U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18929952

Date: JUL. 14, 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 China, seeks advance 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 Los Angeles Field Office denied the application, concluding that the record did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant contends that the Director erred in finding that the unfavorable factors in his case outweighed the favorable factors.

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, 8 U.S.C. § 1182(a)(9)(A)(ii), provides in relevant part that any noncitizen 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, is inadmissible. 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. Section 212(a)(9)(A)(iii) of the Act.

Approval of a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, 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:

- Basis for deportation;
- Recency of deportation;
- Length of residence in the United States;
- Applicant's moral character;

- Applicant's respect for law and order;
- Evidence of the applicant's reformation and rehabilitation;
- Applicant's family responsibilities;
- Any inadmissibility under other sections of law;
- Hardship involved to the applicant or others; and
- 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-Lopez 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 currently in the United States and seeks conditional approval of his application pursuant to the regulation at 8 C.F.R. § 212.2(j) before he departs. The approval of Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he failed to depart. The only issue on appeal is whether the Applicant has demonstrated that approval of his Form I-212 is warranted as a matter of discretion.

A. Procedural History

The record indicates that the Applicant last entered the United States as a B-2 nonimmigrant on or around April 11, 2011, with authorization to remain until October 10, 2011. On October 5, 2011, he filed a Form I-589, Application for Asylum and for Withholding of Removal. On [redacted] 2011, the Applicant was served with a Form I-862, Notice to Appear, charging him with overstaying his visa. On March 7, 2012, the Applicant conceded removability.

On [redacted] 2015, an Immigration Judge denied the Applicant's asylum petition, entered an adverse credibility finding, and ordered him removed from the United States. On February 8, 2016, the Applicant's appeal was dismissed by the Board of Immigration Appeals (the Board), which stated that even assuming the Applicant's credibility, his testimony had "evidentiary gaps." The Applicant's subsequent petition for review was denied by the Ninth Circuit Court of Appeals in 2018.

On [redacted] 2016, the Applicant married a U.S. citizen who subsequently filed a Form I-130, Petition for Alien Relative, on his behalf. The Form I-130 was approved on October 11, 2018. On April 9, 2019, the Applicant filed Form I-212, and it was denied on March 4, 2021. The Applicant remains in the United States, and upon his departure from the United States, he will become inadmissible under section 212(a)(9)(a)(ii) of the Act for having previously been ordered removed. The Applicant seeks conditional approval of his application before departing the United States to apply for an immigrant visa.

B. Favorable Factors

The favorable factors in the Applicant's case include his legal entry into the United States, his marriage to a U.S. citizen, his lack of a criminal record, and his work as a dance teacher with the [redacted] We note that the Applicant got married in 2016, after he was ordered removed from the United States and the Board had dismissed his asylum appeal, and so, as discussed above, his marriage will be given diminished weight.

The brief submitted on appeal states that "as a Catholic,"[1] the Applicant's spouse would follow him to China if he were removed there, stating that "[t]he hardship upon her in relocating to a strange country, which is very much hostile to Americans, is obvious." The appeal provides no further documentation regarding what hardships the Applicant's spouse would experience in China.

Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. While we acknowledge that relocating to another country comes with difficulties, an unsupported statement that China is "very much hostile to Americans" and that the hardship is "obvious" does not constitute a substantial factor in the Applicant's favor.

The appellate brief states that the Applicant made an "outstanding contribution to culture and entertainment in [redacted] performance." The record indicates that the Applicant was employed with the [redacted] from 2013 to 2014. The record does not contain documentation of his work as a [redacted] performer beyond that time. While the evidence of record does not suffice to establish that the Applicant's contribution to [redacted] performance was outstanding, we acknowledge it as a favorable factor in his case.

