U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16429656

Date: MAY 31, 2022

Appeal of Boston, Massachusetts 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 he will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the Boston, Massachusetts Field Office denied the application. The Director stated that the Applicant was inadmissible under section 212(a)(9)(C) of the Act for entering or attempting to enter the United States without being admitted after having accrued unlawful presence in the United States for an aggregate period of more than one year and having been ordered removed from the United States. The Director then concluded that the Applicant did not establish that a favorable exercise of discretion was warranted in his case.

On appeal, the Applicant asserts that the Director did not properly weigh the favorable and unfavorable factors and that he merits a favorable exercise of discretion.

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 dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen who has been ordered removed, or who departed the United States while an order of removal was outstanding, is inadmissible for 10 years after the date of departure or removal. 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 re-embarkation 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.

Section 212(a)(9)(C)(i) of the Act provides that a noncitizen who "has been unlawfully present in the United States for an aggregate period of more than one year, or . . . has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted is inadmissible." A noncitizen who is inadmissible under this section cannot reapply for admission until "more than 10 years after the date of the alien's last departure from the United States." Section 212(a)(9)(C)(ii).

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. *See 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. *See Matter of Tin,* 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee*, *supra*, at 278 (Finding that immigration violations, standing alone, do not conclusively show lack of good moral character).

II. ANALYSIS

The Applicant entered the United States without inspection on [redacted] 2014, and was ordered removed on [redacted] 2014. He was released under an Order of Supervision. There is no indication that he has ever departed the United States since his initial entry.

At the outset, we note that in the decision the Director incorrectly stated that, because the Applicant entered the United States without inspection and has not left the United States, he is eligible for conditional consent to reapply for admission under section 212(a)(9)(C)(i) of the Act. Rather, we note that the Applicant was ordered removed from the United States and has not left. Therefore, only upon departure from the United States will he become inadmissible under section 212(a)(9)(A)(ii) of the Act.

The provisions of section 212(a)(9)(C)(i) and (ii) of the Act apply only to individuals who depart the United States after accumulating unlawful presence, or under an order of removal, and *then* re-enter, or attempt to re-enter, without admission. The cited statutory language refers in the past tense to an individual who "has been unlawfully present" or "has been ordered removed," and in the present tense to an individual "who enters or attempts to reenter the United States without being admitted." This is further evident from the heading of section 212(a)(9)(C) of the Act, which refers to individuals who are "unlawfully present after *previous* immigration violations." The instructions to Form I-212, Application for Permission to Reapply for Admission, (Form I-212), specify, on page 7, that the unlawful entry (or attempt) must have occurred after the order of removal to result in inadmissibility under section 212(a)(9)(C) of the Act.[1] Because the record does not indicate that the Applicant left the United States after his initial entry into the United States without authorization in [redacted] 2014, he does not appear to be presently inadmissible under section 212(a)(9)(C) of the Act.

[1] *See* form instructions at https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf; *see also* 8 C.F.R. § 103.2(a)(1), which incorporates the form instructions into the regulations.

In completing the Form I-212, the Applicant correctly indicated in Part 2 that he was removed as an "arriving alien" under section 212(a)(9)(A)(i) of the Act. The record establishes that the Applicant currently resides in the United States and is seeking conditional approval of the application under the regulation at 8 C.F.R. § 212.2(j) before he departs, as he will be inadmissible upon his departure due to his prior removal order. The approval of the application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.[2]

Despite citing to an incorrect provision of law, the I-212 was properly filed and the Director reviewed evidence to make a discretionary determination. The Director reviewed evidence concerning the Applicant's family ties to the United States and other favorable factors and determined that the Applicant's favorable factors did not outweigh the unfavorable factors. The Director found that his unfavorable factors included his failure to comply with his Order of Supervision and removal order, and his unauthorized employment in the United States.

The Director acknowledged that the Applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, (Form I-130) filed by his U.S. citizen spouse, that he has a U.S. citizen child and two U.S. citizen stepchildren, and that he provided documentation regarding the financial, emotional and medical hardships his family would face if he is not granted permission to reapply for admission. The Director noted the absence of any criminal record for the Applicant among the favorable factors to consider.

The Director noted the Applicant's 2017 marriage occurred after his 2014 removal order, and that equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *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).

