U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15365333

Date: JUN. 7, 2022

Appeal of Santa Ana, California Field 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), because he 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 Santa Ana, California District Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant contends that the Director erred.

The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review 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 dismiss this appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i) of the Act, 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 a noncitizen 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) 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 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 (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).

Any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the noncitizen's inadmissibility or deportability and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal is inadmissible. Section 212(a)(6)(B) of the Act.

II. ANALYSIS

The Applicant is currently in the United States and seeks permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing the United States. He does not contest that he has an outstanding order of deportation and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.

On appeal, the Applicant contends that the Director erred by failing to appropriately consider and weigh the submitted evidence.

The record reflects that in August or September 1991, the Applicant entered the United States without being inspected, admitted, or paroled. At the time of his entry, the Applicant was approximately 15 years old and claims he had no parental guidance in the United States. Approximately two years later, on February 18, 1994, the Applicant filed for asylum. He claims he used the services of a *notario* and that he was unaware of the fact that he had applied for asylum, instead believing that he was applying for a work permit. Two months after filing his application, he attended his asylum interview on April 29, 1994. The record shows he testified, under oath, and with a Spanish interpreter, to the contents of his asylum application. Based on the Applicant's own admission to not knowing that he had applied for asylum or the contents of his asylum application, it appears he testified falsely to entering the United States on February 5, 1994, and that he suffered persecution in Mexico on account of his political affiliation and activities. Based on the Applicant's age at the time of filing his asylum application, the fact that he testified to the contents of his asylum application at an interview that took place two months after filing, and because he used a competent Spanish interpreter at his interview, it appears the Applicant willfully misrepresented material facts in an attempt to obtain asylum and/or a

work permit.[1] In addition, the statement he provided in response to the Director's Notice of Intent to Deny (NOID) appears to contain misleading explanations, in these proceedings.[2]

The Applicant's asylum application was denied, and his application was referred to the immigration court. He did not attend his removal proceedings and was ordered removed *in absentia* in [redacted] 1994.[3] The Applicant never departed the United States. Subsequently, in September 2001, the Applicant filed another asylum application. The record reflects he attended all his immigration hearings, and was ultimately granted voluntary departure, requiring him to depart the United States by [redacted], 2002. It appears he did not leave and has remained here without status since his initial entry in 1991.

On [redacted] 2019, the Applicant married his wife, a native-born U.S. citizen. She filed a petition for him, which was approved. The Applicant seeks to consular process for his immigrant visa. He filed the application for permission to reapply for admission because of his second removal order. The Director's NOID notified the Applicant that because it appeared the unfavorable factors in his case

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[1] While it is premature to make a finding of inadmissibility in the adjudication of this conditional Form I-212, the Applicant's actions and lack of reasonable explanation for his actions, appear to indicate that the Consulate could find him inadmissible under section 212(a)(6)(C)(i) of the Act.

[2] In an undated, and unsigned statement submitted with his response to the Director's Notice of Intent to Deny (NOID), the Applicant wrote "I remember [*sic*] attended an interview with immigration. Initially, I thought the interview was for me to get permission to work legally in the United States. When I finally got to the interview, I was told I applied for asylum. I had no idea. The officer was very polite and told me I would be [*sic*] get instructions in the mail on how to continue my application." The Director's NOID provided the Applicant with notice of his false testimony at his asylum hearing, however the Applicant's statement does not address why he provided the false testimony under oath, and appears to lay all the blame for his misrepresentations and false testimony on the *notario* who prepared his application. His explanation falls short of the candor one would expect given his participation, through the signing of the asylum application and providing false testimony under oath, to obtain asylum and a work permit by misrepresenting his claim. This shows a lack of rehabilitation in his dealings with the immigration system, and is a significant negative factor in the balancing of the Applicant's favorable versus unfavorable equities.

[3] We note here that because the Applicant was ordered removed *in absentia,* he may also be inadmissible for five years after departing the United States for failing to attend his removal proceedings without reasonable cause. Section 212(a)(6)(B) of the Act. There is no waiver for this ground of inadmissibility.