Regarding the Applicant's teaching, the record indicates that the Applicant has worked for [redacted] since 2014, and the letter of support from the organization states that he co-teaches 100 students. The brief submitted on appeal states that the Director's denial gave no consideration to "the educational benefits to many American children, youths, and even their parents through teaching [redacted]" However, despite the Applicant's years of work history, the petition does not contain documentation of the Applicant's teaching or the work done at [redacted] beyond the brief, a support letter from the President of [redacted] and a number of undated photographs of the Applicant with children in a [redacted] studio. We acknowledge the Applicant's teaching work as a favorable factor in his case. However, the lack of supporting documentation diminishes the weight granted to this factor.

The brief provided on appeal states that the Applicant "likely has instilled discipline and purpose in life to [his students], no doubt, diverting many from social illnesses plaquing (*sic*) youths nowadays." Speculative statements by the Applicant's counsel about what impact that Applicant might have had on his students do not suffice to demonstrate a favorable factor. *Id.*

[1] We note that the record includes the Applicant's 2014 baptismal certificate from a Baptist church, and the affidavit from his wife in the underlying petition indicates that they still attend this church, rather than a Catholic one.

C. Unfavorable Factors

There are a number of unfavorable factors in the Applicant's case. The record indicates that the Applicant overstayed his B-2 nonimmigrant visa in 2011 and has not complied with his removal order since his asylum case was denied in 2018. Additionally, while under section 212(a)(9)(B)(iii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii)(II), noncitizens with pending *bona fide* asylum applications normally do not accrue unlawful presence in the United States, an exception exists if such a noncitizen works in the United States without authorization. The record indicates that the Applicant was employed with the [redacted] and [redacted] without authorization. Therefore, the record indicates that upon departure from the United States, he 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 Director, based on their own examination of the record, found that the Applicant's asylum application was "not genuinely made." However, we note that neither the Immigration Judge, who questioned the Applicant in person, nor the Board made such a finding about the Applicant's asylum application, despite noting the same evidentiary gaps that the Director discussed. Instead, the record shows that the Immigration Judge made an adverse credibility finding in the Applicant's asylum case. This does not equate to a finding that the asylum application was "not genuinely made." The Immigration Judge's adverse credibility finding remains an unfavorable factor in the Applicant's application for permission to reapply for admission. Further, the Board, in dismissing the Applicant's appeal, stated that even assuming his credibility, they were "troubled" by his lack of knowledge of Catholicism, given his claim that his parents identify as Catholic. The Board further reiterated the Immigration Judge's concerns about the other inconsistencies and shortcomings in the Applicant's testimony and corroborating evidence. We acknowledge the unresolved evidentiary issues identified by the Board as unfavorable factors in the Applicant's application for permission to reapply for admission.

Finally, we note that the Director found that the Applicant's request for a change of venue from [redacted] California to [redacted] Hawaii during his immigration proceedings was made with "no justification," since they did not find evidence that the Applicant had ever lived or worked in [redacted] An Immigration Judge may grant a change of venue "for good cause" upon a motion by a party. 8 C.F.R. § 1003.20(b). "Good cause" is determined by weighing several factors, of which the noncitizen's residence is only one. *Dugboe v. Holder*, 644 F.3d 462, 471 (6th Cir. 2011) (quoting *Monter v. Gonzales*, 430 F.3d 546, 558 (2nd Cir. 2005)).

Since the Immigration Judge granted the change of venue and the Applicant subsequently attended all of his proceedings in [redacted], we decline to consider the change of venue request as a negative factor in the Applicant's case. Nevertheless, the evidence of record, considered in its totality, does not contain sufficient documentation of the Applicant's favorable factors to outweigh the combined unfavorable factors of the Applicant's visa overstay, his failure to comply with his removal order, his history of unauthorized employment in the United States, the credibility issues in his asylum application, and the fact that he will become inadmissible for unlawful presence upon departing the United States.

III. CONCLUSION

The Applicant has not demonstrated that the positive factors in his case outweigh the negative factors. Therefore, a favorable exercise of discretion is not warranted, and the Applicant's request for permission to reapply for admission to the United States remains denied.

ORDER: The appeal is dismissed.