



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 23872843

Date: JUNE 2, 2023

Appeal of Philadelphia, Pennsylvania Field Office Decision

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

The Applicant seeks 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 be 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 Philadelphia, Pennsylvania Field Office denied the Form I-212, concluding that the Applicant did not establish as required that a favorable exercise of discretion was warranted in his case. The matter is now before us on appeal.

The Applicant submits a brief with updated evidence and asserts generally that the Director's decision was in error.

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 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.

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 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. *See 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").

Equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (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) (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 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.¹

The record reflects the Applicant's testimony that he paid \$25,000 to a smuggler for a passport with a U.S. nonimmigrant visa, with which he entered the United States in 1994. He subsequently requested asylum in the United States, but his request was denied. The Applicant renewed his asylum claim in deportation proceedings, but an Immigration Judge found it to be not credible and instead granted his request for voluntary departure with an alternative order of removal. The Applicant appealed the decision; the Board of Immigration Appeals (the Board) upheld the Immigration Judge's adverse credibility finding but remanded the matter to determine whether the Applicant's claim of eligibility for asylum on another basis was credible. The Immigration Judge found that it was not credible, and again granted the Applicant voluntary departure until December 21, 1998, with an alternative order of removal to China if he did not depart by that date. The Applicant did not comply with the voluntary departure order. In 2002, the Board affirmed the Immigration Judge's decision and dismissed the Applicant's subsequent motions to reopen. The U.S. Court of Appeals for the Second Circuit denied his petition for review of the Board's decisions in 2005, but the Applicant remained in the United

¹ The approval of his application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart.

States. In 2010 he married his U.S. citizen spouse and, as stated, he is now seeking an advance permission to reapply for admission to the United States so he can apply for an immigrant visa abroad.²

In denying the application, the Director acknowledged the favorable factors in the Applicant's case; specifically, his marriage to a U.S. citizen, and the medical, psychological, and financial hardships his spouse would experience, as well as the Applicant's longtime residence and employment in the United States. The Director determined, however, that those positive equities, acquired years after the Applicant had been ordered removed in 1998, were outweighed by his entry into the United States with a fraudulently obtained passport and U.S. visa, which he initially did not disclose, his failure to comply with the voluntary departure and removal orders, and the fact that his presence in the United States was unlawful and his employment unauthorized. The Director also noted that the evidence was not sufficient to support the Applicant's claims that his spouse's medical conditions were severe, and that as a dual citizen of the United States and China she might not have access to subsidized health care in China if she chose to return there with him. Thus, the Director concluded that the Applicant's disregard for the U.S. immigration laws over the years outweighed the positive equities he acquired by remaining in the United States unlawfully after having been ordered removed, and that a favorable exercise of discretion therefore was not warranted. The Applicant has not overcome this determination on appeal.

The Applicant now submits supplemental evidence, which includes his spouse's updated psychological assessment, an additional medical record, a copy of their joint 2021 federal and state income tax returns, and a 2020 U.S. Department of State's Crime and Safety Report for Wuhan, China (DOS report). The Applicant's counsel³ asserts that the Applicant's spouse suffers from multiple physical and mental symptoms of extreme stress. The counsel further states that the spouse struggles to work part time in a Chinese restaurant due to her ailing physical and mental health, and would not be able to cover the monthly expenses of \$3,206 if the Applicant must remain in China for the entire 10-year inadmissibility period. The counsel asserts that the Applicant and his spouse no longer have connections in China and, as an elderly couple with limited education and skills they would be unlikely to obtain employment and support themselves there. Lastly, the counsel states, referencing the DOS report that the Applicant's spouse is worried and anxious that she would be exposed to different variants of COVID and SARS if she is forced to relocate with the Applicant or visit him in China, and that as a foreigner she will not have access to subsidized healthcare in China and will not be able to afford the necessary medical treatment because U.S. insurance plans are not accepted there.

