U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15777093

Date: APR. 29, 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)(A)(ii)(I), (iii), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), (iii). He received a final order of removal in 2004 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 asserts that the Director overlooked factors favoring the Applicant. He also submits additional evidence, claiming that his 10-year absence from the country would cause unusual hardship to his spouse and two children, who are all U.S. citizens.

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 affirm the Director's decision, finding that the Applicant did not demonstrate that he merits 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 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 orders of removal, deportation, or exclusion may file their Form I-212 applications before leaving the country. 8 C.F.R. § 212(j). Any approvals, however, would not take effect until the applicants leave the United States. *Id.*

The Applicant, a 42-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, after stowing away on a container ship in China, he arrived in Haiti in 2002 and about a month

later entered the United States at the U.S. Virgin Islands without admission or parole. Shortly after his U.S. entry, local police transported him to U.S. immigration officers, who placed him in removal proceedings. In 2003, an Immigration Judge (IJ) denied the Applicant's applications for relief and ordered him removed to China. The following year, the Board of Immigration Appeals (BIA) affirmed the IJ's decision.

As the Applicant is under a final order of removal, his departure from the United States would execute the order and render him inadmissible under section 212(a)(9)(A)(ii)(I) of the Act. He hopes to obtain a U.S. immigrant visa in China based on an approved immigrant visa petition for him as the spouse of a U.S. citizen. But, to legally immigrate to the United States within 10 years of his departure, he would require an inadmissibility exception under section 212(a)(9)(A)(iii) 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 therefore demonstrate social and humanitarian considerations outweighing adverse evidence in their records. *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 applicants' removals; the length of their U.S. residences; their moral characters and respect for law and order; evidence of their rehabilitations; their family responsibilities; commissions of repeated immigration violations; hardships to themselves or others; close family ties in the United States; needs for their services in the country; and any other relevant factors. *Id.*

As the Director found, negative factors in the Applicant's case primarily include his U.S. immigration violations. He illegally entered the country and, despite receiving a final removal order in 2004, has remained here unlawfully. Favorable factors include the Applicant's lack of a criminal record and his close ties to relatives in the United States. The record indicates that, besides his U.S. citizen spouse and two children - ages 10 and 9 - his in-laws are either U.S. citizens or lawful permanent residents.[1]

The Director, however, improperly expected the Applicant to demonstrate that his 10-year absence from the United States would cause his spouse "extreme hardship." The Director noted that, because the Applicant accrued more than one year of "unlawful presence," his departure from the United States would subject him to another inadmissibility ground. *See* section 212(a)(9)(B)(i)(II) of the Act.[2] The Director found that the Applicant would not likely obtain a provisional unlawful presence waiver, as a grant would require demonstration of "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 demonstrate extreme hardship to their U.S.-citizen or lawful-permanent-resident spouses or parents). 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

[1] In support of his application for asylum under section 208 of the Act, 8 U.S.C. § 1158, the Applicant testified in removal proceedings that he also fathered a 21-year-old daughter who was born in China from another relationship. The record does not indicate whether the Applicant maintains contact with this daughter or financially supports her.

[2] 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.

ground of inadmissibility is a negative factor that in itself supports denial of this Form I-212 as a matter of discretion.

USCIS may deny a Form I-212 application if an applicant is "ineligible" to waive an additional ground of inadmissibility. *See Matter of J-F-D-*, 10 I&N Dec. 694, 695 (Reg'l Comm'r 1963). Those circumstances merit an application's denial because, without potential resolution of all inadmissibility grounds against an applicant during a relevant period, approval would serve "no purpose." *Id.* In contrast, if USCIS approves this Applicant's application, he would be eligible to apply for a provisional unlawful presence waiver. *See* section 212(a)(9)(B)(v) of the Act. Thus, the Applicant's filing potentially serves a purpose, and the additional inadmissibility ground against him does not warrant the application's denial.

Moreover, Form I-212 applications and Form I-601A submissions for provisional unlawful presence waivers are separate filings. Applicants who need to file both types of applications must submit Form I-212 applications first. 8 C.F.R. § 212.7(e)(4)(iv). Form I-212 filings need not demonstrate "extreme hardship" to applicants' spouses. Section 212(a)(9)(iii) of the Act. Rather, in determining whether to exercise favorable discretion in Form I-212 proceedings, USCIS considers potential "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.

Despite these errors, the record does not establish that the Applicant merits a favorable exercise of discretion. Most of the discretionary factors in his favor arose after the removal order against him became final. As the Director found, the Applicant "decided to create a family in the United States well after the IJ and BIA decisions, and while cognizant of [his] illegal standing in the United States." Thus, these "after-acquired equities" merit diminished, evidentiary weight. *See, e.g., Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995).

Also, evidence casts doubt on the veracity of the Applicant's asylum application. The IJ found - and the BIA affirmed - that the Applicant provided "incredible testimony" in support of portions of his persecution claim. The finding casts doubt on the validity of his asylum claim. *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), considering an adverse credibility determination as a negative, discretionary factor).

Additionally, the Applicant submits evidence on appeal casting doubt on the seriousness of his spouse's mental illnesses if properly treated. The application initially included a 2018 report from a licensed psychologist, stating that the Applicant's spouse suffered from depression, anxiety, and insomnia. On appeal, copies of 2020 records from a new healthcare provider indicate the spouse's continuing diagnosis of depression and anxiety. But the new records indicate that the Applicant's spouse did not take medications previously prescribed to her. The records state that "two years ago [she] saw [an] offsite psychiatrist but did[] not take meds."

The evidence on appeal also indicates the Applicant's employment in the United States since at least 2019. USCIS records, however, indicate that he has not had U.S. employment authorization since 2004.

We have considered the Applicant's evidence on appeal and recognize the existence of discretionary factors that weigh in his favor, including: his lack of a criminal record; his close ties to U.S. relatives; his family responsibilities; and his spouse's depression and anxiety. For the foregoing reasons, however, we conclude that the favorable equities and additional evidence do not outweigh the adverse factors of record. We will therefore affirm the application's denial.

ORDER: The appeal is dismissed.