U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22721011

Date: SEP. 23, 2022

Appeal of New York, New York Field Office Decision

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

The Applicant, a native and citizen of Albania, will be inadmissible for ten years upon departing the United States under Immigration and Nationality Act (the Act) section 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii), for having been previously ordered removed. He seeks advance permission to reapply for admission to the United States, which is an exception to this inadmissibility that U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion. Section 212(a)(9)(A)(iii) of the Act.

The Director of the New York, New York Field Office denied the application, concluding that the record did not establish that the Applicant merited a positive exercise of discretion. The matter is now before us on appeal.

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. Upon *de novo* review, 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 provides in relevant part that any noncitizen who has been ordered removed other than as an "arriving alien" and seeks admission to the United States within ten years of their removal or departure is inadmissible.

Noncitizens found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission before the ten years have passed, and USCIS may grant this exception to inadmissibility in the exercise of discretion.

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).

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).

II. ANALYSIS

The Applicant currently resides in the United States and seeks conditional approval of his application pursuant to the regulation at 8 C.F.R. § 212.2(j) before he departs to apply for an immigrant visa abroad. The approval of a Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he failed to depart. The only issue on appeal is whether the Applicant has demonstrated that approval of his Form I-212 is warranted as a matter of discretion.

A. Procedural History

On [redacted] 13, 2013, the Applicant entered the United States without inspection and was detained by immigration officials. On [redacted] 14, 2013, the Applicant was served with a Form I-862, Notice to Appear, charging him with inadmissibility under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without being admitted or paroled and for entering at a time or place other than as designated by the Attorney General. On [redacted] 18, 2013, the Applicant was released from immigration detention pursuant to an order of recognizance.

On August 19, 2014, the Applicant filed applications for asylum, withholding of removal, and protection under the Convention Against Torture. On [redacted] 2018, the Immigration Judge denied all of the applications, entered an adverse credibility finding, and ordered the Applicant removed from the United States. On March 2, 2020, the Board of Immigration Appeals (the Board) dismissed the Applicant's appeal.

On [redacted] 2018, the Applicant married a U.S. citizen, and on October 22, 2018, she filed a Form I-130, Petition for Alien Relative, on his behalf. On October 2, 2019, the petition was approved. On September 10, 2020, the Applicant filed Form I-212, Application for Permission to Reapply for Admission. The application was denied on May 18, 2021.

B. Discretion

On appeal, the Applicant states that the Director erred when weighing the Applicant's negative and positive factors. We find that the Director did not sufficiently explain the basis for denying the application. The Director's denial stated that the Applicant has the following negative factors:

- Inadmissibility under section 212(a)(9)(A)(ii)[1] of the Act;
- Remaining the United States after being ordered removed and after his appeal before the Board was dismissed;
- Inadmissibility under section 212(a)(6)(A)(i) of the Act;
- Inadmissibility under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for being unlawfully present in the United States;[2]
- Lengthy period of unauthorized stay in the United States;
- Lengthy period of unauthorized work in the United States;
- Likelihood of becoming a public charge; and
- Disregard for immigration laws of the United States.

The Director did not provide any reasoning for the finding that the Applicant is likely to become a public charge, apart from stating that his 2018 federal tax return showed "very limited income." Regarding the Applicant's periods of unauthorized stay and employment, the denial does not mention the fact that the Applicant had work authorization for a portion of his time in the United States and that noncitizens with pending asylum applications do not accrue unlawful presence under section 212(a)(6)(B)(iii)(II) of the Act unless they are employed without authorization during that time.

The Director's finding that that the Applicant has a disregard for the immigration laws of the United States is not fully explained in the decision and does not mention countervailing evidence such as his compliance with the conditions of his order of recognizance and attendance at his removal hearings.

In addressing the Applicant's positive factors, the Director noted that while the Applicant's "removal could have some emotional and financial consequences for [his] spouse, those consequences would not be extreme." However, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission to the United States using Form I-212.[3] When considering whether to grant an applicant permission to reapply for admission to the United States, USCIS may consider any hardship to the Applicant, his spouse,[4] or others as a part of the discretionary analysis. *Matter of Tin*, 14 I&N Dec. at 373-374.

The denial states that evidence provided to establish medical and emotional hardship to the Applicant's spouse was "not supported by any medical records…of your spouse's alleged illnesses" and "lacked information [on] whether any of the doctors prescribed or recommended any medication for your spouse." In actuality, the documentation accompanying the Form I-212 included records of several doctor's appointments specifically stating what medical conditions the Applicant's spouse had at

[1] While the Director states that the Applicant is currently inadmissible under this ground, the inadmissibility will not arise until the Applicant departs the United States and seeks admission prior to the expiration of the 10-year bar.
[2] While the Director states that the Applicant is currently inadmissible under this ground, the inadmissibility will not arise until he departs the United States and seeks admission prior to the expiration of the three or 10-year bar.
[3] The Director also incorrectly stated that the Form I-212 instructions name "unusual hardship" to a qualifying relative, the Applicant, or the Applicant's employer as one of the favorable factors that may be considered. The instructions only state that hardship to these parties may be considered a favorable factor, and do not require that it be "unusual." Instructions for Permission to Reapply for Admission Into the United States After Deportation or Removal at 14, https://uscis.gov/sites/default/files/documents/forms/i-212instr.pdf (last visited Sept. 21, 2022).
[4] We note that the Director also does not mention that the Applicant's marriage occurred after he was ordered removed, which diminishes its weight in discretionary determinations. *See Garcia-Lopes v. INS*, 923 F.2d at 74; *Carnalla-Munoz v. INS*, 627 F.2d at 1007.

various times and what medications she had been prescribed. The Director also does not sufficiently discuss the provided documentation of country conditions in Albania or consider other positive factors in the Applicant's case, such as his lack of a criminal record and payment of federal income taxes.

Finally, we note that the statement the Applicant submitted with his Form I-212 states that he "filed a non-frivolous[5] claim for asylum, which was ultimately denied, not because of lack of credibility, but apparently because the basis for my fear did not fit the criteria for asylum." In fact, the Immigration Judge made an adverse credibility finding in the Applicant's case, finding that inconsistencies in his testimony and lack of corroboration undermined his credibility; that his claim that he would be harmed if returned to Albania was "not plausible in light of the facts presented to the Court;" and that he failed to demonstrate even a subjective fear of harm if returned to Albania. The Director did not mention the asylum case in the denial.

Remanding a matter is appropriate when the Director does not fully explain the reasons for the denial so that the affected party has a fair opportunity to contest the decision and we have an opportunity to conduct a meaningful appellate review. 8 C.F.R. § 103.3(a)(1)(i),(iii) (providing that the director's decision must explain the specific reasons for denial); *c.f. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal.)

In the present case, the Director did not provide sufficient explanation for several of the negative factors she found in the Applicant's case or consider factors that mitigated them. Further, the Director overlooked the adverse credibility finding in the Applicant's asylum case, employed incorrect standards when weighing the Applicant's marriage and potential hardship to himself and his spouse, and failed to fully consider the evidence of the Applicant's positive factors. Accordingly, we will remand the matter to the Director to review the entire 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 of all evidence presented, including the brief submitted on appeal.

The Director may request any additional evidence considered pertinent to the new determination and any other issues. We express no opinion regarding the ultimate resolution of this case on remand.

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

[5] In the context of asylum, filing a frivolous application renders the filer permanently ineligible for any benefits under the Act. Section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6). An application is only frivolous under this section of the Act if an Immigrant Judge or the Board makes a specific finding that a material element of the application was deliberately fabricated. 8 C.F.R. § 208.20.