U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27157598

Date: AUG. 9, 2023

Appeal of New York City, New York Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

The Applicant seeks advance 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 become inadmissible upon departing from the United States for having been previously ordered removed. Permission to reapply for admission 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, New York Field Office denied the application, concluding that the Applicant did not merit a favorable exercise of discretion. The matter is now before us on appeal.

On appeal, the Applicant submits additional evidence and asserts that the Director erred by focusing solely on his immigration violations and by not giving sufficient weight to the many positive factors in his case.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that any noncitizen, other than an "arriving alien," 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 inadmissible under that section of the Act may seek permission to reapply for admission 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. Section 212(a)(9)(A)(iii)of the Act.

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); *see also Matter of Lee*, 17 I&N Dec. 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.")

Generally, favorable factors that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities") are given less weight in a discretionary determination. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (stating that 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) (finding that 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 is seeking conditional approval of the Form I-212 under the regulation at 8 C.F.R. § 212.2(j) before he departs, as he will be inadmissible upon his departure due to the 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. The issue on appeal is whether the Applicant merits a grant of permission to reapply for admission as a matter of discretion.

The record reflects that the Applicant entered the United States without inspection in 1990, and applied for asylum. He was determined to be ineligible for the benefit sought and placed in removal proceedings so he could renew his asylum claim before an Immigration Judge. The Applicant appeared for an initial removal hearing in May 1997, and a subsequent one in August 1998, when he withdrew his asylum application and requested voluntary departure in lieu of removal. The voluntary departure hearing was scheduled for September 1998, to allow the Applicant to obtain the necessary travel documents. The Applicant did not appear at the September 1998 hearing, and the Immigration Judge ordered him removed to China in absentia. The Applicant subsequently married a U.S. citizen, who filed a Form I-130, Petition for Alien Relative, on his behalf. USCIS approved the Form I-130, finding the Applicant eligible for immigrant classification as a spouse of U.S. citizen.

The Applicant is now requesting permission to reapply for admission to the United States, so he can obtain an immigrant visa abroad on that basis and resume his residence in the country with his spouse

and their three children born in 2001, 2007, and 2008. The initial evidence in support of this request included the Applicant's declaration concerning financial and emotional hardships to his spouse and children if he is not permitted to return to the United States before the expiration of the 10-year inadmissibility period; tax and employment documents; a list of monthly household expenses; children's school records, family photographs, and an online article discussing high cost of living in China.

In denying the Form I-212, the Director determined that the Applicant's initial entry without inspection, denial of his asylum request, noncompliance with the in absentia removal order,[1] as well as his prospective inadmissibility under section 212(a)(9)(A) of the Act (for having been ordered removed) and section 212(a)(9)(B) of the Act (for unlawful presence), outweighed the positive equites he acquired after having been ordered removed in 1998. In particular, the Director stated that because the Applicant's family ties were created after he had been ordered removed, any hardships that his spouse and children might suffer as a result of the Form I-212 denial were afforded less weight for the purposes of assessing positive factors in the case.

On appeal, the Applicant asserts that the Director improperly focused on his immigration violations, as having been ordered deported is a prerequisite to seeking permission to reapply for admission, and to obtaining a provisional waiver of unlawful presence. He further states that the Director did not fully address the evidence of the hardship his family will experience without his income, as he is the sole provider for his family, and also did not consider the difficulty he will face in finding employment in China at his age and supporting himself while he is there. Lastly, the Applicant avers that there are mitigating circumstances for his failure to appear at the September 1998 removal hearing, which resulted in the in absentia removal order against him. He explains that he did not speak English at the time and relied on a man he hired to represent him through an agency he thought was a law firm, but apparently was not. The Applicant states that when he appeared in Immigration Court in August 1998, this man told him that he had no chance of prevailing on his asylum claim, and that another attorney would ask the Immigration Judge on his behalf for a grant of voluntary departure. The Applicant states that although he was introduced to this other attorney, the hearing lasted only a few minutes; he did not understand what was said, and he was not aware of a subsequent hearing until he obtained documents from his immigration file in response to a Freedom of Information Act request.

