U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16775797

Date: MAY 11, 2022

Appeal of Queens, New York 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 Queens, New York Field Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case.

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews 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 remand the matter to the Director for additional review and the entry of a new decision.

I. LAW

The Applicant is seeking permission to reapply for admission to the United States and has been found inadmissible for having been previously ordered removed.

Section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), provides that any "arriving alien . . . who has been ordered removed under section 235(b)(1) [of the Act, 8 U.S.C. § 1225(b)(1),] or at the end of proceedings under section 240 [of the Act, 8 U.S.C. § 1229a,] initiated upon the arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years 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."

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 record reflects that the Applicant entered the United States without inspection on [redacted] 2001. He was detained at the port of entry and placed in removal proceedings. An Immigration Judge ordered the Applicant removed on [redacted] 2002. The Applicant has not departed the United States since his entry without inspection in 2001.

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.[1] Because he has an outstanding order of removal, he will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[2]

[1] The approval of his application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

[2] The record indicates that the Applicant's request for asylum in the United States was denied in 2002 and the immigration judge ordered him removed to China. The Board of Immigration Appeals dismissed the Applicant's appeal in 2003 and his subsequent motion to reopen his removal proceedings was denied in 2011. He did not depart and continues to reside in the United States.

In denying the application, the Director reviewed evidence concerning the Applicant's family ties to the United States and other favorable factors and determined that the Applicant's favorable factors did not outweigh the unfavorable factors.

Though the denial acknowledged medical records for the Applicant's stepson and parents-in-law, the Director noted the Applicant's 2009 marriage occurred after his 2002 removal order. Equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *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).

The Director found that the Applicant's unfavorable factors included his illegal entry to the United States and his inadmissibility under section 212(a)(9)(B)(i) of the Act for unlawful presence. Although the Director noted the availability of a waiver of inadmissibility for unlawful presence, he determined that the Applicant was "unlikely" to qualify for the waiver because he would be unable to establish extreme hardship to his qualifying relatives if he were removed from the United States. The Director concluded that the "unlikelihood that [the Applicant would] be able to overcome [his] other grounds of inadmissibility" was an additional unfavorable factor that supported the denial.

On appeal, the Applicant contends that the Director erred by finding him inadmissible for unlawful presence because a U.S. Department of State consular officer will determine his admissibility and eligibility during his immigrant visa interview. He also notes that inadmissibility under section 212(a)(9)(B)(i) of the Act for unlawful presence may be waived through a Form I-601A, Application for Provisional Unlawful Presence Waiver, which he can file upon the conditional approval of his instant Form I-212. He further asserts that the Director did not consider the emotional, physical, and financial hardship that he, his U.S. citizen spouse, and their U.S. citizen children, currently 5, 11, and 17 years old, would suffer if he is removed from the United States or if they relocated with him to China, in light of their children's age; his spouse's and children's reliance on him to provide financial, emotional, and physical support; the support he provides for his spouse's parents; and his stepson's ongoing medical conditions.

As noted by the Applicant on appeal, he may file a provisional waiver application, a separate application for relief, to waive his inadmissibility for unlawful presence and reenter the United States. *See* section 212(a)(9)(B)(v) of the Act. Pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver.[3]

The Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, but did not fully address the evidence of additional

[3] The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) for unlawful presence will be needed after the Applicant departs and regardless of whether he obtains a provisional waiver. *See* Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal – Where to File, https://www.uscis.gov/i-212.

significant favorable factors in the record, including evidence regarding hardship to the Applicant's spouse and his three U.S. citizen children, length of residence in the United States, and family responsibilities.[4] For example, the Applicant, who has lived in the United States for 20 years and has no apparent criminal history, states that he and his U.S. citizen spouse, who have been married for 13 years, and their three children would suffer hardship if he is removed.[5] The previously submitted evidence includes the Applicant's affidavit addressing the claimed physical, emotional, and financial hardship his family would suffer upon separation or relocation to China; his stepson's educational assessment and letter from his neurologist; letters from his parents-in-law's treating physician; financial documentation related to the Applicant's and his spouse's employment and monthly expenses; and country conditions information for China.

In light of the deficiencies noted above, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence and weigh the favorable factors against the unfavorable factors to determine whether the Applicant warrants a favorable exercise of discretion.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[4] When considering whether a request for permission to reapply warrants a favorable exercise of discretion, favorable factors may include hardship to the applicant and U.S. citizen or lawful permanent resident relatives, the applicant's length of residence in the United States, and family responsibilities. *See Matter of Tin,* 14 I&N Dec. at 373.

[5] *But 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).