U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27591514

Date: SEPT. 27, 2023

Appeal of Las Vegas, Nevada Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

The Applicant, a national of Japan who has requested an immigrant visa abroad, was found inadmissible 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). U.S. Citizenship and Immigration Services (USCIS) may grant such permission in the exercise of discretion.

The Director of the Las Vegas, Nevada Field Office denied the Form I-212, concluding that the Applicant was inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation and, as she did not file a Form I-601, Application for Waiver of Grounds of Inadmissibility, granting her permission to reapply for admission would serve no purpose. The Director further found that this inadmissibility and other negative factors outweighed the sole positive factor in the case – absence of criminal history.

On appeal, the Applicant submits additional evidence. She asserts that the Director erred in finding her inadmissible for fraud or misrepresentation, and requests approval of the Form I-212 so she can enter the United States as an immigrant and reunite with her U.S. citizen spouse.

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.

I. LAW

Section 212(a)(9)(A)(i) of the Act provides, in relevant part, that a noncitizen who has been ordered removed under section 235(b)(1) of the Act, 8 U.S.C. § 1225(b), as an "arriving alien" through an expedited removal order, and who seeks admission within five years of the date of such removal, is inadmissible. A noncitizen who is 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 contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying 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); *see also Matter of Lee*, 17 I&N Dec. 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").

Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act, is inadmissible. Section 212(a)(6)(C)(i) of the Act. USCIS may waive this inadmissibility if refusal of admission would result in extreme hardship to the noncitizen's United States citizen or lawful permanent resident spouse or parent.

II. ANALYSIS

The issues on appeal are whether the Applicant has overcome the Director's determination concerning her inadmissibility for fraud or misrepresentation and, if so, whether she merits a favorable exercise of discretion. Upon review of the record as supplemented on appeal, we conclude that it does not support a conclusion that the Applicant is inadmissible for fraud or misrepresentation. We will therefore return the matter to the Director to reevaluate the evidence of positive and negative factors and determine whether a grant of permission to reapply for admission is otherwise warranted in the exercise of discretion.

The record reflects that in January 2020 the Applicant sought admission to the United States as a returning nonimmigrant academic student (F-1). During a secondary passport inspection the Applicant testified before a U.S. Customs and Border Protection (CBP) officer that the purpose of her travel to the United States was "[c]omeback to school." When asked whether she had a business in the United States, she responded that in 2018 she started a restaurant business, held the title of CEO, was responsible for signing paychecks, and hired a manager to run the business. CBP determined that the Applicant was inadmissible to the United States under section 212(a)(7)(A)(i)(I) of the Act as an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act. CBP then cancelled the Applicant's nonimmigrant F-1 visa, expeditiously removed her from the United States pursuant to section 235(b)(1) of the Act, and prohibited her from entering, attempting to enter, or being in the United States for a period of five years.

The Applicant subsequently married her U.S. citizen boyfriend and applied for an immigrant visa with the U.S. Department of State (DOS) based on the approved Form I-130, Petition for Alien Relative (visa petition), her spouse filed on her behalf. Following the immigrant visa interview in February 2022, a DOS Consular Officer determined that the Applicant was ineligible for a visa due to her inadmissibility under section 212(a)(9)(A)(i) of the Act, for having been previously ordered removed, but informed the Applicant that she could file a Form I-212 to overcome this inadmissibility.

In support of the instant Form I-212, the Applicant submitted evidence including Federal Bureau of Investigation criminal history search results, documentation related to her [redacted] 2020 marriage, a statement from her spouse, tax records, letters of support from friends and colleagues, and photographs.

In denying the application, the Director reviewed the Applicant's 2020 sworn statement before CBP, and concluded that her testimony, indicating that while she was an F-1 academic student she did "no work . . . just did not go to school and hung out with [her] friends," meant that she had no intention of attending school and was therefore inadmissible for fraud or misrepresentation. The Director also found that the Applicant's willful and knowing failure to comply with the terms of her F-1 visa indicated that she was not a person of good moral character. The Director further determined that the Applicant's marriage to her U.S. citizen spouse was not a positive factor because it occurred after she had been removed from the United States, and the timing of the marriage raised concerns about its legitimacy. Thus, the Director concluded that the only positive factor in the case was that the Applicant had no criminal history, which was not sufficient to outweigh her inadmissibility under section 212(a)(6)(C)(i) of the Act, lack of good moral character, and other negative factors.

