U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16302305

Date: MAY 23, 2022

Appeal of New York, New York 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 she 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. 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 application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant does not submit any additional evidence, but asserts that the Director erred by failing to consider the totality of positive factors in her 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, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i) of the Act, 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 found 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 continuous 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 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 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).

II. ANALYSIS

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. The record indicates that the Applicant will become inadmissible upon departing the United States under section 212(a)(9)(A)(ii) of the Act.

The record reflects that the Applicant entered the U.S. in August 1994 without being inspected, admitted, or paroled. After his entry, he applied for asylum, and his application was referred to the immigration court because his testimony was found not credible. Pursuant to an Order to Show Cause, he renewed his application for asylum before the immigration court, but it was denied. He was granted voluntary departure until [redacted] 1996, but he did not depart by this date. He then filed a motion to reopen and reconsider his case to the immigration court. The former was denied as untimely, and the latter was denied because the supporting evidence was contrary to his claim and because the same evidence was available prior to the immigration court's decision. He then filed an appeal to the Board of Immigration Appeals (the Board), which denied the motions as untimely in September 2001. (The Board also noted that the Applicant's testimony during his asylum and immigration court proceedings was that he had not been sterilized. He then presented a letter from a medical professional attesting to him having had a vasectomy. The Applicant's explanations for this inconsistency were considered but deemed insufficient.) After the Board's denial of his appeals, he was ordered removed to China, pursuant to section 241(a)(1)(B) of the Act, 8 U.S.C. § 1251(a)(1)(B). He remained in the United States without any status. Then in [redacted] 2018, he was apprehended at or near the U.S.-Canadian border and was placed under a U.S. Immigration and Customs Enforcement order of supervision.

In her decision denying his application for permission to reapply for admission, the Director concluded that the Applicant had not demonstrated that he merited a favorable exercise of discretion. The Director weighed the unfavorable factors (his inadmissibility, unlawful presence, failure to comply with his deportation order, and the fact of his children being adults and no longer dependent on him) against the favorable factors (hardship to his spouse and adult daughters, his good moral character, family responsibilities, family unity, and China's unfavorable country conditions), and found that the favorable factors did not outweigh the unfavorable factors. The Director noted that although China has unfavorable country conditions, in many cases, an applicant will experience a lower standard of living than in the United States, therefore, it is not a sufficiently strong hardship to overcome the unfavorable factors even when viewed in the totality of all favorable factors. The Director also acknowledged the Applicant's spouse's psychiatric condition, and found that although she appeared to be suffering hardships, her condition was related to the stress of his immigration status. In addition, the medical documentation submitted showed that her ailments (high cholesterol, psychiatric

adjustment disorder with anxiety and depression) were not sufficiently severe to warrant taking medication. After weighing all these factors, the Director denied his application.

We agree with the Director that when viewing the totality of the evidence, the Applicant has not established that the favorable factors outweigh the unfavorable ones. On appeal, the Applicant argues that the Director erred because she merely listed the favorable and unfavorable factors and listed generic negative factors such as unlawful presence, and remaining in the United States after an order of deportation, without providing individualized negative factors. On appeal, he also argues that the Director considered the fact of his adult daughters not being dependent on him or that his wife suffers from depression to be negative or unfavorable factor, which he disputes. Finally, on appeal, he reiterates that he and his wife lived apart for over twenty years until she lawfully immigrated to the United States from China to join him, and that separating them again would be a "family tragedy."

After careful consideration of all of the Applicant's unfavorable factors, we conclude that the Director did not err in her analysis. The Director referred to his adult children to emphasize that although he had family ties in the United States, his children were adults and not dependent on him, which therefore lowered the hardship they would experience if they lived in separate countries. We agree. Additionally, the Director noted that his wife's psychiatric ailments were not sufficiently serious to warrant the use of medication. This was not meant to turn the factor into an unfavorable one but to recognize that the hardship present in his wife's medical documentation was not sufficiently serious to show that her life would be so adversely affected by a separation from him. Again, we agree. We note too that the Applicant and his wife lived separately for over 20 years, which he argues makes his case more sympathetic. However, this fact also demonstrates that the family has been apart before, and no evidence was provided to show that they suffered an unusual level of hardship during that separation. As the Director did, we acknowledge that a certain amount of hardship is present in all cases involving families, however, we do not find that the totality of the evidence warrants a favorable exercise of discretion.

We acknowledge the evidence regarding country conditions in the Applicant's home country of China, which shows it is experiencing issues with environmental pollution, and that some returning deportees are treated in a discriminatory fashion upon return. We further acknowledge the evidence that the Applicant appears to be a good person who is dedicated to his family's well-being. Finally, we acknowledge the Applicant's assets in the United States including an apartment lease, bank statements, and a positive work history.

However, as noted by the Director, his immigration history is a serious negative factor which is not overcome by the favorable factors. In particular, we find that the Applicant's apparent inconsistencies and lack of candor during his asylum and immigration court proceedings regarding whether or not he was sterilized further supports dismissing this appeal.

Therefore, a favorable exercise of discretion is not warranted, and the application will remain denied as a matter of discretion.

III. CONCLUSION

The Director did not err in denying the Applicant's Form I-212, application for permission to reapply for admission, as a matter of discretion. As such, the Form I-212 application for permission to reapply for admission remains denied as a matter of discretion.

ORDER: The appeal is dismissed.