U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15785104

Date: APR. 28, 2022

Appeal of Queens, New York Field Office Decision

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

The Applicant seeks advance consent to reapply for admission so that, if he obtains an immigrant visa abroad, he can legally return to the United States within 10 years of leaving. *See* Immigration and Nationality Act (the Act) sections 212(a)(9)(A)(ii)(I), (iii), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), (iii). He received a final order of deportation in 1997 but remains in the country.

The Director of the Queens, New York Field Office denied the application as a matter of discretion. On appeal, the Applicant argues that the Director overlooked evidence and improperly "speculated" on the Applicant's ability to waive another inadmissibility ground against him.

The Applicant bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that, although the Director overlooked discretionary factors and improperly expected the Applicant to demonstrate potential "extreme hardship" to his U.S.-citizen spouse, the record does not support a favorable exercise of discretion. We will therefore dismiss the appeal.

I. THE INADMISSIBILITY GROUND

Noncitizens who have been ordered removed, deported, or excluded from the United States generally cannot gain admission to the country within 10 years of leaving. Section 212(a)(9)(A)(ii)(I) of the Act. This inadmissibility ground does not apply if U.S. Citizenship and Immigration Services (USCIS) consents to a noncitizen's reapplication for admission before their return to the country. Section 212(a)(9)(A)(iii) of the Act.

The Applicant, a 49-year-old native and citizen of China, concedes that his departure from the United States would render him inadmissible under section 212(a)(9)(A)(ii)(I) of the Act. The record shows that he entered the country without admission near [redacted], California in [redacted] 1993. That same day, U.S. immigration officers apprehended him and placed him in deportation proceedings. In [redacted] 1995, an Immigration Judge (IJ) denied the Applicant's applications for asylum and withholding of deportation but granted him permission to "voluntarily depart" the United States. *See* section 242B of the Act, 8 U.S.C. § 1252B (1995) (allowing noncitizens to leave the country under certain conditions without being ordered deported). In January 1997, the Board of Immigration

Appeals (BIA) dismissed the Applicant's appeal and reinstated his permission to voluntarily depart the country, allowing him to leave by [redacted] 1997. Because the Applicant did not leave by that date, the BIA's decision converted into a deportation order. Thus, the Applicant is under a final deportation order, his departure from the United States would render him inadmissible under 212(a)(9)(A)(ii)(I) of the Act, and, to legally return to the country within 10 years, he would require an inadmissibility exception under section 212(a)(9)(A)(iii).

II. THE REQUESTED EXCEPTION

A noncitizen whose departure from the United States would execute a removal, deportation, or exclusion order may file a Form I-212 application before leaving the country. 8 C.F.R. § 212.2(j). If granted, the application receives advance or "conditional" approval, which would not take effect until the applicant leaves the country. *Id.*

On appeal, the Applicant asserts that the Director erred by disregarding the advance nature of the requested consent. The Director's denial, however, does not concern the application's filing in the United States or the Applicant's intent to leave the country. Rather, the Director denied the application as a matter of discretion. Thus, the decision's "failure" to discuss the advance nature of the requested consent is immaterial, meriting neither the application's reversal nor remand.

III. THE DISCRETIONARY DECISION

USCIS may consent to reapplications for admission at its discretion. *See* section 212(a)(9)(A)(iii) of the Act. Successful Form I-212 applicants must demonstrate social and humanitarian factors outweighing adverse evidence of record. *See Matter of Tin*, 14 I&N Dec. 371, 373-74 (BIA 1973). In determining whether to exercise favorable discretion, USCIS should consider: the basis and recency of an applicant's deportation; the length of their U.S. residence; their moral character and respect for law and order; evidence of rehabilitation; their family responsibilities; the existence of repeated immigration violations; hardship to themself or others; close family ties in the United States; the need for their services in the country; and any other relevant factors. 9 *USCIS Policy Manual* A(5)(A), https://www.uscis.gov/policy-manual.

The Director identified the Applicant's lack of a criminal record as a favorable factor. Favorable equities acquired after the issuance of a deportation order may merit lesser evidentiary weight. *See, e.g., Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991). But the Director also favorably considered the length of the Applicant's U.S. residence and his family ties in the country. In addition to his spouse, the record shows that the Applicant has a 16-year-old, U.S.-citizen daughter from a prior relationship and twin, 15-year-old stepdaughters who are also U.S. natives.

