U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 09657134

Date: DEC. 13, 2022

Appeal of Harlingen, Texas Field Office Decision

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

The Applicant, a citizen of Honduras, was found inadmissible for entering the United States without being admitted after having previously been ordered removed. Section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i). He is seeking permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States.

The Director of the Harlingen, Texas Field Office denied the application, concluding that the Applicant's failure to submit requested evidence precluded a determination of whether a favorable exercise of discretion was warranted. On appeal, the Applicant asserts that pertinent evidence was submitted and that the record includes sufficient information to enable the Director to make a favorable decision.[1]

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews the questions in this matter de novo. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will remand the matter to the Director for additional review and the entry of a new decision.

I. LAW

A noncitizen who has been unlawfully present in the United States for an aggregate period of more than one year, or who has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible. Section 212(a)(9)(C) of the Act. Noncitizens found inadmissible under section 212(a)(9)(C) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii), which provides that this inadmissibility shall not apply to a noncitizen seeking admission more than 10 years after the date of last departure from the United States if, prior to the reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

[1] The Applicant indicated on its Form I-290B, Notice of Appeal or Motion, that it would be sending a brief and/or additional evidence to our office within 30 calendar days. As of today, our office has received no further documentation from the Applicant. Consequently, the record is considered complete as currently constituted.

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). 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, 373-74 (Reg'l Comm'r 1973). The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375.

II. ANALYSIS

The record reflects that the Applicant is the beneficiary of an approved immigrant visa petition filed on his behalf by his U.S. citizen mother in 2006. After entering the United States without inspection in 1986, the Applicant was granted voluntary departure but did not timely depart the United States, and the voluntary departure order was converted to an order of removal. He was subsequently deported from the United States in 2004. The Applicant reentered the United States without inspection in 2005, and was apprehended and deported again. He maintains he is eligible for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act as he has remained outside of the United States for 10 years since the date of his last departure in 2005.[2]

The issue presented on appeal is whether the Applicant should be granted permission to reapply in the exercise of discretion. The Applicant does not contest his inadmissibility, which is supported by the record. As stated above, U.S. Citizenship and Immigration Services (USCIS) must weigh any unfavorable factors against the favorable factors to determine if approval of the application is warranted as a matter of discretion.

The Applicant submitted evidence in support of a favorable exercise of discretion, including evidence that he resided in the United States for 18 years and has numerous relatives in the United States that are either U.S. citizens or legal permanent residents, including his U.S. citizen mother and two children. He noted that he is the Beneficiary of an approved Form I-130 petition, and provided evidence in support of the claimed medical, emotional, and financial hardship his family would face should he not be permitted to reapply. He also submitted evidence that criminal charges brought against him in 1997 were ultimately dismissed in 2002,[3] as well as evidence supporting his contention that his home country of Honduras is a dangerous and undesirable country to reside in based on travel warnings and reports issued by the U.S. Department of State and the CIA.

The Director issued a request for evidence (RFE), noting that although the Applicant submitted documentation demonstrating that he avoided a criminal conviction under state law for the 1997 charges brought against him, the record as constituted did not establish whether the Applicant had

[2] The Director also determined that the Applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act.

[3] In 1997, the Applicant was arrested in [redacted], New Jersey and indicted on three criminal counts. The record demonstrates that the Applicant commenced a pre-trial intervention program in 1999, and that all charges under the indictment were dismissed in 2002 after his successful completion of the program's supervisory treatment.

been convicted a crime for immigration purposes as defined at section 101(a)(48)(A) of the Act. The Director requested a full, certified copy of the pre-trial intervention agreement entered into by the Applicant and evidence that he complied with the conditions of that agreement.

In response, the Applicant resubmitted a copy of the 2002 certified court order dismissing the charges against him and verifying his successful completion of the pre-trial intervention program, and provided evidence that he was unable to secure additional documentation as requested by the Director. In support of this assertion, he submitted copies of his inquiries to and responses from the [redacted] New Jersey police department and the Superior Court of New Jersey, stating that records pertaining to the criminal charges in question were unavailable. The [redacted] police department stated that it was unable to locate any arrest records for the charges in question. The court's transcript division stated that the Applicant's hearing transcript had been destroyed because the hearing date fell outside of its 20-year record retention period, and the court's criminal records research unit confirmed that the Applicant's indictment, retained on microfilm, contained no information pertaining to plea forms or plea information.

In denying the application, the Director emphasized the Applicant's failure to provide a copy of the requested pre-trial intervention agreement, and determined that this failure precluded USCIS from conducting a discretionary analysis. Specifically, the Director's decision states: "Because you failed to submit all the requested evidence, USCIS is unable to weigh all the pertinent factors necessary for determining if you merit a favorable exercise of discretion in your case. Based on the insufficient evidence in your case, USCIS must deny your application. See Title 8, Code of Federal Regulations (8 CFR), sections 103.2(b)(11) and (12)."

On appeal, the Applicant avers that he is unaware of any agreement created after his arrest and prior to his acceptance into the pre-trial intervention program, noting that he was accepted into the pre-trial intervention program after a hearing. The Applicant notes that his unsuccessful attempts to secure the hearing transcript and other relevant documentation were corroborated by pertinent evidence submitted in response to the RFE, and asserts that the record as constituted is sufficient to demonstrate that he warrants a favorable exercise of discretion.

Here, the Director did not review and weigh all favorable and negative factors with consideration to all evidence presented, but rather based the denial on the Applicant's insufficient response to the RFE and his potential inadmissibility based on his criminal history.[4] Despite citing to *Matter of Tin* and acknowledging that adjudication of the Form I-212 requires a balancing of positive and negative factors presented to reach a discretionary determination, the decision does not indicate that the Director conducted this balancing of equities. Although the Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, and although he acknowledged the Applicant's submission of evidence of positive factors, the decision did not address or analyze this evidence. Instead, the Director determined that the pre-trial intervention agreement requested in the RFE "was necessary to weigh all pertinent factors in consideration of [the] application," and the Applicant's failure to submit that document precluded them from weighing all relevant factors and performing a discretionary analysis. The Director also discounted the Applicant's

[4] The prospective inadmissibility grounds identified by the Director do not impact the Applicant's eligibility to seek permission to reapply for admission to the United States and for which he may seek a waiver.

18 years of residence in the U.S., stating that those years "were spent living in the United States unlawfully and in defiance of a deportation order," but they did not conduct a balancing of this factor in conjunction with the additional positive and negative factors in the record. Nor did the Director afford any positive or negative weight or analysis to the 2002 certified court order dismissing the Applicant's criminal charges.

In determining whether to grant permission to reapply, all favorable factors must be weighed against the unfavorable factors and considered in the totality of the circumstances. *See Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987); *see also Matter of Lee*, 17 I&N Dec. at 278-79. Because the Director's decision did not address the positive and negative factors, we find it appropriate to remand the matter to the Director to determine whether the Applicant warrants a favorable exercise of discretion. The Director should weigh all favorable and unfavorable factors, and in doing so, the Director may identify and discuss the evidence underlying any inadmissibility as well as any potential waivers or exceptions and consider those factors in a broader discretionary determination.

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