U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27187880

Date: JUN. 15, 2023

Appeal of New York, 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, a native and citizen of Indonesia, 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 New York, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, concluding that the Applicant did not establish a favorable exercise of discretion was warranted. The matter is now before us on appeal. 8 C.F.R. § 103.3. The Applicant asserts the Director did not take into consideration all the relevant positive factors in adjudicating the application and erred as a matter of law in concluding the Applicant did not establish she merited 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 review, we will remand the matter for the entry of a new decision.

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 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] Because she has an outstanding order of removal, she will be inadmissible under section 212(a)(9)(A)(ii) of the Act once she departs. In 1996, the Applicant entered the United States on an F-1 visa, and she subsequently applied for asylum with her now-ex-husband. In March 2006, an Immigration Judge denied that application for asylum, ordered the Applicant removed, and the Board of Immigration Appeals affirmed that decision. The Applicant later filed two motions to reopen her removal proceedings, both of which were denied. The Applicant indicates that she has not departed the United States since being ordered removed.

The Applicant married her current U.S. citizen spouse in [redacted] 2018. Her spouse filed a Form I-130, Petition for Alien Relative, on her behalf, and that petition has been approved. The Applicant filed her Form I-212, which the Director denied in August 2021. The Applicant has appealed that denial, arguing the Director erred in finding she did not merit a favorable exercise of discretion.

On appeal, the Applicant argues the Director erred in denying her waiver application, failing to accurately consider the positive equities and misapplying the law as to her negative factors. In denying the Form I-212, the Director acknowledged the evidence the Applicant presented of her favorable factors, including: a copy of her visa and entry as an F-1 student; her birth certificate; her marriage certificate and her U.S. citizen spouse's identification; her U.S. citizen child's birth certificate; a divorce decree pertaining to her previous marriage; affidavits from the Applicant and her spouse; a copy of a psychological evaluation for the Applicant's spouse; letters of support from friends and community members; and copies of her check-in appointments with U.S. Immigration and Customs Enforcement. The Director determined that the F-1 visa entry was ultimately not a favorable factor, as she started working in 1997 instead of attending classes. With respect to hardship to the Applicant's family, the Director concluded that the Applicant's spouse's psychological evaluation showed his "medical condition is not life threatening."

The Director determined that the Applicant's positive factors were insufficient to overcome the negative impact of the Applicant's non-compliance with the removal order, unlawful presence in the United States, and future inadmissibility under section 212(a)(9)(A)(ii) of the Act. The Director also determined that the Applicant's entry into United States on an F-1 visa and subsequent employment were negative factors, when considering the lack of attendance at school.

When considering whether a request for permission to reapply merits a favorable exercise of discretion, positive factors may include hardship to the applicant and other U.S. citizen or lawful

[1] The approval of her application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

permanent resident relatives, the applicant's respect for law and order, and family responsibilities. *Matter of Tin*, 14 I&N Dec. at 373-74. However, there is no specific requirement that an applicant show extreme hardship, as alluded to by the Director. *Id.* Extreme hardship to a qualifying relative is a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act. In the adjudication of a Form I-212, any hardship to the Applicant or her family members is a factor to be considered in the discretionary analysis.

Here, the record does not indicate that the Director applied the correct standard in evaluating the claims of general hardships to the Applicant and her family members, including emotional and financial hardship upon separation due to her role as a stepparent to her spouse's child, and emotional and financial hardship upon relocation resulting from the Applicant's spouse having to leave his home and adjust to conditions in Indonesia after residing in the United States his entire life. Indeed, there is nothing in the Director's decision to indicate any hardship to either the Applicant herself, her U.S. citizen son, or her U.S. citizen stepchild was considered in rendering the decision. Further, the Director seems to have applied a higher standard – extreme hardship – to the analysis in this case, as particularly noted in the finding that the Applicant's spouse does not suffer from a "life threatening" medical condition. The Director also did not specifically address evidence of additional significant positive factors in the record, including the Applicant's lack of a criminal record and evidence of positive moral character, as evidenced through letters of support from friends and community members.

In light of the deficiencies noted above, we will remand the matter for the entry of a new decision. It will remain the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.