U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24187219

Date: FEB. 24, 2023

Appeal of Yakima, Washington Field Office Decision

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

The Applicant, a native and citizen of Mexico, will be inadmissible upon departing the United States for having been previously ordered removed, and seeks permission to reapply for admission to the United States under Immigration and Nationality Act (the Act) section 212(a)(9)(A)(iii), 8 U.S.C. §1182(a)(9)(A)(iii). 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 Yakima, Washington Field Office (Director) denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that the application did not merit approval as a matter of discretion because the negative factors presented outweighed any positive equities in the Applicant's case.

The matter is now before us on appeal. On appeal, the Applicant submits additional evidence and reasserts his eligibility for the benefit sought. In these proceedings, it is the applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. *See 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 relevant part that any foreign national 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. Foreign nationals 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 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 foreign national'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 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, 373-74 (Reg'l Comm'r 1973). The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

Under section 212(a)(9)(B)(i)(II) of the Act, a foreign national (other than one lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of their departure or removal from the United States is inadmissible. A foreign national may seek a waiver for this inadmissibility under section 212(a)(9)(B)(v) of the Act (the unlawful presence waiver) if they establish that their inadmissibility will cause their U.S. citizen or legal permanent resident spouse or parent extreme hardship. Pursuant to 8 C.F.R. § 212.7(e), some foreign nationals who are inadmissible for unlawful presence may apply for a provisional unlawful presence waiver prior to departing the United States. However, one who is subject to an administrative final order of removal, deportation, or exclusion under any provision of law is ineligible for a provisional unlawful presence waiver under 8 C.F.R. § 212.7(e), unless they file, and USCIS approves, an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 C.F.R. § 212.2(j).

II. ANALYSIS

The Applicant is currently in the United States and seeks conditional permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before he departs.[1] He does not contest that he will become inadmissible under section 212(a)(9)(A)(ii) of the Act upon departure for having been previously ordered removed.[2] 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.

The Applicant was ordered removed from the United States in [redacted] 2017. In October 2017, the Applicant's U.S. citizen son filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved in June 2018. In support of his Form I-212, the Applicant submitted copies of the birth certificates for his four U.S. citizen children, copies of the Lawful Permanent Resident (LPR) cards for his parents, federal income tax returns for 2006 to 2015, and letters of support from his family, friends, employer, and pastor.

In denying the Form I-212, the Director acknowledged as positive factors: the Applicant's close family ties to the United States, stable employment, payment of taxes, and letters of support from his family

[1] The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he does not depart.

[2] The record reflects that the Applicant entered the United States without inspection or admission in 1988. He departed the United States in 1996 and returned without inspection or admission that same year. In [redacted] 2014, the Applicant was placed into removal proceedings. He applied for cancellation of removal, but was ordered removed in [redacted] 2017. In April 2018, the Applicant appealed the immigration judge's decision, which the Board of Immigration Appeals dismissed in October 2020.

members, friends, employer and pastor. However, the Director concluded that they did not outweigh the negative factors in the Applicant's case including his extensive criminal history consisting of three convictions for assault, two convictions for driving under the influence (DUI), four citations for driving-related offenses, and a [redacted] 2020 arrest for harassment, unlawful possession of a firearm and possession of a controlled substance without a prescription; his repeated disregard for U.S. immigration laws by entering without inspection or admission in 1988 and 1996 and failure to report to Immigration and Customs Enforcement (ICE) for removal in [redacted] 2019; his engagement in unauthorized employment; and the adverse hardship finding made by the immigration judge that denied his cancellation of removal application, which the Director stated made it unlikely that he would be granted a provisional waiver to acquire lawful permanent resident status.

On appeal, the Applicant emphasizes that his [redacted] 2020 criminal charges were dismissed. He further states that he never received a letter from ICE to report for removal, and he claims that his attorney contacted the local ICE office in April 2022 to arrange a time for him to check in and was told it was not necessary and it would not be pursuing his removal based on current enforcement priorities. The Applicant further argues that the denial of his cancellation of removal application is not a basis for finding that his Form I-601A would not likely be approved.

