U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18623167

Date: MAY. 18, 2022

Appeal of New York City 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 I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, concluding the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant contends the Director erred by concluding he was inadmissible under section 212(a)(9)(B) and applied an incorrect legal standard in analyzing whether the favorable exercise of discretion was warranted. Upon *de novo* review, we will remand the matter to the Director for further proceedings.

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]

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. *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

[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 reflects that the Applicant entered the United States in 1993 without being inspected, admitted, or paroled. He affirmatively applied for asylum in 1996; however, this application was denied. The Applicant accepted voluntary departure in 2000, but later filed for temporary protected status, which was denied in 2003. The Applicant was later ordered removed *in absentia* in [redacted] 2006. A Form I-130, Petition for an Alien Relative, filed by the Applicant's spouse was approved on his behalf in October 2019. The Applicant filed the current Form I-212 at issue in this matter in July 2020.

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 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).

In denying the Form I-212 application, the Director listed the Applicant's negative factors, stating the evidence "fails to provide proof that your qualifying relative your spouse will suffer unusual hardship in your absence." On appeal, the Applicant contends that the Director erred in applying a higher standard for hardship not applicable to the Form I-212, appearing to indicate that he must demonstrate extreme hardship to a qualifying relative, in this case his U.S. citizen spouse, for the application to be approved. We agree, as the standard of "unusual hardship" does apply in the adjudication of the application before us. Similarly, the Applicant asserts that the Director incorrectly concluded that he was inadmissible under section 212(a)(9)(B) for being unlawfully present in the United States. We concur with the Applicant that he was not inadmissible under section 212(a)(9)(B) when the Form I-212 was filed, as there is no evidence or indication that he departed the United States since entering unlawfully in 1993.[3]

However, the record reflects that the Applicant was removed *in absentia* in 2006, indicating that he would also be inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failure to appear at his removal proceeding. Section 212(a)(6)(B) of the Act provides that any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the noncitizen's inadmissibility or deportability, and who seeks admission to the United States within five years of the noncitizen's subsequent departure or removal, is inadmissible. There is no waiver for this inadmissibility. Evidence that the Applicant's departure will trigger inadmissibility under a separate ground for which no waiver is available is relevant to determining whether a Form I-212 should be granted as a matter of discretion, as no purpose would be served in granting the application under these circumstances.

Based upon the evidence provided, it appears that the Applicant would become inadmissible upon his departure for a period of five years for failure to appear at his removal hearing. Under these circumstances, no purpose would be served by determining whether the Applicant merits approval of his application as a matter of discretion because he would remain inadmissible for five years without a possibility to apply for a waiver. However, since the Applicant was not put on notice of this inadmissibility, he did not have the opportunity to submit additional evidence or to rebut this inadmissibility, such as demonstrating, if applicable, whether he had reasonable cause to not attend his removal proceeding. *See* 8 C.F.R. § 103.2(b)(16)(i). Therefore, we will remand this matter for the Director to determine whether the Applicant would be inadmissible under section 212(a)(6)(B) of the Act, and if he is deemed not inadmissible on this ground, whether a favorable exercise of discretion was warranted in his case, consistent with the analysis above.

Therefore, we withdraw the Director's decision and remand the matter for entry of a new decision.

[3] However, we do agree that the Applicant's unlawful presence in the United States since 1993 can be considered as a negative factor when determining whether a favorable exercise of discretion is warranted. Further, we note that the Applicant would be inadmissible under section 212(A)(9)(B) of the Act once he departs the United States.

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