U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16047092

Date: MAY 18, 2022

Appeal of New York, New York Field Office Decision

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

The Applicant will be inadmissible upon his departure from the United States for having been previously ordered removed and seeks approval of his application for permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii). *See* section 212(a)(9)(A)(ii) of the Act. Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the New York, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant submits additional documentation and contends that the Director erred in finding that the unfavorable factors in his case outweighed the favorable factors. We review the questions raised in this matter *de novo*. *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 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

[1] The approval of this application is conditioned upon the Applicant's 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 2003 without being inspected, admitted, or paroled. He was placed in removal proceedings and subsequently ordered removed in [redacted] 2003. The Applicant's appeal from that decision was dismissed in 2005 and his subsequent motion to reopen was dismissed in 2013. The Applicant did not depart and continues to reside in the United States.

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 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 application, the Director determined that the Applicant's favorable factors, specifically his longevity in the United States, lack of criminal history, and family ties to the United States, did not outweigh the unfavorable factors. Although the Director acknowledged the Applicant's U.S. citizen spouse and two U.S. citizen children, he determined that these factors should be given less weight because the marriage and birth of the Applicant's children occurred after he was ordered removed.[3] The Director found that the Applicant's unfavorable factors included his entry into the United States without inspection, his failure to comply with the removal order, his unlawful presence in the United States, and the unlikelihood that the Applicant will be able to establish eligibility for a provisional waiver of inadmissibility for his unlawful presence in the United States based on extreme hardship to his spouse, his only qualifying relative.[4] *See* sections 212(a)(9)(B)(i) and (v) of the Act. The denial states that because the Applicant is unlikely to qualify for a waiver for his unlawful presence, the remaining ground of inadmissibility is a negative factor that supports denial of the Form I-212 as a matter of discretion.

We find that the Director improperly conflates extreme hardship considerations into the Form I-212 adjudication, given that extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. 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 who is 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.[5] When considering whether a request for permission to reapply warrants a favorable exercise of discretion, favorable factors are not limited to only consideration of an applicant's spouse, and 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.[6]

Although the Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, the denial primarily focuses on the unlikelihood that the Applicant would demonstrate extreme hardship to his spouse, a prerequisite to qualifying for a waiver for his unlawful presence. The Director did not address the evidence of additional factors in

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[3] *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).

[4] *See* Instructions for Form I-601A, Application for Provisional Unlawful Presence Waiver at 7, https://www.uscis.gov/i-601a.

[5] 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.

[6] *See Matter of Tin*, 14 I&N Dec. at 373.

the record, including the Applicant's 17-year residence in the United States, his apparent lack of a criminal history, and his two U.S. citizen children. The record also contains affidavits from the Applicant and his spouse addressing hardship to their family if the Applicant is removed; affidavits from friends and family attesting to the Applicant's good moral character; 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 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.