U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23033787

Date: OCT. 18, 2022

Appeal of Queens, New York Field Office Decision

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

The Applicant seeks advance permission to reapply for admission because her departure from the United States would execute a removal order against her and render her inadmissible to the country for the following 10 years. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(A)(ii)(II), 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

The Director of the Queens, New York Field Office denied the application as a matter of discretion. The Director found that, even if he approved the filing, the Applicant would remain inadmissible for allegedly presenting false documents to gain U.S. admission. On appeal, the Applicant asserts that the Director disregarded evidence that the application's denial would cause hardship to her lawful permanent resident spouse and their 19-year-old, U.S. citizen daughter.

The Applicant bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will withdraw the Director's decision, as he erroneously denied the application where the Applicant qualifies to apply for a waiver of the other purported admissibility ground. But, because the Applicant did not demonstrate eligibility to apply for permission to reapply for admission, we will remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

If ordered removed, noncitizens generally cannot gain readmission to the United States within 10 years of their removals or departures from the country. Section 212(a)(9)(A)(ii) of the Act. U.S. Citizenship and Immigration Services (USCIS), however, may grant exceptions to this inadmissibility ground if, before these noncitizens return to the United States, the Agency consents to their reapplications for admission. Section 212(a)(9)(A)(iii) of the Act. Successful applicants must demonstrate that they merit favorable exercises of discretion. *Id.*

Applicants whose departures from the United States would execute removal orders may apply for permission to reapply for admission before leaving the country. 8 C.F.R. § 212.2(j). USCIS, however, conditions advance approvals on the applicants' departures from the United States. *Id.*

II. ANALYSIS

A. The Director's Decision

The record demonstrates that the Applicant's departure from the United States would render the 55-year-old native and citizen of China inadmissible under section 212(a)(9)(A)(ii)(II) of the Act. In removal proceedings in 1998, an Immigration Judge (IJ) denied the Applicant's applications for asylum and withholding of removal, *see* sections 208, 241(b)(3) of the Act, 8 U.S.C. §§ 1158, 1231, but granted her "voluntary departure," permission to leave the country without being ordered removed. *See* section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The Board of Immigration Appeals affirmed the IJ's denials of her asylum and withholding applications and allowed her to voluntary depart the United States before [redacted] 2002. Because the Applicant did not leave the country by that date, the voluntary departure grant automatically converted to an alternate removal order. *See* 8 C.F.R. § 1240.26(d). Since the removal order's issuance, she has not left the country. Thus, the Applicant's departure from the United States would execute the removal order, *see* section 101(g) of the Act, 8 U.S.C. § 1101(g), and render her inadmissible to return for 10 years under section 212(a)(9)(A)(ii)(I) of the Act.

The Director also found the Applicant inadmissible because she allegedly gained U.S. admission in 1996 "with fraudulent documents." *See* section 212(a)(6)(C)(i) of the Act (barring admission to noncitizens who sought or obtained visas, admission, or other immigration benefits by fraud or willfully misrepresenting material facts). The Director found that, even if he allowed the Applicant to legally return to the United States within 10 years of her removal, the additional misrepresentation ground would bar her readmission. Citing *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg'l Comm'r 1963), the Director denied the application as a matter of discretion.

J-F-D-, however, allows discretionary denial of an application for permission to reapply only if the applicant "is ineligible to apply for a waiver" of another inadmissibility ground. 10 I&N Dec. at 695. Contrary to *J-F-D-*, the Applicant qualifies to apply for a waiver of her allegedly fraudulent U.S. admission. Noncitizens with U.S. citizen or lawful permanent resident spouses or parents, like the Applicant, may apply to waive their fraud or willful misrepresentations of material facts. Section 212(i) of the Act. Thus, *J-F-D-* does not support the Director's denial.

Also, the record does not support the Applicant's purported presentation of fraudulent documents to gain U.S. admission. As she argues on appeal, U.S. immigration authorities did not charge her in removal proceedings with fraud or misrepresentation of a material fact. Further, the record lacks evidence that she conceded presenting false documents or that the IJ so found. Before issuing adverse decisions, USCIS must notify applicants of material, derogatory information of which they may not be aware and afford them opportunities to respond. 8 C.F.R. § 103.2(b)(16)(i). The record shows that the Director neither notified the Applicant of her alleged fraud/willful misrepresentation nor cited evidence to support the charge.

For the foregoing reasons, the Director erroneously denied the application based on the Applicant's allegedly fraudulent admission into the United States. We will therefore withdraw the Director's decision.

B. The Applicant's Eligibility to File the Application

The appeal overcomes the application's denial. But we cannot approve the application because the Applicant did not establish her eligibility to file it.

The instructions to Form I-212, Application for Permission to Reapply for Admission, require filers to have a pending immigrant visa application or an intent to file one. *See* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations). The Applicant is the beneficiary of an approved immigrant visa petition as the spouse of a lawful permanent resident. *See* section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2) (making immigrant visas available to spouses and unmarried sons and daughters of lawful permanent residents). But, contrary to Form I-212's instructions, the record does not demonstrate the Applicant's application, or intent to apply, for an immigrant visa. In an affidavit, she stated that she fears returning to her home country of China. Asked on the Form I-212 where she applied or intended to apply for an immigrant visa abroad, she indicated New York. Yet asked on the form about applying in the United States for an immigrant visa, she left the section blank. Thus, the record does not demonstrate the Applicant's understanding of the form's questions or her required intent to apply for an immigrant visa.

The Applicant has not demonstrated her eligibility to apply for the requested benefit, and the Director did not notify her of the issue. We will therefore remand the matter. On remand, the Director should ask the Applicant to submit additional evidence establishing her application - or intent to apply - for an immigrant visa. Also, if the Director believes the Applicant inadmissible for fraud, willful misrepresentation of a material fact, or on additional grounds, he must notify her of the allegation(s) and evidence supporting the charge(s). He must also allow her a reasonable opportunity to respond.

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