former Section 242B of the Act, not under section 212(a)(6)(B) of the Act, because she was ordered deported before April 1, 1997. The Applicant further asserts that the U.S. Department of State has the prerogative to review a conditional Form I-212, Application for Permission to Reapply for Admission.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for the entry of a new decision.

I. LAW

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

Noncitizens 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 noncitizen's reapplying for admission.

Section 212(a)(6)(B) of the Act provides that any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the noncitizen's inadmissibility or deportability, and who seeks admission to the United States within five years of the noncitizen's subsequent departure or removal, is inadmissible. There is no waiver for this inadmissibility.

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 establishes that the Applicant entered the United States without being admitted in or about 1994. The record also establishes that the Applicant did not appear at her deportation hearing on [REDACTED] 1995, and the Immigration Judge ordered her removed *in absentia* on that date.

The Director specifically did not make "any formal findings or decisions regarding [the Applicant's] inadmissibility to the United States." However, the Director stated that the Applicant "would be inadmissible under section 212(a)(6)(B)" of the Act when she departs "since [she] failed to attend without a reasonable cause or remain in attendance at a removal hearing and [she] received an *in absentia* order of removal." The Applicant correctly asserts on appeal that section 212(a)(6)(B) does not apply to her *in absentia* deportation order dated [REDACTED] 1995, because it became effective on April 1, 1997. *See* 22 C.F.R. § 40.62 (providing, "An alien who without reasonable cause failed to attend, or to remain in attendance at, a hearing initiated on or after April 1, 1997, under INA 240 to determine inadmissibility or deportability shall be ineligible for a visa under INA 212(a)(6)(B) for five years following the alien's subsequent departure or removal from the United States.").

The Director's conclusion that "the approval of an I-212 waiver would not serve any purpose" was based on the "appear[ance] that [the Applicant is] subject to section 212(a)(6)(B) of the INA," which is incorrect. We withdraw the Director's finding that the Applicant will be inadmissible under section 212(a)(6)(B) of the Act when she departs, because her deportation order is dated before April 1, 1997.

The Applicant in this matter is seeking conditional approval of her application under the regulation at 8 C.F.R. § 212.2(j)¹ before departing from the United States to seek an immigrant visa at a U.S. consulate abroad, as she will be inadmissible upon her departure due to her prior deportation order. As the Director did not assess whether the Applicant merits conditional approval of her application as a matter of discretion, we will remand the matter for the entry of a new decision regarding the Applicant's eligibility. As always in these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

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

¹ 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.