U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18763592

Date: MAY 9, 2022

Appeal of Los Angeles, 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.

The Director of the Los Angeles, California Field Office denied the application. The Director concluded that the negative factors in this case outweigh the after-acquired equities. On appeal, the Applicant asserts that he was granted withholding of removal, not ordered removed, and that the equities outweigh the negative factors in this case.

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 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 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. *See 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. *See Matter of Tin,* 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience").

II. ANALYSIS

Upon the Applicant's departure from the United States, he will be inadmissible under section 212(a)(9)(A) of the Act for having been previously ordered removed. Specifically, the Applicant entered the United States without admission in or about 2001 and he was placed in removal proceedings in 2011. The Applicant requested asylum and withholding of removal. In an order dated [redacted], 2015, the Immigration Judge denied the asylum request, ordered the Applicant removed from the United States, and granted the Applicant's request for withholding of removal.

The Director found the Applicant's marriage to a U.S. citizen, being the beneficiary of an approved Form I-130, Petition for an Alien Relative, and "the prospect of general hardship to [the Applicant's] spouse" to be favorable factors. *See Matter of Lee,* 17 I&N Dec. at 278-79. However, the Director found many unfavorable factors in this case, including the Applicant's initial entry into the United States without admission, years of unauthorized employment in the United States, multiple violations of California Vehicle Codes including driving under the influence of alcohol or drug and driving without a valid license, violation of probation, and a conviction for petty theft. *See id*. The Applicant asserts on appeal that the Director erred by disregarding the Immigration Judge's order withholding removal. The Applicant also asserts that his presence in the United States after that order is not a negative factor. The Applicant further asserts that, because his presence in the United States after the order withholding removal is not a negative factor, the equities outweigh the negative factors in this case. For the reasons discussed below, the negative factors in this case outweigh the after-acquired equities.

The Applicant does not assert on appeal that he will not be inadmissible upon his departure from the United States. Instead, the Applicant asserts, "By virtue of being granted withholding of removal, [the] Applicant's presence in the United States from 2017 [*sic*] on cannot be considered an adversarial factor for the simple reason that [the] Applicant was afforded protection by the Immigration Judge under the law." Although the Applicant was unlawfully present in the United States from his entry without admission in or about 2001 until November 2015 when the Immigration Judge ordered the Applicant's removal to be withheld, the Applicant does not accrue unlawful presence following the 2015 order withholding removal, by virtue of U.S. Citizenship and Immigration Services (USCIS) policy for purposes of section 212(a)(9)(B) of the Act. *See* Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops. Directorate et al., USCIS, HQDOMO 70/21.1, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* 6-7 (May 6, 2009), http://www.uscis.gov/legal-resources/policy-memoranda. Because the Applicant did not accrue unlawful presence following the 2015 order withholding his removal for the purposes of

section 212(a)(9)(B) of the Act, that period of presence is not a negative factor. *See Matter of Lee*, 17 I&N Dec. at 278-79. Nevertheless, the 2015 removal order will render the Applicant inadmissible under section 212(a)(9)(A) of the Act upon his departure from the United States, should he depart, regardless of the order withholding removal.

The Applicant's emphasis on the significance of the 2015 order withholding removal is misplaced. The Director's decision does not specifically state that the Applicant's presence between the order withholding removal and the filing date of the Form I-212, Application for Permission to Reapply for Admission, is a negative factor. Instead, the Director observed, "Despite the Immigration Judge's order of removal, [the Applicant] remained in the United States and in [redacted] 2017, [the Applicant] married [his spouse], a U.S. citizen, in [redacted] who filed Form I-130, Petition for Alien Relative, on [the Applicant's] behalf."

The Director also stated that "giving diminished weight to hardship faced by a spouse who entered a marriage with knowledge of the non-citizen's possible deportation was proper," referencing *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992). Specifically, in *Ghassan*, a U.S. citizen married a noncitizen while the noncitizen's deportation proceedings were still being conducted, before an eventual deportation order. *Id.* at 633. The Fifth Circuit found that, in assessing whether negative factors outweigh equities, considering the U.S. citizen's "previous knowledge [that the noncitizen may be ordered deported] seems eminently equitable." *Id.* at 635 (citing *In re Correa*, 19 I&N Dec. 130, 134 (BIA 1984)); *see also 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).

On appeal, the Applicant requests that "proper weight may be given to the Immigration Judge's order which granted [the] Applicant withholding of removal." An order withholding removal is not total relief from removal—it restricts removal of a noncitizen to a country where the noncitizen's life or freedom would be threatened because of the noncitizen's race, religion, nationality, membership in a particular social group, or political opinion. Section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). However, withholding of removal does not restrict removal of a noncitizen to a country where the noncitizen's life or freedom would not be threatened. *See id.* Moreover, an Immigration Judge may terminate withholding of removal. *See* 8 C.F.R. § 208.24(f).

In the instant case, at the time of their marriage, the Applicant's spouse should reasonably have been aware of the Applicant's immigration violations and the possibility of the Applicant being removed. Accordingly, the Director did not err in giving the after-acquired equity of the Applicant's marriage to a U.S. citizen diminished weight. *See Ghassan*, 972 F.2d at 634-35; *see also Garcia-Lopes*, 923 F.2d at 74; *Carnalla-Munoz v. INS*, 627 F.2d at 1007.

The Applicant does not assert that the Director erred in identifying other negative factors, or in determining their value. As noted above, those factors include the Applicant's initial entry into the United States without admission, years of unauthorized employment in the United States, multiple violations of California Vehicle Codes including driving under the influence of alcohol or drug and driving without a valid license, violation of probation, and a conviction for petty theft. The Director

correctly stated that the Applicant's repeated "actions demonstrated willful disregard for laws." Given the totality—and numerosity—of negative factors in this case, and given that the after-acquired equities bear diminished weight as discussed above, the negative factors in this case outweigh the after-acquired equities. *See Matter of Lee,* 17 I&N Dec. at 278-79; *see also Matter of Tin,* 14 I&N Dec. 371.

III. CONCLUSION

The Applicant has the burden of proof in seeking permission to reapply for admission. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Specifically, the negative factors in this case outweigh the after-acquired equities. *See Matter of Lee,* 17 I&N Dec. at 278-79; *see also Matter of Tin,* 14 I&N Dec. 371.

ORDER: The appeal is dismissed.