U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16777610

Date: MAY 31, 2022

Appeal of New York City Field Office Decision

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

The Applicant, a native and citizen of Indonesia, 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 he will be inadmissible upon departing from the United States for having been previously ordered removed. 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 City Field Office denied the application, finding that the Applicant's negative equities outweigh the positive factors. On appeal, the Applicant submits a brief and additional evidence, and asserts that the Director did not properly weigh all his favorable equities against the negative factors.

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews 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 foreign national 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. A foreign national who is 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 alien'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); see also Matter of Lee, supra, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience").

II. ANALYSIS

The Applicant has been found inadmissible under section 212(a)(9)(A) of the Act for having been previously ordered removed. On August 4, 2001, the Applicant entered the United States on a nonimmigrant visitor visa. The Applicant was later denied asylum and was granted voluntary departure on March 28, 2003. After several proceedings and appeals, the Applicant was once again granted voluntary departure on March 26, 2007. The Applicant continued to appeal his case until his motion was dismissed on March 26, 2010. The record indicates that he was released by U.S. Customs and Immigration Enforcement (ICE) under an Order of Supervision. He has not left the United States and continues to reside in the United States. On November 18, 2020, an immigrant visa petition filed on his behalf by his legal permanent resident (LPR) spouse was approved. The issue on appeal is whether conditional approval of his application is warranted as a matter of discretion.

With the application, the Applicant submitted, including but not limited to, a personal statement, an affidavit from his spouse, a letter from his employer, his paystubs, various bills, his tax returns from 2006 to 2017, letter of support, a specialized education program for his daughter who has a hearing impairment, country conditions for Indonesia, and photos.

In his decision, the Director listed the favorable and unfavorable factors in the Applicant's case to be considered as a matter of discretion. The Director listed the following favorable factors: hardship to his LPR spouse and U.S. citizen children; country conditions; affidavits; hardship to his employer; and financial documents. The Director found that the Applicant's unfavorable factors included his inadmissibility under section 212(a)(9)(B)(i) of the Act for unlawful presence and under section 212(a)(9)(A)(i) of the Act for having been ordered removed; remaining in the United States after his removal order; and being an "immigration absconder."

On appeal, the Applicant argues the Director gave undue weight to the unfavorable factors and failed to consider all relevant favorable circumstance in the record. Specifically, the Applicant argues that this application is meant to address his inadmissibility for having been ordered removed. The Applicant also argues that unlawful presence would be addressed by a future provisional waiver. In addition, he asserts that the negative factors of remaining in the United States after removal and being an immigration absconder are the same. Moreover, the Applicant contends that the Director did not provide any meaningful analysis to any of the positive equities.

As mentioned, the Director identified some positive factors, such as hardship to his LPR spouse and U.S. citizen children and country conditions, but she does not discuss these factors meaningfully. For example, the Director's decision does not discuss what hardships she considered and why country conditions would be considered a positive factor. Specifically, the Applicant asserts that his wife will experience financial hardship if he has to return to Indonesia or hardship if she relocates with him. With regard to the financial hardship, the Applicant states that he provides the majority of the family's income and that his spouse works limited hours to provide care to their hearing-impaired daughter. The Director does not appear to have evaluated the Applicant's argument or provided any analysis with the evidence provided. In addition, the Director does not explain how evidence such as affidavits, hardship to the Applicant's employer, and financial documents would be considered favorable factors. Moreover, the decision does not address other possible positive factors, including the Applicant's length of residence in the United States, hardship to the Applicant, his family responsibilities and ties to the United States, his employment, and payment of taxes.

The Director identified only unfavorable factors related the Applicant's inadmissibility grounds which do not impact his eligibility to seek conditional permission to reapply for admission to the United States and for which he may seek a waiver. Although the Applicant failed to depart following his first order of removal, the record supports that the Applicant's case was continued in litigation until 2010, and the Applicant appears to have complied with his obligation to regularly report to ICE under his supervision order. In addition, a review of administrative records the Applicant obtained work authorization, which he has continued to renew since 2003.

In light of the deficiencies noted above and given the positive factors which do not appear to have been weighed in the decision, we deem it appropriate to remand the matter for the Director to review the record and determine whether the Applicant merits a conditional approval of his Form I-212 in the exercise of discretion. On remand, the Director shall review and weigh all positive and negative factors with consideration to all evidence presented.

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