In determining whether to exercise favorable discretion, USCIS should consider whether an applicant committed criminal activity and "[r]epeated or serious violations of immigration laws, which evidence a disregard of U.S. law." *9 USCIS Policy Manual* A(5)(A), https://www.uscis.gov/policy-manual/volume-9-part-a-chapter-5. Here, the Applicant has multiple convictions for assault and driving under the influence (DUI), the last of which occurred in 2013. Furthermore, the Applicant's illegal entry into the United States, unauthorized employment from 1988 until April 2014 when he received an Employment Authorization Document (EAD), unlawful presence for over 35 years, and his continuing residence in the country after being ordered to report for removal are discrete violations of U.S. immigration law. We note that, the Applicant was ordered to appear at a local ICE office for removal on [redacted] 2019. However, he failed to appear as required. While the Applicant contends that ICE later told him check-in was not necessary, he did not submit any evidence from ICE confirming that information.

We agree with the Applicant that the Director improperly speculated that his Form I-601A would not be approved because he did not establish "exceptional and extremely unusual" hardship when he applied for cancellation of removal. The Director found that the Applicant would not likely qualify for a provisional waiver to overcome his inadmissibility for unlawful presence, as a grant would require demonstration of "extreme hardship" to his qualifying relatives— his LPR parents. *See* section 212(a)(9)(B)(v) of the Act (requiring applicants for unlawful presence waivers to establish extreme hardship to their U.S.-citizen or lawful-permanent resident spouses or parents). We note however, that an applicant for a waiver under section 212(a)(9)(B)(v) need only establish extreme hardship to a qualifying relative, rather than the more stringent requirement of demonstrating "exceptional and extremely unusual hardship" for a grant of cancellation of removal. Thus, the Director erred in stating that it was unlikely the Applicant would prove that separation from his parents would cause an extreme hardship to them since he was unable to prove that his removal from the United States would have caused an "exceptional and extremely unusual" hardship to them in his cancellation of removal application. Furthermore, an applicant for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act need not establish extreme hardship to qualifying relatives; rather, in

determining whether to exercise favorable discretion in Form I-212 proceedings, USCIS considers "hardship" to applicants or others. *See* section 212(a)(9)(iii) of the Act.

Despite this error, however, the record does not support a favorable exercise of discretion. We acknowledge that a Deputy Prosecuting Attorney dismissed the [redacted] 2020 charges in March 2021.[3] However, the fact remains that the Applicant has an extensive criminal history involving assault, domestic violence and DUI. We further acknowledge the Applicant's assertion of additional, discretionary factors in his favor. But the record does not indicate that they and the other positive equities of record outweigh the adverse factors. Specifically, the Applicant argues that he takes his elderly parents to their medical appointments and provides for their daily needs. However, the record shows that the Applicant's parents live in his home with his spouse. The record further shows that the Applicant's adult children and three siblings live nearby. There is no indication from the record that his spouse, adult children or siblings would be unable to assist his parents in his absence. Finally, we note that the Director did not base the denial solely on the Applicant's lack of demonstrated hardship. Rather, he based it on multiple factors, including the Applicant's extensive criminal history and numerous immigration violations, which spanned the course of 30 years.

III. CONCLUSION

Despite the error in the Director's analysis, the Applicant has not demonstrated that the positive factors in his case outweigh the negative factors, such that he merits a favorable exercise of discretion. Accordingly, the application will remain denied.

ORDER: The appeal is dismissed.

[3] The Applicant submits a copy of a *Motion and Order of Dismissal With Prejudice* indicating that the charges were dismissed pursuant to *State v. Blake* 481 P.3d 521 (2021)(holding that the state's felony drug possession statute at section 69.50.4013 of the Revised Code of Washington was unconstitutional).