As an initial matter, although the Director determined that the Applicant's prospective inadmissibility for having been ordered removed and for unlawful presence were unfavorable factors, the regulation at 8 C.F.R. § 212.2(j) and the Form I-212 instructions specifically provide that noncitizens who have been ordered removed, but have not left the United States, and will be applying for an immigrant visa abroad, may seek consent to reapply before they leave the United States under the removal order irrespective of their inadmissibility for unlawful presence.[2] Moreover, as a spouse of a U.S. citizen, the Applicant may request a provisional waiver of unlawful presence under section 212(a)(9)(B)(v) of

[1] We note that in 2011 U.S. Immigration and Customs Enforcement (ICE) sent notices to the Applicant and the attorney who represented him in the removal proceedings, requesting the Applicant to report for removal. Both notices were returned to ICE as undeliverable.

[2] *See* Instructions for Form I-212, at 5, https://www.uscis.gov/i-212 (providing in part that if USCIS, at its discretion, chooses to approve the application for consent to reapply, the approval is considered conditional until the noncitizen actually departs the United States, and that consent to reapply for admission in this situation applies only to inadmissibility under section 212(a)(9)(A) of the Act). *See also id.* at 3 (providing that applicants inadmissible under section 212(a)(9)(B) of the Act may be eligible for a waiver of admissibility under section 212(a)(9)(B)(v) of the Act).

the Act before departure[3] or, in the alternative, he may apply for a waiver of this inadmissibility ground in immigrant visa proceedings before the U.S. Department of State after he departs. Lastly, because the Applicant intends to pursue consular processing, the U.S. Department of State will make a final determination of his eligibility for an immigrant visa and any inadmissibility grounds that may apply.[4] Consequently, the fact that the Applicant's departure from the United States will result in his inadmissibility for having been ordered removed and may trigger inadmissibility for unlawful presence does not preclude a favorable exercise of discretion in these proceedings.

In his previously submitted declaration, the Applicant (who is currently 54 years old) explained that he was working at a restaurant and was the sole breadwinner for his family. He stated that his spouse had not been working for over seven years and devoted her time to the two younger children, who were not doing well in school. He stated that without his income his spouse would have to get a full time job and would not be able to provide the necessary care for the children. The Applicant further stated that moving to China would also be detrimental to him and his family because of China's family size restrictions, difficulty finding employment at his age, high cost of living, inferior educational system, and possible religious persecution based on the family's Christian faith.

The Director listed the evidence the Applicant provided in support of these statements, but did not fully address the favorable factors in the case, including the claimed hardships to the Applicant and his family members, longtime residence in the United States, consistent employment, payment of taxes, apparent lack of criminal history, and family responsibilities. While we agree that the Applicant's family ties in the United States are after-acquired equities and have diminished weight, the Director's decision does not indicate how much weight, if any, they were afforded in the discretionary analysis. As stated, the Applicant now submits additional evidence of positive factors in his case.

Because the record does not indicate that the Director considered this additional evidence before forwarding the appeal to our office, and in light of the deficiencies noted above, we will remand the matter to the Director to again review the record, as supplemented, and to determine whether the Applicant merits a conditional approval of his Form I-212 as a matter of discretion when all favorable and unfavorable factors are weighed together.

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

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[3] A provisional waiver is a separate form of relief and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), a noncitizen inadmissible under section 212(a)(9)(A) of the Act must obtain permission to reapply for admission before applying for a provisional waiver. *See also* Instructions for Form I-601A, at 2, https://www.uscis.gov/i-601a.

[4] Including whether the Applicant may be inadmissible under section 212(a)(6)(B) of the Act for failure to attend his removal hearing.