U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17420390

Date: APR. 15, 2022

Appeal of New York, 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 is inadmissible for having been previously ordered removed.

The Director of the New York, New York Field Office denied the application. The Director concluded that the Applicant had re-entered the United States without authorization, and therefore must remain abroad for ten years before he may apply for permission to reapply for admission, as required by section 212(a)(9)(C)(i)(II). The Director also concluded that the Applicant's unauthorized re-entry weighed heavily against him in the discretionary determination.

The matter is now before us on appeal. On appeal, the Applicant submits additional evidence and disputes the Director's conclusion that the Applicant has returned to the United States.

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 for the entry of a new decision consistent with our analysis below.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen who has been ordered removed, or who departed the United States while an order of removal was outstanding, is inadmissible for 10 years after the date of departure or removal. Noncitizens 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) of the Act if, prior to the date of the re-embarkation 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 noncitizen's reapplying for admission.

A noncitizen who has been either unlawfully present in the United States for more than one year, or ordered removed, and who later enters or attempts to enter the United States without being admitted, is inadmissible. *See* section 212(a)(9)(C)(i) of the Act. Such an individual is not eligible for

permission to reapply for admission until 10 years after his or her last departure from the United States. *See* section 212(a)(9)(C)(ii) of the Act.

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*, *supra*, 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").

II. ANALYSIS

The Applicant entered the United States in January 2001 as a B-2 nonimmigrant visitor. He did not depart before his nonimmigrant status expired, and was placed in removal proceedings in [redacted] 2002. After he failed to appear at his removal hearing, he was ordered removed *in absentia* in [redacted] 2002 under the provisions of section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A). The Applicant was ordered to report for removal in [redacted] 2002, but he did not do so. Following the approval of an immigrant relative petition filed in 2014 by the Applicant's U.S. citizen daughter, the Applicant departed the United States, and thereby executed the order of removal, on [redacted], 2019.[1] On September 17, 2019, the Applicant was interviewed for an immigrant visa at the U.S. Consulate in Guangzhou, China. Because he departed under an order of removal, he cannot reapply for admission to the United States before [redacted] 2029 unless he first obtains permission from the Secretary of Homeland Security by filing Form I-212 with U.S. Citizenship and Immigration Services (USCIS). *See* section 212(a)(9)(A)(iii) of the Act.

The Form I-212 application shows a New York mailing address for the Applicant. Asked whether the mailing address is the same as the physical address where he resides, the Applicant answered "Yes." Based on that information, the Director concluded that the Applicant returned to the United States after his [redacted] 2019 departure.

In the denial notice, the Director addressed various factors of a discretionary decision, such as family ties in the United States, but the Director stated that the favorable factors "are heavily outweighed by the negative factors," the foremost being the Applicant's presumed re-entry into the United States. The Director stated that, because there is no record of the Applicant's "re-entry into the United States, USCIS considers [the Applicant] to have entered without inspection." Such an unauthorized re-entry would make the Applicant inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and statutorily ineligible to reapply for admission for ten years after his next departure from the United States. The

[1] Some materials in the record erroneously state the date as [redacted] 2020.

Director stated that this unauthorized re-entry shows "lack of regard for the immigration laws of the United States."

On appeal, the Applicant maintains that he "has remained outside the United States" ever since his documented departure in [redacted] 2019 for his consular interview in Guangzhou later that month. He submits an affidavit from the translator who prepared the Form I-212, who states that she erroneously indicated that the Applicant is in the United States. The Applicant submits a new page from Form I-212, showing a residential address in [redacted] China (while still showing a mailing address in New York).

The only indication that the Applicant is in the United States is the checked box on Form I-212, which the preparer has already repudiated in a sworn statement. Because there is no other affirmative evidence that the Applicant is in the United States, the preparer's affidavit has considerable weight.

We note that several statements and other materials submitted with the Form I-212 application refer to the Applicant as being outside the United States.

In the absence of affirmative evidence that the Applicant has, in fact, returned to the United States, it is appropriate to remand this matter for a new discretionary determination, to be based on the other favorable and adverse factors documented in the record.

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