U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24114480

Date: FEB. 14, 2023

Appeal of Los Angeles, California Field Office Decision

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

The Applicant, a citizen of Mexico currently residing in the United States, 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). The Director of the Los Angeles, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission, as a matter of discretion, concluding that the favorable factors did not outweigh the unfavorable factors in the case. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Applicant submits new evidence and asserts that the Director erred by not giving sufficient weight to the positive factors in his case that warrant a favorable exercise of discretion.

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 dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," 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. 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 continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

The Applicant currently resides in the United States, and he is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. The approval of his 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.

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).

II. ANALYSIS

The issue presented on appeal is whether the Applicant should be granted permission to reapply in the exercise of discretion. The Applicant does not contest the Director's finding that he is inadmissible under section 212(a)(9)(A) of the Act. This finding is supported by the record, which reflects that the Applicant entered the United States without inspection in 1985 and was ordered removed in 2017. In 2019, the Board of Immigration Appeals (Board) dismissed the Applicant's appeal of his removal order. We have considered all the evidence in the record and find that the Applicant does not merit a favorable exercise of discretion.

As stated above, we must weigh any unfavorable factors against the favorable factors to determine if approval of the application is warranted as a matter of discretion. Here, the record reflects that the Applicant and his spouse were married in 2016 and reside with their two children, born in 2013 and 2019, his three stepchildren, and his two U.S. citizen step-grandchildren. The Applicant also has three U.S. citizen adult children from his former marriage. The Applicant asserts that he is the primary income earner and that his spouse, who suffers from depression, would be unable afford their family's living expenses without his financial contribution. In addition, he maintains that his U.S. citizen mother, who resides with his sisters, suffers from rheumatoid arthritis, high blood pressure, osteoporosis, and anxiety, and she relies on him for financial support and assistance with her medical appointments. He also contends that he would be unable to obtain a job and earn enough to support his family due to Mexico's poor economy. Further, he contends that if his spouse and children relocated to Mexico with him, he would be concerned for their safety due to the prevalence of violent crime in Mexico.

In the present case, the favorable factors for the Applicant include his family ties in the United States, particularly his U.S. citizen children and mother; hardship to his spouse, children, and mother; his residence in the United States since the age of 15 years old; and his employment and payment of taxes. The adverse factors include the Applicant's criminal history, unauthorized presence in the United States, and his failure to comply with his removal order.

The Applicant's criminal history includes the following: (1) a 1997 conviction for forgery in violation of section 475(a) of the California Penal Code (Cal. Penal Code); (2) a 1988 felony conviction for sexual battery in violation of section 243.4 of the Cal. Penal Code, for which he was sentenced to a period of confinement of 31 days, three years of probation, and continued registration as a sex offender – the victim in this case was 14 years old; (3) a 2002 conviction for driving under the influence in violation of section 23152(a) and 23152(a) of the California Vehicle Code (Cal. Vehicle Code), with

an enhancement for driving with a minor in the vehicle, for which he was sentenced to 36 months of probation;[1] and (4) a 2002 conviction for driving under the influence in violation of section 23152(a) and 23152(a) of the Cal. Vehicle Code, for which he was sentenced to 25 days in jail and 48 months of probation.

We find that the Applicant's ongoing disregard for U.S. laws, particularly his conviction for sexual battery against a minor, to be a significant adverse factor. The record indicates that, in addition to sexual battery, the Applicant was charged with assault with intent to commit rape in violation of section 220 of the Cal. Penal Code, and he pleaded guilty to the lesser charge of sexual battery. As noted by the Board in their decision dismissing the Applicant's appeal of his removal order, "[t]he victim of the respondent's crime was only 14 years old, and the respondent worked in concert with another person to overpower and sexually assault the victim . . . [t]he seriousness of the respondent's sexual battery conviction, involving a 14-year-old victim, is not mitigated by the passage of time."

We also note that while the Applicant contends on appeal that the Director improperly considered his conviction for sexual battery as a negative factor even though it was dismissed pursuant to section 1203.4 of the Cal. Penal Code in 2014; under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes." Matter of Roldan, 22 I&N Dec. 512, 527 (BIA 1999). Further, any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. Id. at 523, 528. Section 1203.4 of the Cal. Penal Code is a state rehabilitative statute which allows a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record indicating that the Applicant's conviction was expunged because of an underlying procedural defect in the merits of the case, and the vacated judgment remains valid for immigration purposes.

After reviewing the entirety of the record and the totality of circumstances, the evidence in the record concerning the Applicant's family ties, hardship to his family, and other factors is insufficient to outweigh the adverse factors, including his criminal convictions, unlawful entry, and failure to depart the United States after being ordered removed. Therefore, the Applicant has not demonstrated that he merits approval of his waiver application as a matter of discretion. Accordingly, the application remains denied.

ORDER: The appeal is dismissed.

[1] The record reflects that in 2005, the Applicant violated his probation and was sentenced to two days in jail.