To overcome these adverse determinations, the Applicant submits her 2018-2020 U.S. school records, information about the restaurant business, a statement from her spouse, and additional evidence concerning her marital relationship. She asserts that she is not inadmissible for fraud or misrepresentation, and a waiver of inadmissibility therefore is not required. We agree that the record currently does not support the Director's inadmissibility finding.

In making a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, there must be evidence in the record showing that a reasonable person would conclude that an applicant used fraud or that they willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission to the United States, or any other immigration benefit. *See generally* 8 *USCIS Policy Manual* J.3(A)(1), https://www.uscis.gov/policy-manual. Here, the Director did not specifically explain how the Applicant's testimony concerning the F-1 status violation shows that she used fraud or willfully misrepresented material facts to obtain a visa or admission to the United States. We further note that CBP, after considering the Applicant's testimony, determined that she was inadmissible to the United States only under section 212(a)(7)(A)(i) of the Act. More importantly, because the Applicant is seeking an immigrant visa abroad, DOS makes a final determination concerning her eligibility for such visa, including any inadmissibility grounds that may apply. Here, the DOS Consular Officer determined that the Applicant's ineligibility for an immigrant visa was based solely on her inadmissibility under section 212(a)(9)(A)(i) of the Act.[1]

[1] The record reflects that the consular officer was aware of the Applicant's testimony before CBP, which led to the cancellation of her F-1 visa, refusal of admission, and expedited removal.

Furthermore, the academic transcripts the Applicant submits on appeal show that she was enrolled in a language training program at a Nevada school from 2017 through 2020, that she attended classes, passed English writing and oral exams in 2019, and received a certificate of successful completion of the intermediate level language training the same year. The transcripts further show that as of January 2020 the Applicant continued to be enrolled in three language courses at the same Nevada school. The Applicant explains that at the time she was detained at the airport by CBP, the restaurant was no longer in business,[2] but because her English was not very good and she was not offered an interpreter she may have misunderstood the CBP officer's questions on the subject. She reiterates that her purpose in obtaining the F-1 visa and for seeking admission to the United States in 2020 was to continue attending school and learning English.

Based on the above, we conclude that the record currently does not support a finding that the applicant used fraud or that she willfully misrepresented a material fact or facts in an attempt to obtain a visa, other documentation, admission to the United States, or any other immigration benefit. As such, she is not inadmissible under section 212(a)(6)(C)(i) of the Act, and we withdraw the Director's determination to the contrary.

Furthermore, although the Director expressed concern about the legitimacy of the Applicant's marriage, this concern appears to have been based solely on the fact that the Applicant and her spouse were married after the Applicant had been removed from the United States. We note, however, that the record indicates that the Applicant and her spouse started dating in late 2018, and the evidence submitted with the Form I-212 included copies of electronic communications between the Applicant and her spouse, as well as letters from their friends attesting to their ongoing marital relationship. Moreover, on appeal the Applicant submits evidence to show that after she was removed from the United States her spouse obtained Japanese visas and traveled to visit her in Japan every year – in 2020, 2021, 2022, and 2023. The Applicant also submits evidence that her spouse met her mother and other close family members in Japan, and that his name was added to the family's Japanese household registry. We also note that USCIS had previously approved the underlying visa petition, and there is no evidence that the approval has been since revoked, or otherwise invalidated.

Lastly, although the marriage and any related hardships to the Applicant and her spouse need not be afforded full weight in the discretionary analysis,[3] this does not mean that those factors should not be given *any* positive weight. Here, in finding that the only positive equity in the case was the Applicant's lack of criminal history, the Director improperly declined to consider the Applicant's marriage as a favorable factor, and did not address the statements from the Applicant's spouse and friends.

In view of the deficiencies noted above and the additional documentation submitted on appeal, we will return the matter to the Director to reevaluate the evidence and to determine whether the Applicant warrants a favorable exercise of discretion when all positive and negative factors are weighed together.

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[2] The evidence indicates that the restaurant was opened in November 2019 and closed in January 2019.

[3] Equities that came into existence after a noncitizen 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 e.g., Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (finding that less weight is given to equities acquired after a deportation order has been entered).

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