U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15941297

Date: MAY 18, 2022

Appeal of Queens, New York Field Office Decision

Form I-212, Application for Permission to Reapply for Admission

The Applicant seeks advance 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).

The Director of the Queens, New York Field Office denied the Form I-212, concluding that the Applicant did not establish a favorable exercise of discretion was warranted in his case. On appeal, the Applicant offers previously submitted evidence and asserts that the Director erred by failing to consider the totality of positive factors.

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 because the Applicant has not met this burden.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that any noncitizen 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 who are 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 contiguous 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 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). In these proceedings, it is the applicant's burden to establish by a preponderance of the evidence eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The Applicant is currently in the United States and seeks conditional permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before he departs.[1] He does not contest that he will be inadmissible under section 212(a)(9)(A)(ii) of the Act upon departure for having been previously ordered removed. The only issue on appeal is whether the Applicant has demonstrated that approval of his Form I-212 is warranted as a matter of discretion.

The record reflects that the Applicant, a national and citizen of China, entered the United States without inspection and admission or parole in July 1993. The Applicant was placed in removal proceedings in [redacted] 1999, and the Immigration Judge granted voluntary until [redacted] 2000, with an alternate order of removal to China. The Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision in December 2002 and granted voluntary departure until 30 days from its decision, with an alternate order of removal consistent with the Immigration Judge's original order. In January 2006, the U.S. Court of Appeals for the Second Circuit dismissed his appeal. In 2010, he married a U.S. citizen who subsequently filed an immigrant visa petition on his behalf.

In support of the instant Form I-212, the Applicant submitted statements from his spouse, a friend, and two of his spouse's relatives; his spouse's psychological evaluation; birth certificates for his two U.S. citizen children; medical records for his youngest child's skin ailment; and documentation relating to hospital conditions and mental illness treatment in China. The Director acknowledged that there were favorable considerations in the Applicant's case, including the length of his time in the United States and his family ties. However, the Director determined that these positive factors were insufficient to overcome the negative impact of the Applicant's unlawful entry into the United States, failure to depart after having been ordered removed, longtime unlawful residence in the United States, and unlikelihood of overcoming his other ground of inadmissibility for unlawful presence.[2]

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[1] The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he failed to depart.

[2] While the Director found that it is unlikely the Applicant would establish extreme hardship to his spouse in order to qualify for a provisional waiver, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Further, a provisional waiver application is a separate application for relief, and, 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

The Applicant presents previously submitted documentation and asserts that the Director did not take into account his irreplaceable role in the family as a caretaker. He also states that his spouse suffers mental conditions, which could not be properly treated in China. In addition, he indicates that he operates an internet retail store, helps his mother-in-law's retail store, and looks after his children while his spouse works. Further, he claims that his children would have a language barrier issue if they returned with him to China and it would be difficult to afford the international school. Lastly, he contends that since he is eligible to file for a conditional waiver to overcome his inadmissibility for unlawful presence, it should not be a factor in adjudicating this waiver.

We have reviewed the entire record, and for the reasons explained below, we ultimately agree with the Director that the evidence is insufficient to show that a favorable exercise of discretion is warranted.

The positive factors include the Applicant's longtime residence and family ties in the United States. As an initial matter, while there is no dispute that the Applicant's family in the United States will be negatively affected if he must remain abroad for the entire inadmissibility period, any hardships to the Applicant's spouse and children have diminished weight in the discretionary analysis because his marriage in 2010 and the births of his children in 2013 and 2016 occurred after he was ordered removed in 2000. We recognize that the Applicant's spouse was diagnosed with major depressive disorder and high distress anxiety and may face emotional difficulties without the Applicant. Although the Applicant indicated hardships that his spouse and children may face if they joined him in residing in China, his spouse's statement reflects that she and the children would not relocate to China as "the options of moving to China is not acceptable." Furthermore, the Applicant did not establish that his spouse or children would not be able to receive medical treatment in the United States without his presence. Moreover, while he claimed that he operates an online retail business, the Applicant did not demonstrate why he could not operate such business in China. In addition, the Applicant did not submit supporting documentation showing evidence of this online business or the income he receives from either his business or assisting with his mother-in-law's retail business. The record does not contain any income tax returns or other financial documents establishing not only his economic support to his family but also compliance with federal and state tax laws for his employment in the United States. Likewise, the record does not indicate that his family relies on the Applicant for care or could not support themselves in his absence. Finally, the Applicant did not explain why he did not comply with his removal order or show the existence of any circumstances mitigating his immigration violations.

The most significant negative factors in the Applicant's case are his unlawful entry into the United States, failure to depart after having been ordered removed, and longtime unlawful residence in the United States. In addition, the record contains evidence of the Applicant's criminal history in the United States.[3] Specifically, the Applicant was arrested on two separate occasions in

removed must obtain permission to reapply for admission before applying for 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 (providing that an applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) of the Act for unlawful presence will be needed after an applicant departs and regardless of whether he or she obtains a provisional waiver).

[3] In support of the Applicant's Form I-821, Consideration of Deferred Action for Childhood Arrivals, filed in 2016, the Applicant submitted court dispositions for his convictions.

New York in 2003 for trademark counterfeiting in the third degree and pled guilty to disorderly conduct to both charges.

Consequently, we agree with the Director that the Applicant has not demonstrated that the positive factors in his case outweigh the negative factors. A favorable exercise of discretion is therefore not warranted, and the Applicant's request for permission to reapply for admission to the United States remains denied.

ORDER: The appeal is dismissed.