



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

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

In Re: 13022631

Date: MAR. 8, 2021

Motion on Administrative Appeals Office Decision

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

The Applicant seeks permission to reapply for admission into 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) for having been previously ordered removed.

The Director of the Newark, New Jersey Field Office initially denied the application, concluding that no purpose would be served in deciding whether the application merits approval because the Applicant is also inadmissible for fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act. On appeal, we remanded the matter to the Director for entry of a new decision, concluding that the Director's finding of inadmissibility was premature as the U.S. Department of State (DOS) would determine the Applicant's inadmissibility and advise her to seek a waiver of this inadmissibility if needed. We also noted that the Director should consider whether the Applicant is subject to section 212(a)(6)(B) of the Act for failing to attend her removal hearing, for which no waiver is available. On remand, the Director issued a new decision, determining that the Applicant was subject to section 212(a)(6)(B) of the Act and concluding that a favorable exercise of discretion was not warranted. We affirmed this decision on appeal, noting that the Applicant had not submitted any supporting documentation to establish that she met the requirements for an exception to inadmissibility under section 212(a)(6)(B) of the Act. The Director issued a subsequent decision, finding that the Applicant's newly submitted evidence did not establish that she had reasonable cause for not attending her removal hearing. On appeal, we affirmed this decision.<sup>1</sup>

The matter is now before us on a combined motion to reopen and reconsider. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit.

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<sup>1</sup>Our prior decision is incorporated herein.

Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motions because the Applicant has not met this burden.

On motion, the Applicant reiterates her assertion that USCIS does not have jurisdiction to adjudicate whether she had reasonable cause for missing her hearing because an inadmissibility finding under section 212(a)(6)(B) of the Act is not relevant until her immigrant visa interview with the U.S. Department of State (DOS), when a consular officer will determine her admissibility and may find that the Applicant had reasonable cause for failing to appear for her removal hearing. She contends that she has established reasonable cause for not attending her 2003 removal hearing because her attorney failed to update the immigration court with her correct address after she moved from New York to New Jersey, and the woman whom she lived with in New York failed to notify her about any immigration court correspondence after she moved. She also submits additional evidence, including documentation regarding her prior counsel's ineffective assistance, and asserts that she has demonstrated compliance with *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).<sup>2</sup>

We first note that though DOS will determine the Applicant's admissibility and eligibility for an immigrant visa, USCIS can consider the facts related to the Applicant's failure to appear as well as whether she may be subject to other grounds of inadmissibility in determining whether she merits a favorable exercise of discretion.

Further, the record reflects that the Applicant was properly served with a Notice to Appear (NTA), including oral notice in the Spanish language, which provided the consequences if she failed to appear for her hearing and the requirement that she provide an address where she can be contacted in writing by using Form EOIR-33 and update the immigration court if she moves to a new address. The Applicant's attorney filed a motion to change venue on her behalf, and a Notice of Hearing in Removal Proceedings was mailed to the Applicant's updated New York address.<sup>3</sup> On motion, the Applicant contends that after she moved from New York to New Jersey to live with her sister, she did not receive any immigration court correspondence, and the woman whom she had lived with briefly in New York did not advise her of any court correspondence. The Applicant also asserts that her attorney in Texas did not contact the Applicant to confirm her correct address prior to withdrawing as counsel in August 2002, and that she did not take adequate steps to ensure the Applicant was notified of hearing dates or any other case developments.<sup>4</sup>

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<sup>2</sup> In *Matter of Lozada*, the Board of Immigration Appeals (Board) held that any appeal or motion based upon a claim of ineffective assistance of counsel must meet certain requirements, including evidence concerning the agreement that was entered into with counsel with respect to the actions to be taken and indicating that counsel be informed of the allegations leveled against them and be given an opportunity to respond.

<sup>3</sup> In our prior decision, we stated that the Applicant did not provide the court with her new address and her hearing notice was mailed to her attorney. In fact, the Applicant did provide her address in New York, through her attorney, in a motion to change venue.

<sup>4</sup> On motion, the Applicant submits a copy of a June 2020 grievance form filed with the Office of the Chief Disciplinary Counsel of the State Bar of Texas. Though the grievance form indicates that a copy will be forwarded to the attorney named in the grievance, the record does not contain evidence to establish this notification took place. We also note that the record indicates the Applicant filed a motion to reopen her removal proceedings with the immigration court in 2018, which was denied, and that a second motion to reopen with the immigration court is currently pending. It is unclear whether the Applicant's current motion is based on a claim that her failure to appear was due to ineffective assistance of counsel.

Here, the record shows the Applicant was personally served with an NTA that provided the consequences for failing to attend her removal hearing and the requirement that she provide an address where she can be contacted in writing by using Form EOIR-33 and update the court if she moves to a new address. The record indicates that the Applicant's attorney provided the court with an address in New York where the Applicant resided after being released from detention in Texas, and the hearing notice was mailed to that address. The Applicant has not established that she provided her subsequent address to the immigration court, as required, after she moved to New Jersey to live with her sister.<sup>5</sup>

The Applicant asserts that we erred in our decision by not balancing all pertinent favorable factors and that she merits a favorable exercise of discretion because the positive equities, primarily her extensive family ties to the United States and the hardship to her U.S. citizen spouse, outweigh the negative factors. As we explained in our prior decision, an application for permission to reapply for admission is denied, in the exercise of discretion, to a foreign national who is mandatorily inadmissible to the United States under another section of the Act. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). Based on the record before us, the Applicant will become inadmissible upon her departure under section 212(a)(6)(B) of the Act for a period of five years. Under these circumstances, no purpose would be served by determining whether the Applicant merits approval of her application as a matter of discretion because she would remain inadmissible for five years without a possibility to apply for a waiver.

The Applicant has not established our prior decision was based on an inaccurate application of law or USCIS policy. Nor has she established that our decision was incorrect based on the evidence in the record of proceeding. We have also considered the additional evidence offered on motion, and the Applicant has not established that she meets the requirements for an exception to inadmissibility under section 212(a)(6)(B) of the Act based on reasonable cause for failure to attend her removal hearing. 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 review, we will dismiss the motions because the Applicant has not met this burden and her waiver application remains denied.

**ORDER:** The motion to reopen is dismissed.

**FURTHER ORDER:** The motion to reconsider is dismissed.

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<sup>5</sup> We note that her sister indicated in a prior statement that she did not allow the Applicant to use her New Jersey address because she was scared.