As an initial matter, the counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Rather, counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Here, the evidence is not sufficient to support the counsel's

² We note that the Applicant has not provided evidence that he has a pending request for an immigrant visa with the U.S. Department of State. The record reflects that he previously sought to adjust his status in the United States to that of a lawful permanent resident twice, in 2002 (based on employment), and in 2015 (based on the marriage to his U.S. citizen spouse); U.S. Citizenship and Immigration Services (USCIS) administratively closed his most recent adjustment application and accompanying Form I-601, Application for Waiver of Grounds of Inadmissibility, as the Applicant remains in removal proceedings and USCIS has no jurisdiction to consider his adjustment of status request.

³ The Applicant does not provide an updated personal statement on appeal, and only resubmits his spouse's 2020 hardship declaration.

claims. While we recognize that according to the updated psychological assessment the Applicant's spouse has been diagnosed with separation anxiety disorder and adjustment disorder with mixed anxiety and depressed mood, the record remains insufficient to establish if and how the spouse's physical and mental health issues affect her daily life, including her ability to work and support herself. Nor is there evidence to support the counsel's claim that the spouse would not be able to obtain appropriate medical care in China, should she decide to relocate there with the Applicant, or that either she or the Applicant, both currently in their 50s would not be able to find employment in China due to age. We acknowledge the submission of the DOS report, which advises against travel to Wuhan, China due to arbitrary enforcement of local laws and special restrictions on dual U.S.-Chinese citizens. However, there is no evidence that the Applicant intends to reside in Wuhan, or anywhere in the [redacted] province upon return to China. Rather, the record reflects that both the Applicant and his spouse are from the [redacted] province, and on the Form I-130, Petition for Alien Relative, the Applicant's spouse listed a residential address in [redacted] for the Applicant. We also note that while the counsel indicates that the Applicant and his spouse no longer have family ties in China, the Applicant's spouse stated during her psychological assessment that her adult son, who is a U.S. citizen recently moved to China and opened a business there, and the record reflects that the Applicant's adult daughter resides in China as well. The evidence is also inadequate to substantiate the counsel's statement about the Applicant's and his spouse's monthly expenses, as it does not include copies of their mortgage statements, utility bills, or information about their other financial obligations. Furthermore, the claimed expenses of over \$3000 a month (or over 36,000 a year) appear to exceed the Applicant's and his spouse's joint yearly income, which according to the 2021 tax documents submitted on appeal was \$23,563, including \$11,563 in unemployment compensation.⁴ Lastly, while we recognize that the Applicant's departure and prolonged absence from the United States will negatively affect his spouse, any hardships she may experience as a result have diminished weight, as the marriage occurred years after the Applicant had been ordered removed from the United States.

The Applicant, who appears to be employed as a general worker at a Chinese restaurant does not claim that there is a need for his services in the United States, and he does not explain whether he has any close family ties in the country aside from his spouse. We acknowledge the previously submitted letters from the Applicant's cousin and friends describing him as a kind and honest person with good reputation in the Chinese community. However, as none of the letters address the Applicant's entry into the United States by fraud, his longtime unlawful residence, and unauthorized employment in the country, they have limited probative value as evidence of the Applicant's rehabilitation, respect for law and order, and good moral character.

Given the evidentiary deficiencies discussed above and the diminished weight of the claimed medical, psychological, and financial hardships to the Applicant's spouse, we conclude that the Applicant has not met his burden of proof to show that the positive factors in his case are sufficiently meritorious to outweigh the negative impact of his entry into the United States with fraudulently obtained documents, non-compliance with the voluntary departure and removal orders, longtime unlawful presence in the United States, unauthorized employment, and apparent lack of close family ties in the United States other than his U.S. citizen spouse.

⁴ The record includes copies of the previously submitted 2012-2014 and 2018-2019 tax returns, which reflect that they were both employed and their joint income in those years ranged from \$20,400 to \$29,303.

Consequently, we agree with the Director that a favorable exercise of discretion is not warranted at this time, and the Applicant's request for permission to reapply for admission to the United States remains denied.

ORDER: The appeal is dismissed.