The Director found adverse factors to include: the Applicant's illegal entry into the United States; his noncompliance with the BIA's grant of voluntary departure; his length of "unlawful presence" in the country; and the purported likelihood that he would not merit a waiver of his unlawful presence inadmissibility. *See* section 212(a)(9)(B)(i)(II) of the Act.[1]

[1] The term "unlawful presence" includes presence in the United States after entry without admission or parole. Section

The Applicant argues that all the Director's adverse factors relate to the Applicant's unlawful presence. He asserts that the Director "maliciously" listed his unlawful presence violation as four, separate adverse factors in "an attempt at artificially inflating allegedly 'unfavorable' factors."

As previously indicated, however, in determining whether to exercise favorable discretion, USCIS should consider whether an applicant committed "[r]epeated or serious violations of immigration laws, which evidence a disregard of U.S. law." 9 *USCIS Policy Manual* A(5)(A), *supra.* As the Applicant argues, his illegal entry into the United States and his continuing residence in the country after the issuance of the deportation order relate to his "unlawful presence." But the transgressions are also discrete violations of U.S. immigration law. *See, e.g.*, sections 275(a), 276(a) of the Act, 8 U.S.C. §§ 1325(a), 1326(a) (subjecting noncitizens to potential fines and imprisonment if they, respectively, entered the United States improperly or are found in the country after being ordered deported). Also, noncitizens who voluntarily fail to leave the country under grants of voluntary departure face fines and bars to certain immigration benefits. Section 240B(d) of the Act, 8 U.S.C. § 1229c(d). Thus, the Director properly considered the Applicant's U.S. immigration violations on individual bases.[2]

We agree with the Applicant that the Director improperly expected him to demonstrate that his U.S. departure would cause his spouse "extreme hardship." As indicated above, the Director noted that, because the Applicant has accrued more than one year of "unlawful presence," his departure from the United States would subject him to an additional ground of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The Director found that the Applicant would not likely qualify for a provisional unlawful presence waiver, as a grant would require demonstration of potential, "extreme hardship" to his U.S.-citizen spouse. *See* section 212(a)(9)(B)(v) of the Act (requiring applicants for unlawful presence waivers to establish extreme hardship to their U.S.-citizen or lawful-permanent-resident spouses or parents).

Citing *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg'l Comm'r 1963), the Director stated:

> Since it is unlikely that you will qualify for a waiver of unlawful presence and will remain inadmissible even if USCIS were to grant your Form I-212, the remaining ground of inadmissibility is a negative factor that in itself supports denial of this Form I-212 as a matter of discretion.

In *J-F-D-*, however, the applicant for consent to reapply was "ineligible" to waive an additional ground of inadmissibility. *Matter of J-F-D-*, 10 I&N Dec. at 695. As that applicant could not possibly eliminate all the barriers to his legal return to the United States within the applicable period, the Regional Commissioner found that the application's approval would serve "no purpose." *Id.* In contrast, if USCIS approves the Applicant's application, he would qualify to apply for a provisional unlawful presence waiver. *See* section 212(a)(9)(B)(v) of the Act. Thus, unlike the application in

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212(a)(9)(B)(ii) of the Act. The Applicant does not contest that, since section 212(a)(9)(B) took effect on April 1, 1997, he has accrued more than one year of unlawful presence, rendering him inadmissible under section 212(a)(9)(B)(i)(II).

[2] To the extent the Applicant asserts that the Director inflated the number of unfavorable, discretionary factors, we note that a favorable exercise of discretion requires more than a determination that favorable factors *outnumber* adverse ones. Rather, USCIS must "give the appropriate weight to each adverse and favorable factor" and "consider all of the factors cumulatively to determine whether the favorable factors *outweigh* the unfavorable ones." 9 *USCIS Policy Manual* A(5)(B), *supra* (emphasis added).

J- F-D-, the Applicant's application potentially serves a purpose. *J-F-D-* therefore does not apply to this case.

Moreover, Form I-212 applications and Form I-601A submissions for provisional unlawful presence waivers are separate filings. If noncitizens need to file both types of applications, they must submit their Form I-212 applications first. 8 C.F.R. § 212.7(e)(4)(iv). Form I-212 applications need not demonstrate potential "extreme hardship" to qualifying relatives; rather, in determining whether to exercise favorable discretion in Form I-212 proceedings, USCIS considers "hardship" to applicants or others. *See* section 212(a)(9)(iii) of the Act; 9 *USCIS Policy Manual* B(5)(D), *supra*. Thus, the Director erred in expecting the Applicant to meet the extreme hardship standard.

