U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17305851

Date: MAY 25, 2022

Appeal of Philadelphia, Pennsylvania Field Office Decision

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

The Applicant, who has an outstanding order of removal, 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. § l 182(a)(9)(A)(iii).

The Director of the Philadelphia, Pennsylvania Field Office denied the Form 1-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) as a matter of discretion, concluding that the favorable factors did not outweigh the unfavorable factors in the case. On appeal, the Applicant asserts that the Director failed to give proper weight to several positive factors and did not consider certain mitigating circumstances in weighing the unfavorable 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. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See 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 additional review and the entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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 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) of the Act 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 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, a native and citizen of China, 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 she departs.[1] She does not contest that she will become 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 her Form I-212 is warranted as a matter of discretion.

The record reflects that the Applicant entered the United States without being inspected and admitted or paroled in January 2004. An Immigration Judge denied her applications for asylum, withholding of removal and voluntary departure, and ordered her removed to China on [redacted] 2004.[2] Subsequently, U.S. Immigration and Customs Enforcement (ICE) ordered the Applicant to surrender for removal at the ICE New York Field Office on [redacted] 2006. The Applicant did not appear on the scheduled date. The Applicant has not departed and continues to reside in the United States.

The Applicant married her spouse, a lawful permanent resident, in 2006 and he filed an immigrant visa petition on her behalf in 2016. The Applicant and her spouse have two U.S. citizen daughters born in [redacted] 2007. In support of her Form I-212, the Applicant previously submitted evidence including a joint statement from herself and her spouse, statements from her daughters, from her mother-in-law and father-in-law (both lawful permanent residents), and several statements from friends of the family. The initial evidence also included: a psychological report from a licensed clinical social worker who evaluated all family members; evidence related to a restaurant business that is partially owned by the Applicant's spouse; evidence related to the family's finances, including bank statements, bills and tax returns; family photos and civil documents; school progress reports for the Applicant's children; and information regarding country conditions in China.

In denying the Form I-212, the Director acknowledged that the Applicant's family ties in the United States were positive factors, and that her spouse would experience hardship in the event of her removal. Nevertheless, the Director determined that this hardship had a diminished weight in the discretionary analysis because the Applicant's family ties were created after she had been ordered removed and were therefore "after-acquired equities." The Director identified the unfavorable factors as the Applicant's entry without inspection, the existence of a final removal order, her failure to comply with the order to surrender for removal, and her years of unlawful presence in the United States. The Director concluded that the positive factors did not outweigh the negative factors and that a favorable exercise of discretion was not warranted.

---

[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 the Applicant does not depart.

[2] The record reflects that the Board of Immigration Appeals affirmed the Immigration Judge's decision without opinion on December 28, 2005 and denied the Applicant's subsequent motion in 2011.

On appeal, the Applicant contends that the Director's decision reflects a failure to consider all positive factors presented. She notes that the decision focuses narrowly on her ties to her U.S. citizen spouse and gives diminished weight to the hardship he would experience because they were married subsequent to the issuance of her final removal order. The Applicant emphasizes that the hardship that would result from her removal would not be limited to her spouse, and that she presented evidence that she, her spouse, her U.S. citizen children, and her lawful permanent resident in-laws would all experience hardship if her application is not granted. We agree with the Applicant's assertion that the Director's decision does not consider hardship to the Applicant, her children and other close family members or the full extent of her family ties and responsibilities in weighing the favorable factors in her case.

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.

Here, while the Applicant acknowledges that after-acquired equities may be given less weight, she emphasizes that the record contains evidence of additional positive factors, including her community ties, her good moral character, a lack of any criminal record, as well as a detailed statement in which she describes her personal circumstances and expresses remorse for her unlawful entry to the United States at the age of 19. She contends that the Director did not consider these additional favorable factors in making a discretionary determination. We agree with the Applicant that these relevant factors were not discussed and weighed in the Director's decision.

In addition, the Applicant asserts that the Director appears to have equated her immigration-related violations with a lack of good moral character, contrary to case law. *See Matter of Lee*, 17 I&N Dec. 275 (Com. 1978)(finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character"). The Applicant requests consideration of mitigating circumstances surrounding her immigration violations and submits a new statement in which she swears under oath that she was unaware that she had been ordered to surrender for removal in 2006 and remained unaware of this order until the issuance of the Director's decision denying her Form I-212 in 2020. She also submits additional evidence related to her involvement in church activities for consideration as a positive factor in her case.

As the Director's decision does not reflect a proper analysis of the favorable and unfavorable factors in the Applicant's case, as required, we will remand the matter for entry of a new decision regarding the Applicant's eligibility for permission to reapply for admission. Again, when considering whether a request for permission to reapply merits a favorable exercise of discretion, positive factors may

include hardship to the applicant and others, the applicant's respect for law and order, her moral character, her family responsibilities, and her likelihood of becoming a lawful permanent resident. As noted, here, the Director focused on Applicant's U.S. citizen spouse and the hardship he may experience if she is removed, but did not fully evaluate the evidence of other favorable factors presented. While the Director identified the unfavorable factors in the Applicant's case, she did not acknowledge mitigating factors and did not have an opportunity to evaluate the Applicant's claim that she was unaware that she was ordered to surrender for removal in 2006.

In light of the deficiencies noted above, we are remanding the matter for the Director to review the entire record and determine whether the Applicant merits a conditional approval of her Form I-212 in the exercise of discretion. On remand, the Director shall review and weigh all positive and negative factors with consideration of all evidence presented, including the brief and new evidence submitted on appeal.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.