Although the Director did not make any determination with respect to the Applicant's inadmissibility under section 212(a)(6)(B) of the Act for failing to attend his removal proceedings without reasonable cause, we note that this would be a separate reason to deny his application for permission to reapply for admission because there is no waiver for section 212(a)(6)(B) inadmissibility. Although there is no statutory definition of what the term "reasonable cause" means as it is used in section 212(a)(6)(B) of the Act, guiding USCIS policy provides that "it is something not within the reasonable control of the alien." Here, the Applicant has alluded to the fact that he did not know he had to appear in court for his asylum application, and places the blame on a *notario* who prepared his application. However, we find his statement and explanations regarding his first asylum application lack candor, and are incomplete. Therefore, once he departs the United States, it is probable he will be inadmissible for five years under section 212(a)(6)(B) of the Act. As such, although the Director did not deny his application for permission to reapply for admission on this basis, we nonetheless point it out because it is a separate reason for dismissing his appeal.

An application for permission to reapply for admission is denied, in the exercise of discretion, to a noncitizen who is mandatorily inadmissible to the United States under another section of the Act. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). Here, approving the Form I-212 would serve no purpose as the Applicant would likely remain inadmissible under section 212(a)(6)(B) of the Act for a period of five years. As the Applicant will become inadmissible upon his departure under section 212(a)(6)(B) of the Act, and there is no waiver available for this ground of inadmissibility, his application for permission to reapply for admission should remain denied as a matter of discretion.

were not outweighed by the favorable factors, his application was going to be denied. The NOID also informed the Applicant that he had failed to disclose his first [redacted] 1994 *in absentia* removal order, and further informed the Applicant that his first asylum application contained misrepresentations related to his date of entry and the basis for his claim for asylum. As stated above, the NOID also notified the Applicant that he testified to the basis of his claim at his asylum interview. On July 23, 2020, the Applicant responded to the NOID and provided a statement explaining his actions, along with documentation to support the exercise of positive discretion in his case.

The Director denied the application for permission to reapply for admission, and determined the Applicant had not demonstrated that he merited a favorable exercise of discretion. The Director weighed the unfavorable factors including his *in absentia* removal order, his second removal order, his failure to depart after both orders, his unlawful presence, his misrepresentations and lack of reasonable explanations for his misrepresentations on his first asylum application, and his unlawful presence in the United States against the favorable factors including his family and community ties, good moral character, hardships to his spouse, and work history in the United States. Upon balancing the favorable versus the unfavorable factors, the Director determined that the unfavorable factors outweighed the favorable ones.

The Director's decision highlighted that the record did not contain a reasonable explanation for why the Applicant provided false testimony, under oath, at his asylum interview. We agree. Furthermore, the Applicant's explanations appear to lack candor. As noted above, the Applicant had a Spanish interpreter at his asylum interview, and the interview took place just two months after he filed the application. The record shows he testified to the details of his asylum application including that he received death threats in Mexico because of his political affiliation. The Applicant claims he was the victim of *notario* fraud, but he provides no evidence that he reported the fraud. Importantly, the Applicant's statement lacks candor regarding his actions in these proceedings, and is an additional, significant unfavorable factor which must be considered because it shows a lack of rehabilitation in his dealing with our immigration system. We understand that at the time of his prior misrepresentation, the Applicant was young, approximately 17 years old, however he is now an adult, approximately 45 years old, and appears to still be presenting misleading and/or incomplete information to negate his culpability.

In arriving at her conclusion, the Director noted that the Applicant's family ties were after-acquired equities, meaning he met his wife, and acquired his community ties after entering the United States unlawfully, and obtaining two removal orders. In general, favorable factors ("equities") acquired after an order of deportation, exclusion, or removal has been entered may be given less weight in assessing favorable factors in the exercise of discretion. *See Garcia- Lopes*, 923 F.2d at 74 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz*, 627 F.2d at 1007 (9th Cir. 1980) (an after-acquired equity, referred to as an after-acquired family tie in *Tijam*, 22 I&N Dec. at 416 (BIA 1998), need not be accorded great weight by the director in a discretionary determination). We therefore agree with the Director's analysis of the evidence, and the weight accorded to his unfavorable and favorable factors.

