U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27165962

Date: OCT. 31, 2023

Appeal of New York, 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, a native and citizen of Guyana, seeks conditional 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 (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii); 8 C.F.R. § 212.2(j).

The Director of the New York, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (application for permission to reapply), concluding that the record did not establish the Applicant's favorable factors outweighed her unfavorable factors and she therefore did not merit a favorable exercise of discretion. 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 sustain 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.

8 C.F.R. § 212.2(j) states that a foreign national whose departure will execute an order of deportation shall receive a conditional approval depending upon his or her satisfactory departure. However, the grant of permission to reapply does not waive inadmissibility under section 212(a)(9)(A) of the Act

resulting from exclusion, deportation, or removal proceedings which are instituted subsequent to the date permission to reapply is granted.

Equities that came into existence after a foreign national has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *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); *Camalla-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 the Applicant was inspected and admitted to the United States in B-2 nonimmigrant visitor status on April 12, 2004, at the [redacted] Georgia port of entry. The Applicant's authorized period of stay expired on October 11, 2004, and she remained in the United States after that date. She was placed in removal proceedings on [redacted] 2006, and she was ordered removed by an immigration judge on [redacted] 2007. The Board of Immigration Appeals (the Board) dismissed her appeal on October 28, 2008, and the U.S. Court of Appeals for the Second Circuit dismissed in part, denied in part, and granted in part her petition for review on August 31, 2009. The Board dismissed her appeal on May 11, 2010, and denied her motion to reopen on October 25, 2010. The Applicant has not departed the United States, and she will therefore become inadmissible under section 212(a)(9)(A)(ii) of the Act upon departure from the United States. The Applicant does not contest this finding on appeal.

The issue on appeal is whether the Applicant merits a favorable exercise of discretion. We will address the Director's decision in making this determination. The Director listed evidence of favorable factors presented by the Applicant, and then listed her unfavorable factors. The Director concluded that the Applicant's unfavorable factors outweighed her favorable factors, and she therefore did not merit a favorable exercise of discretion. However, the Director listed several unfavorable factors incorrectly. First, the Director stated the Applicant claimed she entered the United States on April 12, 2004, under the Visa Waiver Program (VWP), even though Guyana is not a participant in the VWP, and that she possibly committed fraud by entering the United States under the VWP. The Director did not indicate when the Applicant mentioned entry under the VWP. In her application for permission to reapply, the Applicant claimed she entered the United States with a visitor visa on April 12, 2004. The record includes the Applicant's B1/B2 nonimmigrant visitor visa, valid from March 1, 2001, until February 28, 2006, and her Form I-94 Arrival/Departure Record, reflecting that she was admitted to the United States on April 12, 2004, in B-2 nonimmigrant visitor status. The record also includes a passport stamp from another passport for that date with initials indicating valid visa in other passport, not VWP. Therefore, the record does not establish the Applicant willfully misrepresented her category of admission to the United States or fraudulently entered the United States under the VWP on April 12, 2004.[1]

[1] When the Applicant was apprehended on [redacted] 2006, the record appeared to have contained contradictory information on her manner of entry, but this was clarified in removal proceedings. The Applicant's Form I-862, Notice to Appear, was amended to correctly reflect her admission to the United States as a nonimmigrant visitor on or about April 12, 2004, at [redacted] Georgia.

Second, the Director noted the Applicant is inadmissible under section 212(a)(6)(A)(i) for entering the United States without having been inspected or paroled. The Applicant's Form I-862, Notice to Appear, initially included a charge of being present in the United States without being admitted or paroled. However, this charge was subsequently changed to reflect her admission to the United States as a nonimmigrant visitor on or about April 12, 2004, at [redacted] Georgia. The record establishes that the Applicant was inspected and admitted to the United States on April 12, 2004, and that she did not enter the United States without inspection.

Third, 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 application for permission to reapply 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.[2] Moreover, the Applicant may request a provisional waiver of unlawful presence under section 212(a)(9)(B)(v) of the Act before departure.[3] 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.

Fourth, the Director mentioned the Applicant was ordered removed *in absentia* on [redacted] 2007. However, the record establishes that she applied for asylum and withholding of removal in immigration court, and she was ordered removed on [redacted] 2007, after these applications were denied. There is no evidence in the record that she was ordered removed *in absentia* on [redacted] 2007.

The Applicant's unfavorable factors include her unauthorized stay and unauthorized employment in the United States. The Applicant's favorable factors include her U.S. citizen spouse, daughter, and grandchildren; lawful permanent resident son and grandchildren; approved Form I-130, Petition for Alien Relative; and hardship her spouse would experience without her. The Applicant states that her 71-year-old spouse has hypertension, high cholesterol, depression, chronic neck and back pain, and degenerative disc disease. She mentions that he depends on her to work and pay for their expenses. The Applicant's spouse describes the assistance the Applicant provides financially and in helping him take his medication. His physician describes his medical conditions and dependence on the Applicant. The Applicant's other favorable factors include her payment of taxes, lack of a criminal record, community involvement such as coordinating visits to the sick through her religious center, and good character as described by several family members and friends. We note the Applicant married her spouse in [redacted] 2009, after being ordered removed from the United States, and he is therefore considered an after-acquired equity. However, when considering the totality of the Applicant's

[2] *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).

[3] 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.

favorable factors, we determine that they outweigh her unfavorable factors, and she merits a favorable exercise of discretion. We hereby withdraw the Director's decision and sustain the appeal.

ORDER: The appeal is sustained.