U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15922291

Date: MAY 19, 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 asserts that the Director erred by failing to consider the totality of positive factors in his 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. 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 native and citizen of former Yugoslavia, entered the United States without inspection and admission or parole in [redacted] 2000. The Applicant was placed in removal proceedings, and the Immigration Judge granted voluntary until [redacted] 2002, with an alternate order of removal to Serbia-Montenegro. The Board of Immigration Appeals (BIA) dismissed the Applicant's appeal in February 2003. In 2014, 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 a statement, a statement from his spouse, a birth certificate for his U.S. citizen child, a death certificate for his spouse's first husband, his spouse's psychological evaluation, their 2017 federal and state income tax returns, and a U.S. Department of State "Country Reports on Human Rights Practices for 2017" for Montenegro. The Director acknowledged that there were favorable considerations in the Applicant's case, including the length of his time in the United States, lack of criminal history, 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 granted voluntary departure, 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 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 –

On appeal, the Applicant submits another statement from his spouse and a birth certificate for their second child and asserts that the Director did not properly evaluate and consider all the favorable factors that he accumulated after he was ordered removed and solely focused on the negative factors. He also states that the Director did not appropriately assess the extreme hardship his spouse would suffer if he would be unable to return to the United States, including that his spouse suffers from posttraumatic stress disorder resulting from the murder of her first spouse. In addition, he indicates that he is person of good moral character and since he and his spouse just had their second child, his spouse relies on him for financial and emotional assistance to care for both children.

We have reviewed the entire record, and for the reasons explained below, we agree ultimately 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 2014 and the births of his children in 2014 and 2020 occurred after he was ordered removed in 2002. We recognize that the Applicant's spouse suffered a tragic event in the death of her prior spouse and has been diagnosed with posttraumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood and may face emotional difficulties without the Applicant. However, the record does not show that the spouse would not be able to continue her treatment or receive adequate medical care in the Applicant's absence. In addition, while the spouse's psychotherapist states that the spouse reported depression and anxiousness, poor sleep and appetite, concentration issues, and crying spells about the possibility of being separated from the Applicant, the record does not show that the spouse's mental health conditions and related symptoms significantly impact her ability to continue employment and perform daily tasks, or that the Applicant provides her with assistance in managing these symptoms aside from his general emotional support. Furthermore, his spouse's initial statement indicated that she is gainfully employed in the evenings, has a "good salary with health benefits," and depends on the Applicant to watch and care for their daughter. In her subsequent statement, she states that the Applicant has returned to work. Although we acknowledge hardships from family separation, the Applicant has not sufficiently documented her financial situation or inability to obtain childcare.

Moreover, according to the Applicant's statement, he claimed to be "gainfully employed" despite USCIS records not reflecting that he received employment authorization since his removal order, legally permitting him to work in the United States.[3] In addition, as indicated above, the record contains joint federal and state income tax returns for 2017. However, the tax returns only report his spouse's income for 2017. Here, the Applicant did not demonstrate that he has complied with federal and state tax laws not only for 2017 but for all periods of employment since being present in the United States.

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] The Petitioner did not indicate or document his employment history in the United States.

Further, although the Director indicated the Applicant's lack of any criminal history as a positive factor, the record does not support the Director's determination. The Applicant did not submit any criminal background checks or other similar evidence showing his lack of any criminal history in the United States. In fact, USCIS records show that he was fingerprinted in connection with the filing of his asylum application before the Immigration Judge in 2001. Although the Applicant claimed in his initial statement that has "never been arrested or convicted of a criminal offense," the Applicant has not corroborated his assertion since 2001.

In addition to the discussion above, the other 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. We note that the Applicant's statement did not explain why he did not comply with his removal order or show the existence of any circumstances mitigating his immigration violations. Consequently, we agree with the Director that the Applicant has not demonstrated that the positive factors in his case considered individually and in the aggregate 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.