The Director also acknowledged medical records documenting that the Applicant was injured during his entry to the United States. The record demonstrates that when the Applicant was found by a U.S. Customs and Border Patrol agent he had suffered injuries resulting in a fractured arm and fractured hip and was immediately transported to a hospital for treatment. After his release under Order of Supervision the Applicant required further treatment of his injuries, including surgery on his fractured arm in February 2014 and a post-operative appointment on May 2, 2014.

On appeal, the Applicant states that the Director paid minimal attention to the favorable factors and asserts that undue weight was given to his failure to comply with the Order of Supervision and his unauthorized employment. The Applicant reiterates his claim with the Form I-212 that he initially complied with the Order of Supervision and reported in person to U.S. Immigration and Customs Enforcement (ICE) in April 2014, but was unable to attend the telephonic check-in scheduled for May 1, 2014 due to his post-operative appointment the next day and was unable to reach ICE officers to

[2] The Applicant indicates that he intends to seek a provisional unlawful presence waiver under section 212(a)(9)(B) of the Act.

update them about his availability before and after that scheduled check-in. The Applicant also states that his employment, while unauthorized, was "not operating any large scale business ... simply working minimal side jobs in an effort to contribute money towards his family's household bills" and that he responsibly reported this income and paid his taxes.

We have reviewed the entire record, and for the reasons explained below 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 family ties in the United States, apparent lack of criminal history, and difficult conditions in his native Dominican Republic.

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, we agree with the Director that any hardships to the Applicant's spouse and children have diminished weight in the discretionary analysis because his marriage occurred after he was ordered removed in 2014. We recognize that the Applicant's spouse has suffered the loss of her father and the sudden death of her children's father; however, beyond the Applicant's and his spouse's statements, the record does not include evidence of how these events have impacted the Applicant's spouse, including any psychological evaluation, evidence of treatment sought for her claimed anxiety, or an explanation of how the Applicant plays a role in her emotional and psychological care. Evidence shows that the Applicant's spouse's oldest child (age 20) resides with her, and her mother resides nearby, and there is nothing in the record to suggest that they would be unwilling or unable to provide her with emotional support. Similarly, the record does not include evidence of the emotional or psychological hardships that the Applicant's children may face in his absence.

While the Applicant reasserts that separation would cause significant financial hardship to his spouse, the record does not indicate that she relies on the Applicant's income or could not support herself in his absence. The 2017 tax return in the record demonstrates that the Applicant and his spouse filed jointly and the only claimed income was from the Applicant's spouse's childcare business.[3]

The Applicant also claims to have a role in caring for his spouse's mother. However, the record does not include evidence to document the Applicant's mother-in-law's health, the role the Applicant plays in her care, or that his spouse would be unable to find alternative care for her mother.

The most significant negative factors in the Applicant's case are his noncompliance with the Order of Supervision and removal order, his eight years of unlawful presence and his unauthorized employment.

While the medical records support that the Applicant suffered injuries to his arm and hip at the time he was apprehended in [redacted] 2014, and that he required additional treatment for those injuries, it appears that the Applicant recovered following his [redacted] 2014 surgery and May 2014 post-operative visit. The medical records indicate that the Applicant was last seen for these injuries in August 2014 and that he recovered well, with a recommendation that he continue to attend physical therapy for stretching and strengthening. The additional medical records dated after August 2014 do

[3] The record does not include complete tax returns for any other year and does not include any record of the Applicant's individual income, such as pay records, or Internal Revenue Service forms documenting wages and income.

not pertain to the Applicant's injuries, but rather identify separate and unrelated conditions, including a jammed finger and a dermatological condition.

As the Director notes, the Applicant did not contact ICE after missing his May 2014 check-in and his only subsequent contact with immigration officials was when his spouse filed Form I-130 on his behalf. Although the Applicant attests that he feared further contact with ICE after missing the check-in, he does not contest these facts. Nor does he contest that he was employed without authorization. Thus, the Applicant has not shown that the claimed hardships to himself, his spouse, and their children outweigh the negative factors in his case, or that the additional circumstances mitigate his immigration violations. The evidence of record is insufficient to overcome the adverse impact of the Applicant's non-compliance with the Order of Supervision and removal order, his unlawful presence in the United States since 2014, and his unauthorized employment.

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.