U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16130765

Date: MAY 19, 2022

Appeal of New York City, 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 New York City, 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 the 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 deported. 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 China, filed an asylum application indicating that he entered the United States without inspection in June 1995. However, at his asylum interview, he testified that he was admitted into the United States by using fraudulent documents. After being placed in deportation proceedings, the Applicant did not appear at his hearing and the Immigration Judge determined that no good cause was given for the failure to appear and found that the Applicant abandoned any claims for relief from deportation. Accordingly, the Immigration Judge ordered the Applicant deported to China in [redacted] 1995. Subsequently, the Immigration Judge denied the Applicant's motion to reopen in March 1996, and the Board of Immigration Appeals (BIA) dismissed the Applicant's appeal in May 1996. In 2006, the Applicant's U.S. citizen sister filed an immigrant visa petition on his behalf.

In support of the instant Form I-212, the Applicant submitted a statement, statements from his mother and sister, his mother's medical records, federal income tax documents from 2001 – 2018, photographs, a letter from the Wen Chow Association, and documentation relating to country conditions 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, his family ties, and the filing of his federal income tax returns. 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, use of fraudulent documents, failure to attend his deportation hearing, and longtime unlawful residence.

On appeal, the Applicant submits another statement and birth certificates for his two U.S. citizen children and asserts that the Director did not properly evaluate his documentation and consider all the favorable factors. He also states that he had extenuating circumstances for not attending his

[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.

deportation proceeding. In addition, he indicates that he is person of good moral character, has no criminal history, his mother has a degenerative medical condition, and she needs care of her doctors in the United States.

We have reviewed the entire record, and for the reasons explained below, we 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 children have diminished weight in the discretionary analysis because their births in 1996 and 2000 occurred after he was ordered deported in 1995.[2] We also recognize his mother's medical history of stroke, memory loss, cardiac arrhythmia, and shortness of breath. The Applicant claims that his mother resides with him in order to give her the required care and support. However, as pointed out by the Director, USCIS records reflected that his mother traveled overseas for four months in 2019. In addition, the Applicant presented a medical evaluation listing his sister as the companion and translator to her doctor's appointment. On appeal, the Applicant claims that his mother was escorted on her trips to and from China, and there was a misunderstanding relating to the medical report because his sister lives in another state, and he and his wife accompanied his mother to the appointment. However, the Applicant did not provide any documentation to support his assertions. Moreover, the medical evaluation contained in the record indicated that her "daughter had to translate."

We also acknowledge, as indicated above, that the Applicant presented evidence showing compliance with federal income laws from 2001 – 2018. A review of the income tax documentation reflects the Applicant's employment for various businesses, such as construction, sales, and cellular services. However, USCIS records do not reflect that he has ever received employment authorization, legally permitting him to work in the United States. Furthermore, although he claims to be of good moral character and "has no criminal history that would render him ineligible to adjust his status in the U.S.," the Applicant did not submit any criminal background checks or other similar evidence showing his lack of any criminal history in the United States.

Finally, the Applicant claims that he "had extenuating circumstances which were entirely out of his control" as a reason for not attending his deportation proceeding. However, the Applicant does not explain those extenuating circumstances, nor did he present any documentation to corroborate his assertions. In fact, the Immigration Judge's decision denying his motion to reopen stated:

> The respondent has not demonstrated the existence of "exceptional circumstances" as contemplated by section 242(f) of the Act for his failure to appear for his hearing. Respondent asserts that his failure to appear was not intentional and he was unable to travel as the car he was traveling in had broken down and repairs were not able to be completed for a three (3) day period. The respondent asserts that he returned too late for his hearing was due to his voluntary trip allegedly taken to [redacted] Illinois just before his hearing. The respondent's failure to plan and anticipate travel delays is not a basis to re-open the proceedings. Moreover, the respondent fails to present any corroboration for his trip. He also fails to attach an invoice or bill for the car repair and

[2] The Applicant makes no hardship claims regarding his children.

the reason why the respondent had to be in [redacted]

The respondent also fails to explain why he waited over three (3) months to apply to re-open the proceedings. Clearly the respondent has failed to act with alacrity in protecting his claim before the court. The written notice specified the date, place and time of the hearing as well as the consequences for the respondent's failure to appear.

Again the BIA affirmed the Immigration Judge's decision and dismissed his appeal. Moreover, the Applicant did not explain why he did not comply with his deportation order or show the existence of any circumstances mitigating his immigration violations.

In addition to the discussion above, the other significant negative factors in the Applicant's case are his unlawful entry into the United States, his use of fraudulent documents to enter the country, and longtime unlawful residence in the United States. 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.