U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18850558

Date: MAY 17, 2022

Appeal of New York, 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. *See* section 212(a)(9)(A)(ii) of the Act.

The Director of the New York, New York Field Office denied the Form 1-212 as a matter of discretion, concluding that favorable factors did not outweigh the unfavorable factors in the 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. The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will remand the matter for the entry of a new decision consistent with our analysis below.

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] The Applicant's U.S. citizen son filed a Form I-130 immigrant petition on the Applicant's behalf, which was approved. He intends to depart the United States in order to apply for an immigrant visa with the U.S. Department of State. 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]

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

[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 entered the United States in May 1981 without being inspected, admitted, or paroled. He departed the United States in April 1985, then reentered the country in [redacted], 1985, when he was detained by the U.S. Border Patrol. In [redacted] 1985 he was ordered deported (removed) by an Immigration judge. The Applicant appealed this decision to the Board of Immigration Appeals (BIA), which affirmed the Immigration Judge's order and dismissed the appeal in November 1985. The Applicant departed the United States again in [redacted], 1988, then reentered the country in February 1988 without being inspected, admitted, or paroled. His [redacted] 1985 removal order remains in effect; he did not depart after his reentry in 1988 and continues to reside in the United States.

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, 373-74 (Reg'l Comm'r 1973).

The Director determined that the Applicant's favorable factors did not outweigh the unfavorable factors and denied the application as a matter of discretion. The Director indicated that she "carefully considered the evidence presented and weighed the favorable and unfavorable factors," in the application, concluding that the Applicant's "inadmissibility and other negative factors outweigh the favorable factors [he] acquired after the removal order was entered against [him in 1985]."

When denying an application, the Director must fully explain the reasons for denial to allow the Applicant a fair opportunity to contest the decision and provide the AAO an opportunity for meaningful appellate review. *Cf. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal). The regulation at 8 C.F.R. § 103.3(a)(1)(i) states that when denying an application, the Director shall explain in writing the specific reasons for denial.

For the foregoing reasons, we conclude that the Director's decision does not sufficiently explain the basis for denying the application. We first observe that the Director erred by indicating that the Form I-212 instructions include "*unusual* hardship to U.S. citizen or lawful permanent resident relatives, yourself, or your employer" as a factor to consider when weighing the equities in a Form I-212 application. (Emphasis added). The instructions to Form I-212 do not list "*unusual* hardship to U.S. citizen [] relatives . . . ," rather the instructions simply indicate that hardships to these individuals will be considered as favorable factors within the Form I-212 discretionary analysis.[3]

Importantly, while the Director determined that the Applicant presented evidence of his own unusual hardship, unusual hardship to his spouse and children, his own good moral character after his removal order was issued, the maintenance of his family's unity, and the country conditions in Ecuador, she did not identify or specifically discuss any of the evidence submitted in support of the application.

On appeal, the Applicant contends that the Director improperly applied the extreme hardship standard to the Form I-212 adjudication and erred by failing to appropriately consider and weigh the submitted evidence. While the Director determined that the evidence did not establish that the Applicant's spouse and children would experience extreme hardship should the Form I-212 be denied, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Extreme hardship to a qualifying relative is a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act.

[3] *See* the instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, at https://www.uscis.gov/i-212.

When considering whether a request for permission to reapply warrants a favorable exercise of discretion, favorable factors may include hardship to an applicant, his employer, and his 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. The previously submitted evidence includes the Applicant's medical records, affidavits from the from the Applicant's grown children and from the Applicant (who is currently 78 years old, lacks a criminal record, and has been present in the United States for over 30 years) which address hardship to the family if the Applicant is removed; employment and financial documentation; and country condition information for Ecuador.

The Director should clearly explain why the Applicant does not qualify for the conditional Form I-212 waiver, including why the documents in the record do not establish eligibility. Therefore, we are remanding the application to the Director for further review in order to provide accurate and sufficient explanation regarding the weighing of the favorable and unfavorable factors based upon the evidence in this particular case so that the Applicant more fully understands the Director's concerns.

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