Also, in considering potential, "extreme hardship" to the Applicant's spouse, the Director's decision mentions her "mental health." But, in identifying favorable, discretionary factors, the Director did not consider potential, emotional hardship to her. Prior trauma suffered by applicants or others may aggravate the emotional impact of their potential separations or relocations. 9 *USCIS Policy Manual* B(5)(D). The record contains evidence that, as a teenager, the Applicant's spouse tried to commit suicide and later endured several years of abuse from her first spouse. Reports from a licensed psychologist diagnose the Applicant's spouse with posttraumatic stress disorder and depression. The reports indicate that, if the Applicant remains outside the United States for 10 years, his spouse's prior trauma could aggravate her emotional hardship. The Director therefore should have considered this hardship evidence.

Despite these oversights, however, the record does not support a favorable exercise of discretion. The Applicant developed many of the factors favoring him - including his family ties in the United States and his lengthy residence in the country - after his deportation order became final. Thus, these "after-acquired equities" merit lesser evidentiary weight. *See, e.g., Garcia-Lopes*, 923 F.2d at 74. Also, the Director disregarded discretionary factors adverse to the Applicant. Although the application seeks to excuse the Applicant's noncompliance with the deportation order, the Director did not specifically consider the Applicant's noncompliance with the order as a negative, discretionary factor. We find the Applicant's noncompliance with the order to constitute one of the most significant negative factors, as it suggests substantial, repeated disrespect for U.S. law.

The Director also did not consider the Applicant's unauthorized employment in the United States. USCIS records show that he obtained permission to work in the country from 1994 to 1997, while his asylum application remained pending in deportation proceedings. *See* 8 C.F.R. § 274a.12(c)(8) (allowing asylum applicants to apply for employment authorization). But the Applicant's affidavits, applications, and copies of his federal income tax returns indicate his employment in the United States since 1997. USCIS records indicate that he lacked authorization for his post-1997 work.

Additionally, the record shows that both the IJ and BIA doubted the Applicant's asylum testimony. In affirming the IJ's denial of the asylum application, the BIA described the Applicant's recollection of events supporting his claimed fear of political persecution in China as "very sketchy." The Board found that his testimony was neither "detailed, consistent, [nor] believable." As these findings cast doubt on the veracity of the Applicant's asylum claim, they constitute a negative, discretionary factor. *See Matter of M-L-M-A-*, 26 I&N Dec. 360, 363 (BIA 2014) (in the context of an application for

special rule cancellation of removal under section 240A(b)(2) of the Act, 8 U.S.C. § 1229b(b)(2), finding an adverse credibility determination to constitute an adverse, discretionary factor).

The Applicant asserts additional, discretionary factors in his favor. But the record does not indicate that they and the other positive equities of record outweigh the adverse factors. He argues that he is the primary caregiver of his twin, U.S.-citizen stepdaughters.[3] But the record shows that the girls are now almost 16 years old. They presumably attend school most of the year, and the record lacks evidence that they have special needs or require large amounts of supervision.

The Applicant also submitted medical documentation showing that his spouse suffers from breast lesions and uterine fibroids that require medical monitoring. The evidence, however, does not indicate that these maladies are cancerous or that they otherwise seriously impair his spouse's daily activities.

Additionally, the Applicant asserts that his departure from the United States would cause financial hardship to his spouse and daughters. But a copy of the couple's joint federal income tax return for 2017 - the most recent of record - reports their receipt of cash gifts from a foreign person(s) totaling well over $100,000.[4] Based on the Applicant's receipt of these apparent, substantial incomes in 2017, the record does not establish that his U.S. departure would cause his family unusual, financial hardship.

IV. CONCLUSION

Despite errors in the Director's analysis, the Applicant has not demonstrated that he merits a favorable exercise of discretion. We will therefore affirm the application's denial.

ORDER: The appeal is dismissed.

[3] The record indicates that the Applicant's 16-year-old U.S.-citizen daughter does not regularly reside with her father.

[4] On IRS Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, the Applicant and his spouse reported receiving three cash payments, totaling more than $100,000, in June and July 2017. Also, government records show that, in the same year, the Applicant and a co-owner sold a residential property for nearly $1 million, about 60% more than they paid for it in 2009. *See* NYC Dept. of Finance, ACRIS [Automated City Register Information System], https://www1.nyc.gov/site/finance/taxes/acris.page.