



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

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

In Re: 15766361

Date: JUN. 21, 2022

Appeal of Charleston, South Carolina 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 approval of her application for permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii). Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the Charleston, South Carolina Field Office denied the application, concluding that the Applicant would become inadmissible under section 212(a)(6)(B) of the Act for having failed to attend removal proceedings without reasonable cause, and there is no waiver for this ground of inadmissibility. The matter is now before us on appeal.

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 dismiss the appeal because the Applicant has not met this burden.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any foreign national, 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 an alien convicted of an aggravated felony) 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 reapplication for admission.

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).

Any foreign national who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the foreign national's inadmissibility or deportability and who seeks admission to the United States within five years of such foreign national's subsequent departure or removal is inadmissible. Section 212(a)(6)(B) of the Act.

II. ANALYSIS

The record indicates that the Applicant, a native and citizen of China, will become inadmissible upon departing the United States pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed.¹ The Applicant is seeking conditional approval of her Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States. The issue on appeal is whether the Applicant is eligible to file the Form I-212 and whether she had reasonable cause for not attending her removal proceeding.

The record reflects that the Applicant entered the United States without being admitted or paroled on or about [REDACTED] 1999. She was apprehended by immigration officials and served a Notice to Appear (NTA) on [REDACTED] 1999. The Applicant did not attend her removal hearing on [REDACTED] 1999 and was ordered removed in absentia.

The Director determined that the Applicant will be inadmissible under section 212(a)(6)(B) of the Act upon departure for having failed to attend her removal proceedings without reasonable cause. As there is no waiver for this ground of inadmissibility, she would therefore remain inadmissible for five years even if her Form I-212 were approved. The Director noted that although the Applicant filed two motions to reopen her removal order with the Board of Immigration Appeals (Board), the Board affirmed the decision in both instances, in August 2008 and October 2009. Later, the Immigration Judge denied the Applicant's a motion to reopen in May 2019.

On appeal, the Applicant contends that due to the ineffective assistance of her prior counsel, she had reasonable cause for failing to attend her removal proceeding. The Applicant asserts that her former counsel during the proceeding told her that she did not need to appear to her removal hearing. As she would have to process her immigrant visa before a U.S. consulate, the Applicant contends that the Department of State (DOS) Foreign Affairs Manual (FAM) provides "reasonable cause" exception for ineffective assistance of counsel. The Applicant asserts that she has fulfilled or was exempt from

¹ On her Form I-212 under "Reasons You Are Filing Form I-212," the Applicant did not identify the inadmissibility for which she was applying for.

providing the requirements to demonstrate ineffective assistance of her former counsel.² Specifically, the Applicant states she submitted an affidavit with her second motion to the Board and fulfilled the first Lozada requirement and that the second and third requirements were unnecessary due to her prior counsel's disbarment. In support of her claim, the Applicant submits additional evidence, including an excerpt from the USCIS Adjudicator's Field Manual, an excerpt from the FAM, and evidence of her previous attorney's disbarment.

While the Director based her decision on the Immigration Judge's order and the subsequent affirmations on the Applicant's motions to reopen, the Director did not discuss whether the Applicant may have had "reasonable cause" for not attending her hearing. Considering the Applicant's new claim and evidence submitted on appeal relating to the reasonable cause exception, we find it appropriate to remand the matter for the Director to determine in the first instance whether the Applicant merits a favorable exercise of discretion.

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

² When asserting claims of ineffective assistance of counsel, noncitizens must generally submit: 1) written affidavits providing detailed descriptions of the actions that counsels agreed to take, the specific actions they took, and any representations they made about their actions; 2) evidence that applicants informed counsels of the allegations of ineffective assistance and gave them opportunities to respond; and 3) evidence that applicants filed complaints against counsels with appropriate disciplinary authorities or explanations for why complaints were not filed. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Applicants asserting ineffective assistance must also show that, but for counsels' deficiencies, the applicants would have prevailed on their claims. *Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020). The Board established these evidentiary requirements to deter meritless claims and ensure that adjudicators have sufficient information to evaluate allegations of ineffective assistance. *Lozada*, 19 I&N Dec. at 639.