U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20793694

Date: JUL. 13, 2022

Appeal of Philadelphia, Pennsylvania Field Office Decision

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

The Applicant will be inadmissible upon his departure from the United States for having been previously ordered removed and 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 Director of the Philadelphia, Pennsylvania Field Office denied the Form 1-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, as a matter of discretion, concluding that the Applicant's favorable factors did not outweigh the unfavorable factors. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in 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, or who 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, 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 continuous 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 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

The Applicant is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa.[1] With the Form I-212 the Applicant submitted an affidavit from his spouse; a psychiatric report concerning his spouse; school records from his two stepsons, born in 2001 and 2005; a medical record for one stepson; financial records; and civil documents.

The Applicant is a native and citizen of India who was placed in removal proceedings after entering the United States without inspection in 2001. An immigration judge denied his asylum application and ordered him removed in 2003, and the Board of Immigration Appeals dismissed his appeal in 2004. In 2012 the Applicant pled *nolo contendere* to two counts of possessing a controlled or counterfeit substance. In 2015 he married a U.S. citizen, and his spouse filed a Form I-130, Petition for Alien Relative on the Applicant's behalf, which was approved in 2017.

The Director denied the application as a matter of discretion, concluding that the favorable factors in the Applicant's case did not outweigh the unfavorable factors. The Director identified the Applicant's favorable factors as his family ties, hardship to his family if he is removed, his employment history and assistance to his spouse with her businesses, filing of taxes, and compliance with U.S. Immigration and Customs Enforcement orders of supervision. The Director acknowledged that the Applicant has been in the United States more than 20 years but noted that most of that time was after he was ordered removed from the country and that his family ties were also formed after he was ordered removed and carried diminished weight. The Director acknowledged the spouse's claim she would be devastated emotionally and financial if the Applicant were removed and that the record showed she was treated for mental health issues and determined that although the Applicant's spouse could financially support her family, she may still face considerable hardship without the Applicant.

The Director found that the Applicant's negative factors of entering the United States without inspection and having a final removal order were serious and that his criminal record was most critical. The Director noted specifically that in 2012 the Applicant was convicted of two counts of intentionally possessing a controlled substance by a person not registered and was sentenced to 45 days to three months.[2] The Director noted that the record indicated the Applicant was originally charged with manufacture, delivery, or possession with intent to manufacture or deliver under section 780-113(A)(30) and conspiracy under title 18 section 903(C) of the Pennsylvania statute in addition to the two counts to which he pled *nolo contendere*. The Director observed that a plea agreement showed

[1] The approval of his application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

[2] The Applicant was convicted of knowingly or intentionally possessing a controlled or counterfeit substance in violation of 35 Pa. Cons. Stat. § 780-113(a)(16), and his record of conviction indicates he possessed "synthetic marijuana, a controlled substance, without a license or valid prescription."

the Applicant admitted to possessing synthetic marijuana on two occasions and found that since the Applicant had two convictions for violating the controlled substance laws of Pennsylvania, the negative factors outweighed positive equities and he failed to demonstrate a favorable act of discretion was warranted. The Director further concluded that because of the two controlled substance offenses, the Applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act and statutorily ineligible for admission as a lawful permanent resident, so there was no purpose in granting the Form I-212 application as a matter of discretion.

On appeal, the Applicant argues, through counsel, that the Director's denial is based on his sole encounter with the criminal justice system, but that his conviction was not categorically a controlled substance violation under section 212(a)(2)(A)(i)(II) of the Act and that a "counterfeit substance" is not categorically a controlled substance.[3] The Applicant contends that the conviction does not refer to a specific substance listed in the Controlled Substance Act and he therefore cannot be found inadmissible. The Applicant argues that it was therefore an abuse of discretion to deny his application based on his criminal conviction. He further maintains that he is primarily responsible for operating the family business while his spouse cares for her children and she relies on him for emotional support. He points out that the Director conceded his spouse would suffer hardship whether she remains in the United States or relocates to India, and he argues that in light of these factors, his application should be approved as a matter of discretion.

