U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16677455

Date: APR. 14, 2022

Appeal of Queens, New York Field Office Decision

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

The Applicant 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), because he will be inadmissible upon departing from the United States for having been previously ordered removed. *See* section 212(a)(9)(A)(i) of the Act. Permission to reapply for admission to the United States 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 Queens, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant contends the Director erred in finding that the unfavorable factors in his case outweighed the favorable factors. We review the questions raised 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 remand the matter to the Director for further proceedings.

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 he has an outstanding order of removal, he will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[2]

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

[1] The approval of his application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

[2] The record indicates that the Applicant entered the United States without being inspected, admitted or paroled in September 2004 at the age of 17. He affirmatively applied for asylum and was referred to the immigration judge. His request for asylum was denied in 2009 and he was ordered removed from the United States. The Board of Immigration Appeals dismissed the Applicant's appeal and affirmed the Immigration Judge's decision in 2013. He has not departed and continues to reside in the United States.

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). The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

In denying the application, the Director determined that the Applicant's favorable factors, specifically his lack of criminal history, his length of residence in the United States, and his family ties to the United States, did not outweigh the unfavorable factors. The Director found that the Applicant's unfavorable factors included his entry into the United States without inspection, his failure to comply with his removal order, and his unlawful presence in the United States. The Director also determined that the Applicant did not appear to be eligible for a provisional waiver of inadmissibility for his unlawful presence in the United States based on extreme hardship to his U.S. citizen spouse.[3] *See* section 212(a)(9)(B)(i), (v) of the Act. The denial states that because the Applicant has not demonstrated that his spouse would experience extreme hardship, he is unlikely to qualify for a waiver for his unlawful presence, and this remaining ground of inadmissibility is a negative factor that in itself supports denial of the Form I-212 as a matter of discretion.

On appeal, the Applicant contends that the Director improperly applied the extreme hardship standard to the Form I-212 adjudication and erred by failing to appropriately consider and weigh the submitted evidence.

While the Director found that it is unlikely the Applicant would establish the extreme hardship to his spouse needed to qualify for a provisional waiver for his unlawful presence ground of inadmissibility, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Further, a provisional waiver application is a separate application for relief, and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver.[4] When considering whether a request for permission to reapply warrants a favorable exercise of discretion, favorable factors may include hardship to the applicant and U.S. citizen or lawful permanent resident relatives, the applicant's length of residence in the United States, and family responsibilities.[5]

The Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, but the denial did not address the evidence of additional significant favorable factors in the record. For example, the record reflects that the Applicant has lived in the United States for over 16 years, has no apparent criminal history, has two young U.S. citizen children, a U.S. citizen spouse, and his household includes his spouse's parents, who are lawful permanent residents. The previously submitted evidence includes detailed affidavits from the

[3] *See* Instructions for Form I-601A, Application for Provisional Unlawful Presence Waiver at 7, https://www.uscis.gov/i-601a.

[4] The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) for unlawful presence will be needed after the Applicant departs and regardless of whether he obtains a provisional waiver. *See* Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal – Where to File, https://www.uscis.gov/i-212.

[5] *See Matter of Tin*, 14 I&N Dec. at 373.

Applicant, his spouse, and his mother-in-law, addressing hardship to their family if the Applicant is removed; medical records for his spouse, mother-in-law, and children; employment and financial documentation; family photographs; and country conditions information for China. The Applicant emphasizes that he left China as a teenager and has established roots in the United States, where his spouse, children and in-laws rely on him for physical, emotional, and financial support that he will not be able to provide if he must depart and separate from them. The Applicant also states that relocation to China would impose hardships on his family due to lack of educational and employment opportunities, language barriers for his children, lack of health insurance and limited access to healthcare. While it appears that the Director reviewed some of this evidence in terms of whether the Applicant would be able to establish *extreme* hardship to his spouse in a future waiver application, the decision does not reflect that he considered the hardship involved to the Applicant and others and additional positive factors set forth in *Matter of Tin*.

In light of the deficiencies noted above, we find it appropriate to remand the matter to the Director to determine whether the Applicant warrants a favorable exercise of discretion.

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