U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13715834

Date: APR. 20, 2022

Appeal of New York City, New York Field Office Decision

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

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), because she will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the New York City Field Office denied the application as a matter of discretion, finding that adjudicating the Applicant's request for permission to reapply for admission would serve no purpose because she was also inadmissible under section 212(a)(6)(B) of the Act for failing to attend removal proceedings without reasonable cause, a ground of inadmissibility that may not be waived. On appeal, the Applicant asserts that she had reasonable cause for failing to attend her removal hearing.

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

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that any noncitizen, other than an arriving alien described in clause 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 an alien 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 renders inadmissible 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 such noncitizen's subsequent departure or removal.

The Applicant currently resides in the United States and is seeking conditional approval of the application under the regulation at 8 C.F.R. § 212.2(j) before she departs, as she will be inadmissible upon her departure due to her 2004 removal order.[1]

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 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); *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.")

Generally, favorable factors that came into existence after a noncitizen has been ordered deported or removed from the United States ("after-acquired equities") are given less weight in a discretionary determination. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination).

II. ANALYSIS

The record reflects that in [redacted] 2003, when the Applicant was 16 years old, she entered the United States without being inspected, admitted, or paroled, and was apprehended by U.S. border patrol agents who issued her a Form I-862, Notice to Appear (NTA) before an Immigration Judge in [redacted] Texas on [redacted] 2004.[2] The Applicant did not appear for the scheduled court hearing, and the Immigration Judge ordered her removed from the United States *in absentia*.[3] The Applicant has not departed the United States. In 2009 the Applicant married her U.S. citizen spouse, who then filed an immigrant visa petition on her behalf which was approved in 2014. The Applicant and her spouse have a U.S. citizen son born in 2009. The only issue on appeal is whether the Applicant has

[1] The approval of the application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if she fails to depart.
[2] The record shows that the Applicant was apprehended with her brother [redacted] who, according to records of U.S. Citizenship and Immigration Services (USCIS), was 27 years old when apprehended.
[3] *See* section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A) (stating that any individual who does not attend a required hearing "shall be ordered removed in absentia if [the Department of Homeland Security] establishes by clear, unequivocal, and convincing evidence that . . . written notice was . . . provided and that the [individual] is removable").

demonstrated that she merits conditional approval of her request for permission to reapply for admission to the United States as a matter of discretion.

In her decision, the Director determined that upon departure the Applicant will become inadmissible for five years under section 212(a)(6)(B) of the Act due to her failure to appear at her hearing without reasonable cause, and the resulting *in absentia* order of removal, and noted that there is no waiver for this ground of inadmissibility. Therefore, she concluded that as a matter of discretion, no purpose would be served in approving the instant application, as the Applicant would remain inadmissible.

On appeal, the Applicant reasserts that she could not have been reasonably expected to comply with the NTA because she was 16 years old when apprehended and had no familial support that would have enabled her to retain counsel. She further claims that she did not know about the need to attend the scheduled court hearing and had no familial support that would have enabled her to appear in court. Rather, she states that her half-sister [redacted] with whom she was residing in New York, subjected her to abuse, neglect, and isolation. Moreover, the Applicant argues that she was mentally impaired based on a childhood history of physical and emotional abuse. The Applicant submits new evidence, which includes her updated statement and a psychosocial examination from [redacted]

In this case, the Applicant does not contest that she will be inadmissible under section 212(a)(9)(A)(ii) of the Act upon her departure from the United States. However, with respect to her claims regarding her potential inadmissibility under section 212(a)(6)(B) of the Act, we need not determine at this time whether the Applicant has demonstrated reasonable cause for her failure to attend removal proceedings. As noted, the record reflects that a Form I-130, Petition for Alien Relative, was approved on her behalf and she intends to apply for an immigrant visa abroad. Accordingly, the U.S. Department of State will make the final determination concerning the Applicant's eligibility for a visa, including whether she is inadmissible under section 212(a)(6)(B) or any other provisions of the Act.[4]

As discussed above, USCIS must weigh any unfavorable factors against the favorable factors to determine if approval of the application is warranted as a matter of discretion. Here, though, the decision does not weigh favorable and unfavorable factors related to the Applicant's Form I-212. Instead, the Director appears to have taken one negative factor—the Applicant's potential inadmissibility for failure to attend her removal proceedings—and used it as the basis to deny on discretion without considering any favorable factors presented, or other unfavorable factors in the record. Although immigration violations may be considered as negative factors in a discretionary determination, they must be weighed against the positive factors presented as well as with other negative factors. We will therefore remand the record for the Director to consider the claimed circumstances surrounding the Applicant's failure to appear as discretionary factors along with the other positive and negative factors in adjudicating the discretionary request.

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[4] We note that the Applicant may also be inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or willful misrepresentation of a material fact. The Applicant failed to disclose being subject to the 2004 removal order when she filed a provisional unlawful presence waiver application in 2015, which application was subsequently denied.

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