The Director denied the application as a matter of discretion, concluding that the favorable factors in the Applicant's case did not outweigh the unfavorable factors. While the Director indicated that the Applicant is inadmissible for a controlled substance violation, the Applicant intends to depart the United States and apply for an immigrant visa. A final determination of his inadmissibility for this or any other ground will be made by a consular officer after he has applied for a visa. However, irrespective of whether the Applicant's conviction is found to render him inadmissible, the crime and circumstances surrounding it are negative discretionary factors relevant to determining whether a Form I-212 should be granted as a matter of discretion.

We agree with the Director that the positive factors do not outweigh the negative factors. As noted above, in finding that the Applicant's negative factors outweighed his positive equities, the Director observed that the Applicant was originally charged with manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance and with conspiracy in addition to the two counts of possessing synthetic marijuana. The record shows that following his plea the Applicant was sentenced to 45 days to three months for a conviction with a possible maximum sentence of one year for each of the two counts to which he pled. The Applicant asserts ambiguity in the charges against him that led to his conviction and claims that he is not inadmissible for a controlled substance violation, but he has not explained or otherwise addressed the circumstances surrounding his arrest and conviction. The Applicant did not provide an arrest report, police narrative, or other documentation to provide detail of the events leading to his arrest and the charges against him. The record reflects that the Applicant was charged with multiple violations of Pennsylvania controlled substance laws,

[3] Section 212(a)(2)(A) of the Act provides that any noncitizen who admits having committed acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

was convicted on two counts, and was sentenced to confinement. The charges against the Applicant and his subsequent conviction are significant negative factors.

The Director noted the claims that the Applicant's spouse had been treated for mental health issues and acknowledged that she would face hardship despite her ability to financially support her family. In her statement, the Applicant's spouse explained that the Applicant has been emotionally supportive of her, particularly during a difficult time, and a psychiatric evaluation states that she was diagnosed with major depressive disorder and post-traumatic stress disorder after being twice the victim of armed robbery and fears separation from the Applicant. The record does not show, however, that any mental health condition she has significantly impacts her ability to continue working and performing daily tasks, that the Applicant provides her with assistance other than general emotional support, or that she would be unable to continue to receive adequate care in the Applicant's absence.

The Applicant's spouse stated that she has two retail shops where she does payroll, but that the Applicant manages the stores, employees, and business loans because she does not know how to manage the business outside of payroll and that she would struggle financially to replace the Applicant. We recognize the spouse's contention that she is unable to operate their businesses beyond performing payroll duties, but the record does not establish that she does not have the ability to continue operating the businesses or obtain adequate professional assistance to maintain her stores and income. On appeal, the Applicant contends that he is the principal in operating the family business while his spouse cares for her children, but we note that the sons are now in early adulthood.

The Applicant's spouse also stated that she has been in the United States more than 20 years, all her family is here, and she fears poverty, violence, and lack of access to health care if she and her sons relocated to India. She contended that she would be unable to find a source of income in India and a lack of accessibility to health care would result in a lesser quality of life and deterioration of her health. The Applicant did not submit additional evidence in support of his spouse's claims that she would face hardship upon relocating to India and the couple would be unable to find employment and access health care. Further, the Applicant's spouse stated that her father would not relocate, and she has no family in the United States who could care for him as he does not work, receives only social security benefits, and would be unable to cover all financial expenses. The Applicant submitted a copy of his father-in-law's naturalization certificate and Medicare card, but no other evidence directly related to his spouse's father, his financial situation, or any health concerns; nor did he explain whether other members of her family in the United States would be available to assist her father.

The Director noted that family ties are generally a positive equity and acknowledged that the Applicant's family would experience emotional and financial hardship without him, but found that his family ties carried diminished weight as they were formed after he was ordered removed and that his spouse could financially support her family. We agree that while the Applicant's spouse will be negatively affected if he remains abroad for the entire inadmissibility period, any hardships to the Applicant's spouse and stepchildren have diminished weight in the discretionary analysis because their marriage in 2015 occurred after he was ordered removed in 2003. *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).

Although we acknowledge the hardship to the Applicant's spouse and recognize the positive factors in his case the evidence overall does not support a favorable exercise of discretion. The Applicant's negative factors include his entry to the United States without inspection and periods of unlawful presence, final order of removal, and his conviction in Pennsylvania for illegally possessing a controlled substance. The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Applicant has not established that he merits a favorable exercise of discretion. After considering the record in its entirety, we do not find that the on appeal the Applicant's arguments overcome the reasons for the Director's denial.

ORDER: The appeal is dismissed.