U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23944901

Date: FEB. 15, 2023

Motion on Administrative Appeals Office Decision

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

The Applicant, a native and citizen of Mexico, 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 Detroit, Michigan Field Office denied the Form I-212, Application for Permission to Reapply for Admission to the United States After Deportation or Removal, concluding that the Applicant did not establish a favorable exercise of discretion was warranted. The Applicant later filed a motion to reopen and a motion to reconsider, both of which were dismissed by the Director. The Applicant appealed the Director's decision to us, submitting no new evidence but asserting the Director did not take into consideration all the relevant positive factors in adjudicating the application and subsequent motions. We dismissed the Applicant's appeal, reaching the same conclusion as the Director, that the Applicant had not established he merited a favorable exercise of discretion. The matter is now before us on a combined motion to reopen and reconsider. On motion, the Applicant has submitted additional evidence in support of his application, asserts that he has established he merits a favorable exercise of discretion, and avers prior contrary decisions were in error. Upon review, we will dismiss both motions.

I. LAW

A motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit. Additionally, a review of any motion is limited to the bases supporting the prior adverse decision. 8 C.F.R. § 103.5(a)(1)(i). Thus, we examine any new arguments to the extent that they pertain to our dismissal of the Applicant's prior appeal.

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that any noncitizen 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 is inadmissible. 8 U.S.C. § 1182(a)(9)(A)(ii). Noncitizens who are inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) if prior to the date of 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 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).

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).

II. ANALYSIS

The Applicant is currently in the United States and seeks advance permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before he departs. The Applicant does not contest he will be inadmissible under section 212(a)(9)(A)(ii) of the Act upon departure because he was previously ordered removed. The only issue – initially before the Director and then before us on prior appeal – has been whether the Applicant has demonstrated that approval of his Form I-212 is warranted as a matter of discretion.

The Applicant, a native and citizen of Mexico, entered the United States without inspection and admission or parole in 1994. The Applicant's father, who is now a U.S. citizen, filed a Form I-130, Petition for Alien Relative, on behalf of the Applicant in 1995, and that petition was later approved. In [redacted] 2006, following placement in removal proceedings, the Applicant was ordered removed from the United States. The Applicant has remained in the United States, residing here continuously since 1994. The Applicant filed the current Form I-212 in January 2020.

As noted above, the Director denied the application, as well as the Applicant's subsequent motions. In doing so, the Director concluded the Applicant did not merit a favorable exercise of discretion because his negative factors outweighed his positive equities. The Director considered the totality of

the record, identifying numerous factors that were weighed in making the decision to deny the application and dismiss the motions. Specifically, the Director pointed to the Applicant's history of illegal entry into the United States and continued work without authorization, both of which were contrary to the laws of the United States. Additionally, the Applicant failed to depart upon the issuance of his removal order. On appeal, we agreed with the Director's prior decision, finding the Applicant had not established he merits a favorable exercise of discretion.

A. Motion to Reopen

Now on motion, the Applicant contends we should reopen and reconsider our prior decision because the Director failed to properly consider all the positive equities in the first instance, and as the Applicant now submits new evidence of equities, he argues his case should be remanded for the Director to consider that additional evidence. However, the Applicant does not reference any new facts to be proved; rather, he submits additional evidence of facts already in the record. Specifically, he has submitted a marriage certificate, birth certificates for his children, and medical records related to his father's health conditions. We note that evidence concerning the related equities – his wife and daughters – was in the record before the Director, and previously submitted letters of support indicated the Applicant is the sole provider for his wife and two daughters. In support of his motions before the Director, the Applicant claimed he had paid taxes while employed in the United States, and he submitted copies of 2019 tax returns and W-2s in support of that contention. Finally, the Applicant has submitted medical records for his father throughout the history of this case; the documents filed with his current motion list the medications he is taking, consistent with the records the Applicant submitted with the Form I-212. On motion, the Applicant submits the new documents noted above that supplement the record as to previous assertions by the Applicant but do not contain new facts to be proved. As such, the brief and motion to reopen do not meet the requirements of a motion to reopen, as set out in regulations. 8 C.F.R. § 103.5(a)(2). Therefore, the motion to reopen must be dismissed.

B. Motion to Reconsider

The Applicant also argues we must reconsider our prior decision. Specifically, he maintains the Director misinterpreted relevant precedential caselaw related to the balancing of negative factors and positive equities, and in dismissing his appeal, we continued that misreading through our most recent decision.[1] The Applicant points to the Director's interpretations of *Matter of Lee*, 17 I&N Dec. 275, and *Garcia-Lopes v. INS*, 923 F.2d 72, as erroneous such that they led to the incorrect outcome in this case. In his motion, the Applicant contends that "[w]hile *Matter of Lee* and *Garcia-Lopes* would have the adjudicator consider as [a] positive factor the length of time that the Applicant has lived and worked [in the United States], the Director takes the inverse view."

In our prior decision, we found the Applicant had not established he merits a favorable exercise of discretion, and we applied both *Matter of Lee* and *Garcia-Lopes* in weighing the positive and negative factors. While *Lee* instructs that approval of a Form I-212 is a discretionary matter, and an applicant's

[1] The Applicant refers to one of our non-precedent decisions concerning the proper weight that equities acquired after the entry of a removal order should receive. This decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. See 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

positive equities and negative factors are balanced to determine if approval is warranted as a matter of discretion, *Garcia-Lopes* does clarify that generally, favorable factors that came into existence after a noncitizen was ordered removed are given less weight in a discretionary analysis. 17 I&N Dec. at 278-79; 923 F.2d at 74. *Garcia-Lopes* does not preclude the after-acquired equities from being given any positive weight; rather, they are given less weight than other positive equities. 923 F.2d at 74. In our prior decision, we applied these standards in weighing the Applicant's equities and negative factors. We recognized that certain factors weigh both for and against a favorable exercise of discretion and that where favorable factors that came into existence after a removal order are given less weight – those equities may not be sufficient, without more, to overcome the negative factors. *See Garcia-Lopes*, 923 F.2d at 74. Thus, some of the Applicant's positive equities – his marriage which took place and his children who were born after his removal order – were given diminished weight because they were acquired after the entry of the removal order.

In our previous decision, we properly weighed the positive and negative factors in determining that a favorable exercise of discretion was not warranted. We acknowledged the favorable factors in the Applicant's case, including the potential hardship to his spouse and children and his U.S. citizen father; the length of time he has resided in the United States, including the time since his removal order; and lack of criminal convictions in recent years. The Applicant's length of residence in the United States was viewed as positive in that he has lived here for many years and established community and family ties, including his wife and children; however, this was also a treated as a negative factor where he has been in the United States without authorization and a substantial portion of that residence has been in violation of a removal order. Finally, although he established the positive equity of working and paying taxes in the United States, we found that also weighs against him, as he has done so entirely without work authorization and after the entry of his removal order. We thus found that the positive equities were insufficient to overcome the adverse factors including: the Applicant's three prior arrests, the lack of evidence and detail as to how he has been rehabilitated, his unlawful presence in the United States since 1994, his failure to comply with his removal order, and his lengthy unauthorized employment during that time.

III. CONCLUSION

In our most recent decision, we considered the positive equities and negative factors in the Applicant's case, in conjunction with the totality of the record and in accordance with current law and policy, and explained why the Applicant did not establish he merited a favorable exercise of discretion. The Applicant has not established our prior decision was based on an incorrect application of law or USCIS policy at the time of that decision, and he has not submitted new evidence on motion to reopen to overcome the basis for our prior decision. Accordingly, the motion to reopen and reconsider will be dismissed, and the Applicant's application remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.