U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19328539

Date: AUG. 22, 2022

Appeal of Los Angeles Field Office Decision

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

The Applicant, a native and citizen of Mexico, will be inadmissible upon his departure from the United States for having been previously ordered deported and seeks permission to reapply for admission to the United States under Immigration and Nationality Act (the Act) section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). 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 Los Angeles Field Office denied the application, concluding that the record did not establish that the Applicant merited a positive exercise of discretion. On appeal, the Applicant asserts that the Director did not weigh the positive and negative equities in his case correctly and that he merits a positive exercise of discretion.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that a noncitizen other than an "arriving alien" who has been ordered removed under section 240 of the Act, 8 U.S.C. §1229a, or any other provision of law, and who departs or is removed from the United States, will be inadmissible for 10 years after the date of that departure or removal.

Noncitizens found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission before the 10 years have passed, and USCIS may grant this exception to inadmissibility in the exercise of discretion.

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 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).

Generally, favorable factors that came into existence after a noncitizen has been ordered removed from the United States, are given less weight in a discretionary determination. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408, 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination).

II. ANALYSIS

A. Procedural History

On June 18, 2005, the Applicant attempted to enter the United States without inspection and was granted a voluntary return to Mexico. On June 20, 2005, the Applicant again attempted to enter the United States without inspection and was again granted a voluntary return. On an unknown date, the Applicant successfully entered the United States without inspection and has remained in the United States since that time.[1]

On [redacted] 2017, the Applicant was issued a Form I-862, Notice to Appear, charging him with removability under section 212(a)(6)(A)(i) of the Act as a noncitizen present in the United States without being admitted or paroled. On [redacted] 2018, the Applicant married his U.S. citizen wife. On April 10, 2018, the Applicant conceded removability under section 212(a)(6)(A)(i) of the Act. On June 29, 2018, his spouse filed a Form I-130, Petition for Alien Relative on his behalf. On December 13, 2018, the Applicant applied for asylum, withholding of removal, and cancellation of removal.

On [redacted] 2019, an Immigration Judge denied the Applicant's applications for asylum, cancellation of removal, withholding of removal under section 241(b)(3) of the Act, and withholding of removal under the Convention Against Torture. The Immigration Judge did grant the Applicant's request for voluntary departure. On November 6, 2019, the Board of Immigration Appeals (BIA) dismissed the Applicant's appeal and granted the Applicant 30 days from the date of the order to voluntarily depart the United States. The Applicant filed a petition for review with the Ninth Circuit Court of Appeals. This terminated his grant of voluntary departure, and an alternate order of removal was entered. USCIS systems indicate that the petition for review was dismissed in December 2021.

On January 9, 2020, USCIS approved the Form I-130 that had been filed on the Applicant's behalf. The Applicant seeks advance permission to apply for admission to the United States so that he can apply for an immigrant visa abroad. The Applicant does not contest his inadmissibility on appeal. The record indicates that the Applicant currently resides in the United States and is seeking conditional approval of the application under the regulation at 8 C.F.R. § 212.2(j) before he departs, since he will become inadmissible upon his departure due to his prior deportation order. The approval of the

[1] The record indicates that the Applicant succeeded in entering the United States at some other point in 2005.

application under these circumstances is conditioned upon the Applicant's departure from the United States and will have no effect if he fails to depart.

B. Discretion

The Director concluded that the record did not establish that the Applicant merited a positive exercise of discretion. We have reviewed the entire record, including the materials submitted on appeal, and for the reasons explained below conclude that the Applicant has not established: (a) that the positive factors in his case outweigh the negative ones, and (b) that a favorable exercise of discretion is warranted.

The Applicant's positive factors include his long-term and close relationships with his U.S. citizen wife and stepson, the potential emotional and financial hardship to his wife and stepson if they were to be separated, the letters submitted in support of his good character, his record of paying income taxes, and the difficult conditions he would potentially face upon returning to Mexico.

The negative factors in the Applicant's case include his repeated attempts to enter the United States without inspection, his history of unauthorized employment, his felony conviction, and his failure to appear at an arraignment regarding that felony. The record also indicates that upon departing the United States, the Applicant will become inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for being unlawfully present in the United States for over a year.

The record includes documentation of hardships the Applicant's wife has experienced in the past, including statutory rape and multiple miscarriages, as well as her current diagnoses of major depression and generalized anxiety disorder. The underlying petition includes a letter from a licensed marriage and family therapist, who states that if the Applicant's wife "were actually faced with long-term separation from her husband, her depression and anxiety could certainly worsen exponentially and could even become debilitating, preventing her from working, being emotionally available for her son and unborn child, or adequately functioning day-to-day."

