U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15777248

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 may legally return to the United States within 10 years of leaving. *See* Immigration and Nationality Act (the Act) sections 212(a)(9)(iii), 8 U.S.C. § 1182(a)(9)(iii). He received a final order of removal in 2003 but remains in the country. *See* section 212(a)(9)(A)(ii)(I) of the Act.

The Director of the Queens, New York Field Office denied the application as a matter of discretion. On appeal, the Applicant submits additional evidence and asserts that his 10-year absence from the United States would cause unusual hardship to his U.S.-citizen spouse.

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 the Director did not fully consider potential, emotional hardship to the Applicant's spouse and improperly expected the Applicant to demonstrate "extreme hardship" to his spouse. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. THE INADMISSIBILITY GROUND

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

Applicants whose departures from the United States would execute remove orders may file their Form I-212 applications while in the country. 8 C.F.R. § 212.2(j). Approval of their applications, however, would not take effect until they leave the United States. *Id.*

The Applicant, a 55-year-old native and citizen of Guyana, concedes that his departure from the United States would render him inadmissible under section 212(a)(9)(A)(ii)(I) of the Act. He entered the

country in 2002 by wading across the Rio Grande near [redacted] Texas. Shortly after, a U.S. immigration officer apprehended him and placed him in removal proceedings. The Immigration Judge (IJ) granted the Applicant "voluntary departure," allowing him to leave the country without being removed by [redacted] 2003. *See* section 240B of the Act, 8 U.S.C. § 1229c. Because the Applicant did not leave by that date, however, the IJ's order automatically converted to a removal order. Thus, the Applicant is under a final order of removal and, upon leaving the United States, would face a 10-year bar on legally returning to the country. *See* section 212(a)(9)(A)(ii)(I) of the Act.

II. 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 (BIA 1973). In determining whether to exercise discretion, USCIS should consider: the basis and recency of an applicant's removal; the length of their U.S. residence; their moral character and respect for law and order; evidence of their rehabilitation; their family responsibilities; their commission 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. *Id.*

As the Director found, the Applicant's negative factors primarily include his U.S. immigration violations. He not only entered the country illegally but also violated the IJ's order by not voluntarily departing. Favorable factors include his lack of a criminal record, length of residency in the United States, and close ties to relatives in the country. The record shows that, in addition to his U.S.-citizen spouse, the Applicant has four U.S.-citizen stepdaughters - ages 31 to 41 - and at least 10 U.S.-citizen step-grandchildren. The Applicant and his spouse, a naturalized U.S. citizen who has lived in the country for about 28 years, reside with one of his stepdaughters and her family.

The Director erred in listing an additional negative factor: the Applicant's "unlikelihood" to overcome a second inadmissibility ground. The Director noted that, because the Applicant has accrued more than one year of "unlawful presence," his departure from the United States would also render him inadmissible for 10 years under section 212(a)(9)(B)(i)(II) of the Act.[1] The Director found that the Applicant would not likely qualify for a provisional unlawful presence waiver, as such 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.

[1] The term "unlawful presence" includes presence in the United States after entry without admission or parole. Section 212(a)(9)(B)(ii) of the Act.

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 the 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 approval of the Form I-212 application would serve "no purpose." *Id.* In contrast, if USCIS approves the Applicant's application, he would qualify to apply for a provisional waiver of his unlawful presence. *See* section 212(a)(9)(B)(v) of the Act. Thus, unlike the application in *J-F-D-*, the Applicant's filing potentially serves a purpose. *J-F-D-* therefore does not apply to this case.

Moreover, Form I-212 applications for consent to reapply 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. Section 212(a)(9)(iii) of the Act; 9 *USCIS Policy Manual* B(5)(D), *supra*. Rather, in determining whether to exercise favorable discretion in Form I-212 proceedings, USCIS considers "hardship" to applicants or others. *Matter of Tin*, 14 I&N Dec. at 373. Thus, the Director erred in expecting the Applicant to meet the extreme hardship standard.

The Director noted that the Applicant's close ties to U.S. relatives merit diminished evidentiary weight, as he developed those ties after his receipt of the final removal order. *See, e.g, Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995)). But the Director disregarded potential hardship to the Applicant's spouse and family. Prior trauma suffered by applicants and their relatives may aggravate the emotional impact of separation or relocation. 9 *USCIS Policy Manual* B(5)(D), *supra*. The Director acknowledged reports from a psychopathologist and licensed clinical social worker, stating that the Applicant's spouse suffers from depression and anxiety. But the record also indicates that, for much of her life, the Applicant's spouse suffered physical and emotional abuse from her father and her first spouse. She stated that, at one point in her first marriage, she doused herself with kerosene in a suicidal attempt to set herself ablaze. One of her daughters, then seven years old, reportedly grabbed a box of matches from her to prevent her immolation. On appeal, the Applicant submits additional evidence that, if he leaves the United States for 10 years, his spouse's prior traumas could aggravate the emotional hardship caused by his departure.

For the foregoing reasons, we will withdraw the Director's decision. To allow proper reassessment of discretionary factors, we will remand the matter. Upon remand, the Director should review the entire record, including evidence submitted by the Applicant on appeal.

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