U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24489557

Date: DEC. 13, 2022

Service Motion to Reopen on Administrative Appeals 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). The Applicant will be inadmissible upon departing from the United States for having been previously ordered removed. *See* section 212(a)(9)(A)(ii) of the Act. 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 Queens, New York Field Office denied the application, finding that the negative factors outweigh the positive ones, that the Applicant did not establish extreme hardship to his lawful permanent resident (LPR) spouse, and that he is unlikely to obtain approval of a Form I-601A, Application for Provisional Unlawful Presence Waiver, for his unlawful presence inadmissibility. We initially rejected the Applicant's appeal of the Director's decision as untimely, however we reopened this matter *sua sponte,* pursuant to 8 C.F.R. § 103.5(a)(5), and afforded the Applicant 33 calendar days to submit a brief. In response the Applicant submitted additional evidence, including financial documentation and medical records for his spouse.

The Applicant bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will withdraw the Director's decision that erroneously considered extreme hardship in denying the Form I-212 application, but we will remand the matter for entry of a new decision for the reasons detailed in the following analysis.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i), who "has been ordered removed . . . or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible." 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 reembarkation at a

place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

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). 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).

Under section 212(a)(9)(B)(i)(II) of the Act, a noncitizen (other than one lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of their departure or removal from the United States is inadmissible. A noncitizen may seek a waiver for this inadmissibility under section 212(a)(9)(B)(v) of the Act (the unlawful presence waiver) if they establish that their inadmissibility will cause their U.S. citizen or legal permanent resident spouse or parent extreme hardship. Pursuant to 8 C.F.R. § 212.7(e), some noncitizens who are inadmissible for unlawful presence may apply for a provisional unlawful presence waiver prior to departing the United States. However, one who is subject to an administrative final order of removal, deportation, or exclusion under any provision of law is ineligible for a provisional unlawful presence waiver under 8 C.F.R. § 212.7(e), unless they file, and USCIS approves, an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 C.F.R. § 212.2(j).

II. ANALYSIS

A. Facts and Procedural History

The record reflects that the Applicant is a native and citizen of China who claims to have entered the United States without inspection in 1995. The Applicant filed a Form I-589, Application for Asylum and for Withholding of Removal, and in 1996 was issued a Form I-221, Order to Show Cause, placing him in removal proceedings. On [redacted] 1997, an Immigration Judge granted the Applicant a period of voluntary departure until [redacted] 1998, but as the record indicates that the Applicant has not departed the United States, the grant of voluntary departure became a final order of removal. Thus, the Applicant's departure from the United States would execute the removal order, *see* section 101(g) of the Act, and render him inadmissible to return for 10 years under section 212(a)(9)(A)(ii)(I) of the Act. On [redacted] 2006, the Applicant married his LPR spouse who filed a Form I-130, Petition for Alien Relative, on his behalf in 2013. The Form I-130 was approved in 2014 and in October 2016 the Applicant filed his Form I-212.

B. The Director's Decision

The Director determined that the negative factors outweigh the positive factors and denied the application as a matter of discretion. The Director identified the Applicant's favorable factors as his

length of time in the United States, a lack of criminal history, and family ties to the United States, although affording family equity less weight because the Applicant's marriage occurred after his removal order. The Director identified the unfavorable factors as the Applicant's illegal entry into the United States, his failure to comply with the grant of voluntary departure, his unlawful presence in the United States, and the unlikelihood that he would overcome other grounds of inadmissibility.

The Director specifically determined that to re-enter the United States the Applicant needed an approved Form I-601A to waive his inadmissibility for unlawful presence, but that evidence was insufficient to show his LPR spouse would experience extreme hardship if the Applicant were refused admission. The Director acknowledged that showing extreme hardship was not required for a Form I-212 to be approved but concluded it unlikely that the Applicant will qualify for a waiver of unlawful presence and the remaining ground of inadmissibility was a negative factor that supported denial of his Form I-212 as a matter of discretion.[1]

As an initial matter we note that the Director erred in finding, in the Form I-212 decision, it is unlikely the Applicant would establish extreme hardship to his spouse in order to qualify for a provisional waiver for the unlawful presence ground of inadmissibility. Extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. A provisional waiver application is a separate application for relief, and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver.[2] Because the Director inappropriately adjudicated the Applicant's eligibility for a provisional unlawful presence waiver, we are withdrawing the Director's decision.

However, review of the record does not show that the Applicant identified his intent in filing for permission to reapply for admission to the United States. The filing instructions for Form I-212 stipulate that an applicant may file the form if they are inadmissible under INA section 212(a)(9)(A) and are an applicant for an immigrant visa or an applicant for adjustment of status under INA section 245. *See* 8 C.F.R. § 103.2(a)(1) that every form, benefit request, or other document must be submitted to DHS and executed in accordance with the form instructions. The record does not indicate that the Applicant has applied, or intends to apply, for an immigrant visa, or that the Applicant has a pending Form I-485, Application to Adjust Status.[3]

On his Form I-212 the Applicant left blank the fields asking for information about seeking an immigrant or nonimmigrant visa; provided a Form I-130 receipt number in the fields asking if the Form I-212 application is submitted in connection with an application to adjust status; and indicated "no" where asked if he had filed a Form I-601, Application for Waiver of Grounds of Inadmissibility.

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[1] The Director cited *Matter of J-F-D-*, 10 I&N Dec. 694 (INS 1963), however that decision allows discretionary denial of an application for permission to reapply only if an applicant is ineligible to apply for a waiver of another inadmissibility ground. Here the Applicant may seek a waiver of his unlawful presence inadmissibility.

[2] The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) of the Act for unlawful presence will be needed after he departs and regardless of whether he obtains a provisional waiver. *See* Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal – Where to File, https://www.uscis.gov/i-212.

[3] The record indicates that the Applicant filed an adjustment application in conjunction with a Form I-140, Immigrant Petition for Alien Worker, both of which were denied in 2005.

The Applicant has not provided information concerning visa processing and the record does not indicate that he has a pending adjustment of status application. The Applicant's affidavit and counsel's brief submitted on appeal address only hardship to the Applicant's spouse if he must return to China; not an intent to apply for an immigrant visa or a pending adjustment application.

We therefore remand the matter for the Director to ask the Applicant to submit additional evidence establishing his application for, or intent to apply for, an immigrant visa, or for evidence that he has a pending application to adjust status. If the Applicant then establishes his intent to seek an immigrant visa or that he has a pending adjustment application the Director should determine whether the Applicant merits approval as a matter of discretion on his application for permission to reapply for admission, without more. As explained, for approval of a Form I-212 the Applicant is not required to establish extreme hardship to a qualifying relative, which would be addressed through adjudication of Form I-601A or I-601 to waive his inadmissibility for unlawful presence. If the Applicant indicates the intent to pursue an immigrant visa abroad the Director can consider underlying actions that might render the Applicant inadmissible in a discretionary analysis but should not base the denial of the application on an inadmissibility that has not yet been determined by a U.S. Department of State counselor officer or otherwise base the denial of this application on the Applicant's eligibility for a waiver that he has not yet submitted.

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