U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16629507

Date: MAY 31, 2022

Appeal of Queens, 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 he 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 Queens, New York Field Office denied the application, concluding that the Applicant was ineligible because no purpose would be served in approving his application since he was inadmissible for misrepresentation and had not established extreme hardship to his qualifying relative. The Director also denied his application because the Applicant is required to file a waiver application (Form I-601A) for his unlawful presence. The matter is now before us on appeal.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *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, and for the following reasons, we will remand the matter to the Director for entry of a new decision.

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), 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 an alien 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) 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 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 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).

Generally, favorable factors that came into existence after a noncitizen has been ordered removed from the United States are given less weight in a discretionary determination. *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).

Under section 212(a)(9)(B)(i)(II) of the Act, a noncitizen (other than one lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of their departure or removal from the United States is inadmissible. A noncitizen may seek a waiver for this inadmissibility under section 212(a)(9)(B)(v) of the Act (the unlawful presence waiver) if they establish that their inadmissibility will cause their U.S. citizen or legal permanent resident spouse or parent extreme hardship. Pursuant to 8 C.F.R. 212.7(e), some noncitizens who are inadmissible for unlawful presence may apply for a provisional unlawful presence waiver prior to departing the United States. However, one who is subject to an administratively final order of removal, deportation, or exclusion under any provision of law is ineligible for a provisional unlawful presence waiver under 8 C.F.R. 212.7(e), unless they file, and USCIS approves, an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 C.F.R. 212.2(j).

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 because he will become inadmissible upon departing the United States under section 212(a)(9)(A)(ii) of the Act.

The record shows that the Applicant, a native and citizen of China, entered the United States on or about January 3, 1996.[1] On [redacted] 1999, an Immigration Judge denied the Applicant's application for asylum and related relief and ordered him removed to China.[2] However, the Applicant has

[1] The manner of the Applicant's entry to the United States is not clear. The record shows that when he applied for asylum, he noted that he entered through "NYC, NY" with a passport that was taken by his smuggler. However, he testified during his asylum hearing that he entered with a Taiwanese passport through JFK Airport in New York. Therefore, a preponderance of the evidence appears to establish that the Applicant used a false identification document to enter the United States, however it is unclear if he entered through an airport or other port of entry.

[2] On July 19, 2002, the Board of Immigration Appeals affirmed the Immigration Judge's judgment without decision. Consequently, the Immigration Judge's removal order became final.

remained in the United States, and upon his departure, he will become inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The record indicates that the Applicant is seeking conditional approval of his application under 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. Approval of this 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.

The Director denied the application, concluding that the Applicant was not eligible for permission to reapply for admission because he misrepresented his identity during his asylum application (". . . you are inadmissible under INA Section 212(a)(6)(C)(i) for willful fraud or misrepresentation of a material fact to procure an immigration benefit because of your use of a fake name when applying for asylum."). Furthermore, the Director denied the Applicant's application because "[i]n order to re-enter the United States, you will also need an approved Form I-601A [provisional unlawful presence waiver] to waive your inadmissibility for unlawful presence." The Director erred in denying the Applicant's application for these reasons.

To start, the Director's erred when determining that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The Applicant's inadmissibility for any misrepresentation he may have made in relation to his identification, manner of entry, or use of fraudulent documents to gain entry, is a determination that will be made by the Department of State (DOS) when he departs the United States and applies for his visa at the U.S. consulate overseas. It is improper to make an inadmissibility finding in the context of an application for permission to reapply for admission. However, we note that the Director can and should consider any underlying actions taken by the Applicant that might render him inadmissible in a discretionary analysis, but should not ground the denial of his application on an inadmissibility that has not yet been determined by the DOS.

Furthermore, the Director's decision erroneously adjudicated the Applicant's eligibility for a provisional unlawful presence waiver by concluding "[a]lthough refusal of your admission would undoubtedly affect your entire family, only the potential hardship of your qualifying relative, your spouse, can be considered. After review, it has been determined that the evidence is insufficient to show that your spouse would experience extreme hardship if you were refused admission."[3] Because the Director inappropriately adjudicated the Applicant's eligibility for a provisional unlawful presence waiver, we are withdrawing the Director's decision, and remanding the matter for the Director to

[3] The Director's full statement is "[a]fter review, it has been determined that the evidence is insufficient to show that your spouse would experience extreme hardship if you were refused admission because the mental health issues her doctor describes are common among people facing family separation. . . . Although a showing of extreme hardship is not required for a Form I-212 to be approved, it is required for the waiver of unlawful presence. Since it is unlikely that you will qualify for a waiver of unlawful presence and will remain inadmissible even if USCIS were to grant your Form I-212, the remaining ground of inadmissibility is a negative factor that in itself supports denial of this Form I-212 as a matter of discretion. *See Matter of J-F-D-*, 10 I&N Dec. 694 (INS 1963)."

The Board of Immigration Appeals (Board) in *Matter of J-F-D-* determined that the denial of an application for permission to reapply for admission could be grounded in the fact that the Applicant was subject to a ground of inadmissibility that does not have a waiver available. In this scenario, an application for permission to reapply for admission would be futile because an applicant would remain inadmissible and the inadmissibility is not waivable. Here, however, if DOS determines the Applicant is inadmissible for fraud or misrepresentation, a waiver is available. Thus, the case is distinguishable from the scenario at issue in *J-F-D-*.

consider whether the Applicant merits a favorable exercise of discretion on his application for permission to reapply for admission, without more.

Finally, the Director incorrectly determined that the Applicant's application must be denied because he needs to file a provisional unlawful presence waiver (Form I-601A). Pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual, like the Applicant, who is inadmissible for having been ordered removed must obtain permission to reapply for admission before seeking a provisional unlawful presence waiver. Here, the Applicant expresses his intention to complete his immigration process through consular processing. Upon his departure, the Applicant will become inadmissible under section 212(a)(9)(A) of the Act and therefore, he may apply for conditional approval of his Form I-212 application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States. 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 he fails to depart. According to the regulations, it is only after he has obtained consent to reapply for admission, that the Applicant may file a provisional unlawful presence waiver under section 212(a)(9)(B)(v) of the Act, which is a separate application for relief. *See* 8 C.F.R. § 212.7(e)(4)(iv). Therefore, the Director erred in considering the fact that the Applicant would have to apply for a Form I-601A, provisional unlawful presence waiver, in denying his application.

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, 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).

We find it appropriate to remand the matter to the Director to determine whether the Applicant warrants a favorable exercise of discretion. The Director should weigh all favorable and unfavorable factors, and in doing so, the Director may identify and discuss the evidence underlying any inadmissibility as well as any potential waivers or exceptions and consider those factors in a broader discretionary determination. However, the Director should not ground the denial of this application solely on the Applicant's eligibility for a waiver that he has not yet applied for.[4]

[4] Here, the Director identified the Applicant's use of a different name on his asylum application as a misrepresentation that would fall within the meaning of section 212(a)(6)(C)(i) of the Act. We note that any identification documentation used to gain entry to the United States that was not the Applicant's, could also be considered a misrepresentation that may lead to a finding of inadmissibility by the DOS.

III. CONCLUSION

In accord with the foregoing analysis, we withdraw the Director's decision and remand the matter. The Director may request any additional evidence considered pertinent to the new determination and any other issue. We express no opinion regarding the ultimate resolution of this case on remand.

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