U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17163205

Date: MAY 25, 2022

Appeal of Los Angeles County, California Field Office Decision

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

The Applicant has been ordered removed from the United States and seeks permission to reapply for admission 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 Los Angeles County, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding the Applicant does not meet the statutory requirements for permission to reapply for admission into the United States after deportation or removal. The Director stated that the Applicant is "ineligible for a waiver under Sections 212(a)(9)(A)(iii) and 212(a)(9)(B)(v) of the Act," and that he had not sufficiently supported his claim of extreme hardship to his family members or shown that his application warrants approval. On appeal, the Applicant submits additional evidence and contends that the Director failed to provide a reasoned discretionary determination based on a balancing of positive and negative factors presented in his application.

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.

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 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, 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).

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 to apply for an immigrant visa abroad.[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]

In denying the Form I-212, the Director incorrectly observed that the Applicant filed this application "seeking relief under Sections 212(a)(9)(A)(iii) and 212(a)(9)(B)(v) of the Act." The sole purpose of the Form I-212 is to request consent to reapply for permission to the United States for noncitizens who are inadmissible under sections 212(a)(9)(A) and (a)(9)(C) of the Act.

Section 212(a)(9)(B)(i)(II) of the Act provides that a noncitizen who has been unlawfully present in the United States for one year or more is inadmissible for ten years from the date of their departure from the United States. While the Applicant will become inadmissible for unlawful presence upon his departure to apply for an immigrant visa, he may file a provisional waiver application (Form I-601A, Application for Provisional Unlawful Presence Waiver), a separate application for relief, to waive his inadmissibility for unlawful presence and reenter the United States. *See* section 212(a)(9)(B)(v) of the Act. 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.[3]

While USCIS may consider an applicant's period of unlawful presence in the United States in the exercise of discretion when adjudicating a Form I-212, the Director's decision suggests that she concluded that the Applicant is statutorily ineligible for the relief sought because he did not establish extreme hardship to his U.S. citizen spouse. The Director observed that although the Applicant submitted statements attesting to his good moral character from friends and family, the statements

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[1] The approval of this application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

[2] The record indicates that the Applicant, a native and citizen of Guatemala, entered the United States without being inspected in 1992. In August 1994, he filed a Request for Asylum in the United States (Form I-589). In June 1996, the Applicant withdrew his applications for asylum and withholding of removal and an Immigration Judge granted him voluntary departure until [redacted] 1997. The Applicant did not surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On [redacted] 1997, a warrant for the Applicant's removal was issued. He did not depart and continues to reside in the United States.

[3] 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, https://www.uscis.gov/i-212.

"were not supported by corroborative evidence of extreme hardship," and that the record as a whole, lacked "additional evidence that supports your claim of extreme hardship."

The requirement of establishing extreme hardship to a qualifying relative (or qualifying relatives) does not apply to noncitizens who seek advance permission to reapply for admission to the United States after deportation or removal. Extreme hardship to a qualifying relative applies to inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act. In the adjudication of a Form I-212, *any* hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis. Here, the record does not indicate that the Director applied the correct standard in evaluating the claims of general hardships to the Applicant and his family members.

The Applicant further contends that the Director did not follow established law in weighing the positive and negative factors presented in the record. Specifically, the Applicant maintains that the Director erred by giving little weight to his family ties and responsibilities on the grounds that many of the positive factors in his case are after-acquired equities. The Director commented that "the hardship to the marriage is diminished because the marriage was entered into with knowledge of the applicant's possible deportation."

While it is true that favorable factors ("equities") acquired after an order of deportation, exclusion, or removal has been entered may be given less weight in assessing favorable factors in the exercise of discretion, they should not be dismissed as such, and they must still be considered and balanced against the adverse factors in the totality of circumstances. *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). Thus, depending on the specific facts, such as the length of time since the removal order, or the number and strength of the equities (e.g., longstanding demonstration of good moral character, family ties, contributions to the community, business ownership, etc.) after-acquired equities may be sufficient to outweigh the negative factors. *Garcia-Lopes v. INS*, 923 F.2d at 76; *Matter of Tijam*, 22 I&N Dec. at 417.

Further, despite citing to *Matter of Tin* and acknowledging that adjudication of the Form I-212 requires a balancing of positive and negative factors presented to reach a discretionary determination, the decision does not indicate that the Director conducted this balancing of equities. As noted, the Director's decision instead reflects the application of an extreme hardship standard which resulted in an incorrect finding of statutory ineligibility; it does not specifically identify the favorable and unfavorable factors that were considered.

In light of the deficiencies noted above, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence (including the brief and evidence submitted on appeal) and 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.