U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18182804

Date: MAY 10, 2022

Appeal of Newark, New Jersey 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 Newark, New Jersey Field Office denied the application, concluding that the record did not establish that a favorable exercise of discretion was warranted.

The matter is now before us on appeal. In the appeal, the Applicant states that the Director erred in giving too much weight to unfavorable factors in his case, and that the Director relied upon caselaw which did not apply in his jurisdiction.

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 alien, 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 an alien convicted of an aggravated felony) is inadmissible."

Foreign nationals 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 foreign national'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

The Applicant has been found inadmissible under section 212(a)(9)(A) of the Act for having been previously ordered removed. Specifically, he entered the United States without admission or parole in July 2001 and was subsequently detained and issued a Notice to Appear on [redacted] 2007. He withdrew his application for asylum, and the immigration judge denied his requests for withholding of removal and voluntary departure and ordered him removed on [redacted] 2009. The Applicant's appeal of this decision was dismissed by the Board of Immigration Appeals on January 20, 2012. The record indicates that he has not left the United States since his initial entry.

In his decision, the Director considered the evidence submitted in support of the Applicant's claims to financial and mental hardship to his U.S. citizen spouse, but noted that since the Applicant married his spouse more than two years after he was ordered removed, this evidence would be afforded lesser weight. He also noted the unfavorable factors in the Applicant's case, which include his entry without admission, his unlawful presence in the United States, and a criminal conviction for a misdemeanor. After reviewing these factors, the Director concluded that the unfavorable factors in the Applicant's case were not outweighed by the favorable factors and denied the application as a matter of discretion.

On appeal, the Applicant challenges the Director's decision on several grounds. He first asserts that the Director erred in considering the Applicant's entry without admission or parole and his unlawful presence as distinct unfavorable discretionary factors, arguing that for most, "unlawful entry to the United States will be accompanied by a period of unlawful presence." While that may be the case, they are separate grounds of inadmissibility under the Act,[1] and the Applicant's many years of unlawful presence reflect his disrespect for the laws of the United States. We therefore find that the Director did not err in considering the Applicant's entry without admission or parole and his lengthy unlawful presence to be distinct unfavorable factors.

The Applicant next asserts that the Director gave inappropriate weight to his criminal conviction in Nebraska for attempted bribery in 2007, which the record indicates is a Class 1 Misdemeanor, as it would qualify for the "petty offense exception" for inadmissibility under section 212(a)(2)(A)(ii)(II)

[1] See section 212(a)(6)(A)(i) for inadmissibility due to entering without admission or parole versus section 212(a)(9)(B) for inadmissibility for unlawful presence. Also, Section 212(a)(9)(C)(i) of the Act renders inadmissible noncitizens who enter or attempt to enter without admission *after* having previously been unlawfully present in the United States for more than one year.

for crimes involving moral turpitude. A copy of the judge's order shows that the Applicant was sentenced to 33 days of time served in prison and court costs of $160.50. We note that the Director did not raise the issue of an additional inadmissibility under section 212(a)(2)(A)(i)(I), which is one of the discretionary factors named in *Matter of Tin*, presumably because he recognized that the petty offense exception would apply in the Applicant's case since his sentence was for less than six months of imprisonment. While we agree that the nature and severity of any criminal history are considered in a discretionary analysis, upon review we do not find that the Director gave improper weight to the Applicant's misdemeanor conviction in his decision. The documents regarding it are listed and discussed in the same manner as other evidence in the record, and there is no indication that the Director misinterpreted this evidence or gave it undue weight in his analysis.

The next argument made by the Applicant concerns the Director's statement that since his marriage to his spouse occurred after he was served with a Notice to Appear, the relationship and her hardships are not accorded great weight. He first points out that none of the decisions cited to in support of this statement were decided in the U.S. Court of Appeals for the Third Circuit, in whose jurisdiction he resides. However, we note that the Board of Immigration Appeals (Board) has also applied this reasoning in its decisions involving discretionary analysis. *See Matter of Correa*, 19 I&N Dec. 130, 134-5 (BIA 1984)("equities which are acquired after a final order of deportation has been issued against an alien [including the birth of children] are entitled to less weight than those acquired before an alien has been found deportable.") In addition, the Applicant has not cited to or submitted any Third Circuit caselaw which shows that that court treats after-acquired equities differently than the Board does when weighing favorable factors against unfavorable ones.

We also acknowledge the Applicant's argument that since none of the federal court cases cited by the Director involve applications for permission to reapply for admission, they are not controlling. But each of these cases involved the weighing of adverse factors against those in an applicant's favor in a discretionary analysis, and the Applicant has not shown that the Director analysis was contrary to the Act, pertinent regulations or USCIS policy.

Finally, the Applicant asserts that per the Board's decisions in *Matter of Tin*, *Matter of Lee*, and *Matter of Carbajal*, 17 I&N Dec. 272 (Comm'r 1978), his case warrants a favorable exercise of discretion. He compares his equities to those of the noncitizen in the latter case, in which the Board ordered the application for permission to reapply for permission to be approved despite the applicant's four illegal entries into the United States. However, we note that those illegal entries were found to be the only negative factors in *Matter of Carbajal*, and that positive factors including the need for the applicant's services and two U.S.-born children were present which are absent here. In any event, each application must be viewed independently and all favorable and non-favorable factors considered.

As noted in the Director's decision, the Applicant's spouse claims to be under financial strain due to his inability to work, but the record lacks evidence showing a complete picture of the couple's financial situation. Notably, the Applicant did not submit their federal tax returns or other evidence to show their earnings, and there was no indication that they pay rent to his aunt with whom they appear to have lived for many years. With regard to another favorable factor, we recognize that the spouse's mental health has suffered due to the possibility that her husband will be removed, but the Director properly gave reduced weight to this hardship as an after-acquired equity. We also recognize the Applicant's volunteer service and donations to his temple as contributions to his community.

The unfavorable factors in this case include the Applicant's entry without admission or parole, his many years of unlawful presence, and his misdemeanor conviction for attempted bribery. We also note that in denying his applications for withholding of removal and voluntary departure, the immigration judge made an adverse credibility finding which reflects on his moral character. Considering the record in its totality, we agree with the Director that the Applicant has not established that the positive factors in his case outweigh the negative factors, and thus that a favorable exercise of discretion is not warranted. Accordingly, the application will remain denied.

ORDER: The appeal is dismissed.