U.S. Citizenship and Immigration Services

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

In Re: 27166590

Date: AUG. 17, 2023

Appeal of New York City, New York 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 advance 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 become inadmissible upon departing from the United States for having been previously ordered removed. Permission to reapply for admission 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 New York City, New York Field Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in her case. On appeal, the Applicant asserts that in reaching this conclusion the Director improperly focused on her immigration violations and did not fully evaluate all favorable factors.

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.

The Applicant is currently in the United States and seeks permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing the United States.[1] Because she has an outstanding order of removal, she will be inadmissible under section 212(a)(9)(A)(ii) of the Act once she departs.[2]

[1] The approval of the Form I-212 under those circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if she does not depart.

[2] The record indicates that an Immigration Judge granted the Applicant asylum in 2006, but the Department of Homeland Security appealed the grant. In 2008 the Board of Immigration Appeals sustained the appeal and ordered the Applicant removed to China. The Applicant did not depart and continues to reside in the United States with her U.S. citizen spouse and three U.S.-born children.

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, 373-74 (Reg'l Comm'r 1973).

In denying the application, the Director reviewed evidence concerning the Applicant's family ties, payment of taxes, her spouse's and her child's medical conditions, and other favorable factors, but determined that they did not outweigh the unfavorable factors. The Director identified the unfavorable factors as the Applicant's initial entry without inspection, her failure to comply with the removal order, her inadmissibility under section 212(a)(9)(B)(i) of the Act for unlawful presence and under section 212(a)(9)(A)(i) of the Act for having been ordered removed, as well as her 2015 arrest for shoplifting.

The Director acknowledged that the Applicant's spouse was undergoing treatment for major depressive disorder, and that their child was diagnosed with obstructive sleep apnea, intermittent asthma, and allergic rhinitis, but found that none of those conditions were life threatening. The Director also recognized that, based on the evidence the Applicant presented, denial of her request for permission would have adverse effects, but concluded that the Applicant's inadmissibility and other negative factors outweighed the positive equities she acquired after the removal order against her had been entered.

On appeal, the Applicant asserts that the Director's adverse determination was improper, because she is the beneficiary of an approved visa petition filed by her U.S. citizen spouse, and intends to apply for a waiver of unlawful presence before she travels abroad to obtain an immigrant visa from the U.S. Department of State. She further states that she had permission to work in the United States while her asylum request was pending and has been filing tax returns every year; because her request for asylum was initially granted, she was issued a Social Security card and continued to work after she had been ordered removed to support her children who were born in the United States in 2005, 2008, and 2010. She indicates that the fact she elected to continue working rather than to rely on government assistance should count as a mitigating factor. The Applicant also submits a court disposition for her 2015 arrest, and points out that the Director did not consider her explanation for this incident, which she claims was a misunderstanding, and did not take into account that the charges were dismissed and she has no criminal history in the United States. The Applicant further states that while her spouse and child may not have life-threatening medical conditions they nevertheless need her care and support. She reiterates that her prolonged absence from the United States will cause significant hardship to her and her family, as it will be difficult for her spouse to work full time and care for the children while undergoing treatment for his mental health issues. Lastly, the Applicant references previously provided evidence of adverse conditions in China, and states that she and her family would face financial, health-related, and other hardships if they were to relocate to China and remain there until the expiration of her inadmissibility period.

Although the Director considered the Applicant's prospective inadmissibility for having been ordered removed and for unlawful presence to be unfavorable factors, the regulation at 8 C.F.R. § 212.2(j) and the Form I-212 instructions specifically provide that noncitizens who have been ordered removed, but have not left the United States, and will be applying for an immigrant visa abroad, may seek consent to reapply before they leave the United States under the removal order irrespective of their inadmissibility for unlawful presence.[3] Moreover, as the Applicant correctly points out on appeal, she may request a provisional waiver of unlawful presence under section 212(a)(9)(B)(v) of the Act before departure.[4] Consequently, the fact that the Applicant's departure from the United States will result in her inadmissibility for having been ordered removed and for unlawful presence does not preclude a favorable exercise of discretion in these proceedings.

The Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, but did not fully address the evidence of additional significant favorable factors in the record, including evidence regarding hardship to the Applicant and her three U.S. citizen children, her long-time residence in the United States, consistent employment, and family responsibilities. The Director also did not address the Applicant's explanation concerning her 2015 arrest. The previously submitted evidence includes affidavits from the Applicant and her spouse describing their claimed hardship upon separation or relocation to China; letters from her three children and medical records; financial documentation related to the Applicant's and her spouse's employment and monthly expenses; and country conditions information for China.

In light of the deficiencies noted above, we will remand the matter to the Director to reevaluate the evidence and determine whether the Applicant warrants a favorable 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.

[3] *See* Instructions for Form I-212, at 5, https://www.uscis.gov/i-212 (providing in part that if USCIS, at its discretion, chooses to approve the application for consent to reapply, the approval is considered conditional until the noncitizen actually departs the United States, and that consent to reapply for admission in this situation applies only to inadmissibility under section 212(a)(9)(A) of the Act). *See also id.* at 3 (providing that applicants inadmissible for unlawful presence may be eligible for a waiver of admissibility under section 212(a)(9)(B)(v) of the Act).

[4] A provisional waiver is a separate form of relief and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), a noncitizen inadmissible under section 212(a)(9)(A) of the Act must obtain permission to reapply for admission before applying for a provisional waiver. *See also* Instructions for Form I-601A, at 2, https://www.uscis.gov/i-601a.