In their denial, the Director found that the potential hardship to the Applicant's wife should be given diminished weight pursuant to *Ghassan v. INS*, 972 F.2d 631, 634-635 (5th Cir. 1992), since her wedding to the Applicant occurred while the Applicant was in removal proceedings, and she therefore knew at the time that the Applicant could be deported. On appeal, counsel states that the Director erred in relying on *Ghassan* because in the present case, the Applicant and his wife had been in a relationship since 2005, well before he was placed into removal proceedings, and so the potential hardship to his wife should not be given diminished weight.[2] Counsel cites *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980), *rev'd on other grounds*, 450 U.S. 139 (1981), which states that equities acquired when a noncitizen knows they are in the country illegally should be weighed according to their individual circumstances, such as whether they raise a suspicion that the noncitizen has a calculated purpose to delay or avoid deportation, or whether they are simply facts that arise because "life has not stopped for the [noncitizen] merely because he is in the country illegally."

[2] We acknowledge counsel's argument that *Ghassan* is not binding upon the present case since the latter is in the Ninth Circuit. However, we may cite non-binding federal appellate decisions as persuasive authority.

We acknowledge that the Applicant and his wife have had a long relationship and will weigh her potential emotional hardship accordingly. However, this does not distinguish the present case from *Ghassan*, where the applicant and his spouse also had a relationship prior to his removal proceedings and then married after proceedings began. While counsel also points out that the applicant in *Ghassan* had a much more serious criminal record than the Applicant in the present case, this distinction does not pertain to the Fifth Circuit's reasons for giving diminished weight to the potential hardship of the applicant's wife in that case – namely, that she married her husband after removal proceedings began and therefore knew that he could potentially be deported. These reasons are also applicable in the present case.

Regarding counsel's citation to *Wang v. INS*, 622 F.2d at 1346, we decline to find that the marriage in this instance was simply a fact that arose because life does not stop while a noncitizen is in the country illegally. While the Applicant and his wife had been in a relationship for over ten years before his removal proceedings began, they only married several months after the Applicant was issued his Notice to Appear, and three days before he conceded removability. While this timing does not eliminate the weight of the marriage and the potential hardship to the Applicant's wife and stepson, it does diminish that weight.

Regarding the claims of potential financial hardship to the Applicant's wife and stepson, the underlying petition includes records of the Applicant's 2019 wages and joint tax return with his wife, which indicate that the $7,762 he earned that year was the family's only income. The record also includes a January 2020 bank statement with a final balance of less than $100 and a January 2020 gas bill indicating that the previous month's payment is past due. However, while the record includes general evidence regarding conditions in Mexico, it does not contain sufficient specific evidence to establish that the Applicant, who is in his 30s and in good health, would be unable to earn similar wages to support his family while living there. It is further noted that both the Applicant and his wife have family members living in the United States who may be able to provide economic and other support.

Regarding the Applicant's respect for law and order, we first note that the Applicant twice attempted to enter the United States without inspection and was twice granted a voluntary return, and then successfully entered without inspection on his third try within the same year. The Applicant's repeated violations of immigration law are negative factors in his application.

We acknowledge that the Applicant's repeated attempts at entering without inspection occurred over fifteen years ago. However, in [redacted] 2017, the Applicant was arrested for driving under the influence (DUI), and in [redacted] 2018, he failed to attend his arraignment, causing a warrant to be issued for his arrest. While counsel points out that the Applicant did attend all of his subsequent hearings, no reason is given for why he did not attend his arraignment. In their brief, counsel also characterizes the Applicant's conviction as a "misdemeanor violation." However, the record indicates that the Applicant's violation of Cal. Veh. Code § 23153(b) was charged as a felony which required the Applicant to have had a blood alcohol level of over 0.08 percent while driving a vehicle, to have concurrently either committed an act forbidden by law or neglected a duty imposed by law for driving a vehicle, and that this act or neglect proximately caused bodily injury to a person other than himself. The record does not state the circumstances of the Applicant's violation or what injury was caused or to whom. Regarding rehabilitation, we acknowledge counsel's statement that the Applicant has

completed the mandatory driver education program that was part of his sentence, as well as the support letters stating that the Applicant has not drunk alcohol since his arrest. However, the recency of the Applicant's felony and the fact that it caused injury to another person are factors that weigh against a favorable exercise of discretion.

After a careful review of the entire record, we find that the Applicant has not established that the favorable factors in his case considered individually and in the aggregate outweigh the unfavorable ones. Therefore, he has not established that a favorable exercise of discretion is merited in this case, and the Applicant's request for permission to reapply for admission to the United States remains denied.

ORDER: The appeal is dismissed.