On appeal, the Applicant argues that the Director erred for three reasons. First, he argues that because he was a minor when the *notario* filled out his first asylum application, he should not be held accountable for its contents. Courts that have considered whether a minor is capable of and should be

held accountable for a fraud have found that the age of the minor is indicative of their culpability. In *Malik v. Mukasey*, 546 F.3d 890 (7th Cir. 2008), the Seventh Circuit found that 17-year-old brothers who lied about their names and nationality to receive asylum could be held responsible for the misrepresentations, even though they were likely "under the thumb" of their father. On its own, the fact that he was a minor and used a *notario* to fill out his application does not render him less culpable for his actions. Therefore, as the Applicant was 17 years old, had a Spanish interpreter at his asylum interview when he provided false testimony under oath, and appears to have used the *notario* services willingly, he has not demonstrated why he should not be held accountable for willfully misrepresenting material facts to obtain asylum and/or a work permit.

Second, the Applicant argues that the Director prematurely determined he is inadmissible for willful misrepresentation because inadmissibility is a question for a consulate to determine and an unpublished AAO decision to support his argument. First, as this decision was not published as a precedent decision, it does not bind USCIS officers in future adjudications.[4] *See* 8 C.F.R. § 103.3(c). Beyond that, to the extent the Director's decision made a finding of inadmissibility under section 212(a)(6)(C)(i) for fraud or misrepresentation, we will withdraw that finding. However, the Director's analysis, which is supported by our view of the evidence, determined that the Applicant's misrepresentations on his asylum application and interview, without reasonable explanation, were an additional and significant unfavorable factor in her discretionary analysis. As such, we find no error in the Director weighing the Applicant's misrepresentations in her discretionary analysis but withdraw a finding of inadmissibility to the extent one may have been made.[5]

The Applicant's third argument on appeal is that the Director incorrectly cited to and analogized to the holding in *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), which considered whether after-acquired equities carry the same weight as pre-existing equities. The Director cited *Mendez-Morales* for the proposition that equities (or favorable factors) acquired after a removal order has been entered are weighed, but not as heavily, as the same equity (for instance, family ties) would be weighed if the family tie existed prior to the entry of the removal order. The Applicant takes issue with *Mendez-Morales* because that case concerned a waiver for criminal inadmissibility under section 212(h)(1)(B) of the Act, which also requires proof that removal will result in extreme hardship to a qualifying family member. We find no reversible error with the Director's citation to *Mendez-Morales*. In *Mendez-Morales*, the Board reviewed an Immigration Judge's decision to deny an extreme hardship waiver on discretion. In doing so, the Board reiterated the general principle found in our discretionary analyses that "the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. *Ghassan v. INS*, 972 F.2d 631 (5th Cir.1992), *cert. denied*, 507 U.S. 971 (1993)." We find no error of law in the Director's use of *Mendez-Morales* for this general principle simply because it was discussed in the context of criminal inadmissibility, and a 212(h)(1)(B) extreme hardship waiver application. Moreover, the appeal argues that *Tijam*, 22 I. & N. Dec. at 408, which

[4] Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.
[5] The Director's decision does not clearly make a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act stating ". . . you have sufficiently demonstrated that you are not inadmissible under INA § 212(a)(6)(C)(i) for seeking to procure entry into the U.S. by fraud or by willfully misrepresenting a material fact." The Director's analysis appears to concern the Applicant's lack of a reasonable explanation for his actions, however as stated above, we withdraw a finding of inadmissibility, as premature.

the Director also cites, is more applicable to the case at hand since the waiver at issue in *Tijam* does not contain an extreme hardship requirement. The crux of the Board's analysis in *Tijam*, as it relates to the issue of after-acquired equities, concerned whether, on remand, the Immigration Judge should consider the respondent's initial fraud in its discretionary analysis and weigh it against her after-acquired equities. The Board was not, however, discussing whether to give after-acquired equities the same or less weight than pre-existing equities in a discretionary analysis, which is what the Applicant argues is the standard. Most importantly, in citing to *Mendez-Morales*, the Director did not incorrectly apply an extreme hardship standard to the Applicant's application, therefore we have considered but reject the Applicant's third argument on appeal.

III. CONCLUSION

For the reasons stated above, we withdraw the portion of the Director's decision to the extent it found the Applicant inadmissible under section 212(a)(6)(C)(i) of the Act. However, we agree with the Director that when weighing the totality of the circumstances presented, the Applicant has not established that the favorable factors in his application for permission to reapply for admission outweigh the unfavorable ones. In sum, a favorable exercise of discretion is not warranted, and the application will remain denied as a matter of discretion.

ORDER: The appeal is dismissed.