U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27163756

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 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, New York Field Office denied the Form I-212, concluding that the Applicant did not establish, as required, that a grant of permission to reapply for admission was warranted in the exercise of discretion. The matter is now before us on appeal.

On appeal, the Applicant submits a brief with additional evidence and asserts that the Director did not properly evaluate all the positive factors in the case, focusing solely on the negative ones.

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 in relevant part that a noncitizen who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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 noncitizen 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) 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); *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, a national of Kosovo, 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. He does not contest that he has an outstanding order of removal and will become inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[1] The only issue on appeal is whether approval of his application is warranted as a matter of discretion.

The record reflects that the Applicant is currently 40 years old. He has been residing in the United States since 2008. In 2011 he married his U.S. citizen spouse, and their child was born in 2012. The Applicant is currently employed as a superintendent with a real estate management company in New York, and manages multiple buildings throughout the city. He is the beneficiary of an approved Form I-130, Petition for Alien Relative, and intends to apply for an immigrant visa abroad on that basis. In support of the instant Form I-212, the Applicant submitted evidence of positive equities including marriage and birth certificates; employment and tax records; his and his spouse's statements concerning hardship in the event he is not allowed to return to the United States before the end of the 10-year inadmissibility period; the spouse's psychological evaluation; and a 2019 Human Rights Report for Kosovo.

In denying the Form I-212, the Director acknowledged that the Applicant and his spouse were concerned about the lack of proper medical care, employment opportunities, and adequate living conditions in Kosovo, but determined that although the Applicant's removal from the United States could have some financial and emotional consequences for his spouse and child, those consequences would not be extreme. The Director identified the negative factors in the case as the Applicant's initial entry without inspection and noncompliance with the removal order, as well as his prospective

[1] The record reflects that the Applicant initially entered the United States in 2008 without inspection, and applied for asylum. His asylum application was denied, and he was placed in removal proceedings. In 2013 an Immigration Judge ordered the Applicant removed from the United States to his native Kosovo, and the Board of Immigration Appeals dismissed the Applicant's appeal in 2014, and denied a subsequent motion to reopen.

inadmissibility under section 212(a)(9)(A)(ii) of the Act (for having been ordered removed), and section 212(a)(9)(B) of the Act (for having been unlawfully present in the United States). The Director then concluded that the Applicant's inadmissibility and other negative factors outweighed the positive equities he acquired after the removal order was entered against him in 2013.

On appeal, the Applicant does not dispute that there are some unfavorable factors in his case; he contends, however, that they are outweighed by his longtime residence and family ties in the United States, and the emotional and financial hardships to his spouse and child, and to himself. He reiterates that his spouse suffers from anxiety and depression and relies on him for emotional and financial support, and that both she and their son will experience significant hardship in his absence. The Applicant submits additional evidence to corroborate these claims.

We have reviewed the entire record, as supplemented on appeal. For the following reasons, we will return the matter to the Director for additional review and entry of a new decision.

As a preliminary matter, while the Director considered the Applicant's prospective inadmissibility for having been ordered removed and for unlawful presence as negative factors, both 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.[2] Furthermore, such noncitizens may seek permission to reapply for admission irrespective of inadmissibility under section 212(a)(9)(B) of the Act.[3] We also note that as a spouse of a U.S. citizen the Applicant may request either a provisional waiver of unlawful presence under section 212(a)(9)(B)(v) of the Act[4] before departure or, in the alternative he may apply for a waiver in immigrant visa proceedings if the U.S. Department of State determines that he is inadmissible on this ground. 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 addition, while the Director found that the negative factors outweighed the positive equities the Applicant acquired after the removal order was entered against him in 2013, we note that the only two relevant negative factors the Director identified are the Applicant's noncompliance with the removal order and his unlawful presence in the United States. Moreover, although equities acquired after the removal order had been entered may be accorded less weight in the discretionary analysis,[5] the

---

[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).

[3] *See 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).

[4] 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.

[5] *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) (explaining 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).

Director did not explain how much weight, if any, was given to the Applicant's post-2013 residence in the United States, consistent employment, family responsibilities, lack of apparent criminal history, and payment of taxes.

Furthermore, as the Applicant's marriage and the birth of his child preceded the entry of the removal order against him, his family ties and hardships to his spouse and child should be given full weight. Here, the Director concluded that if the Applicant must remain abroad for the entire inadmissibility period, the financial and emotional hardship to his spouse would not be extreme. However, *extreme* hardship is not a requirement for a grant of permission to reapply for admission. Rather, when considering whether permission to reapply is warranted in the exercise of discretion, positive factors may include *any* hardship to the applicant and their U.S. citizen or lawful permanent resident relatives. *See Matter of Tin*, 14 I&N Dec. at 373 (stating, in part, that a noncitizen who has a bona fide reason for wanting to immigrate to the United States may be granted permission to reapply for admission even though the hardship to their U.S. citizen relative would not be unusual, absent any adverse factors).

On appeal, the Applicant submits additional evidence regarding the emotional and financial hardship his spouse and child would experience, including the spouse's updated hardship statement, evidence of home ownership and related financial obligations, and 2020 employment and tax records.

Considering this new evidence, and in view of the deficiencies noted above, we will remand the matter to the Director to again review the record 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.