U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24246994

Date: MAR. 24, 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 Santa Ana, California 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 appealed the Director's decision to us, asserting the Director gave undue negative weight to unfavorable factors and failed to give sufficient weight to favorable equities. 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 not submitted any new evidence in support of his application, argues we erred in finding he might be inadmissible under section 212(a)(6)(B) of the Act, and continues to assert that he has established he merits a favorable exercise of discretion. Upon review, we will dismiss both motions.

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 establish that our decision was based on an incorrect application of law or U.S. Citizenship and Immigrations Services (USCIS) policy and that the decision was incorrect based on the evidence in the record of proceedings 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 facts and 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. 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).

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 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);*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).

The Applicant is currently in the United States and seeks permission to reapply for admission. In 1991, the Applicant, at the age of 15, entered the United States without being inspected, admitted, or paroled. The Applicant applied for asylum in 1994, and upon denial of his application, an Order to Show Cause was issued, placing him in deportation proceedings. Records indicate the Applicant was subsequently ordered deported when he failed to appear for deportation proceedings in 1994. The Applicant again applied for asylum in 2001.[1] USCIS conducted an asylum interview and referred the Applicant to an Immigration Judge for review of his asylum application in removal proceedings, which culminated in a grant of voluntary departure in 2002. The Applicant did not depart the United States during the allotted period, and that order converted to an order of removal. The Applicant indicates that he has not departed the United States since being ordered removed.

The Applicant married his U.S. citizen spouse in [redacted] 2019. His spouse filed a Form I-130, Petition for Alien Relative, on his behalf, and that petition has been approved. The Applicant filed his Form I-212, which the Director denied in September 2020. The applicant appealed that denial, and we dismissed the Applicant's appeal, agreeing with the Director's conclusion that the Applicant did not establish he warranted a favorable exercise of discretion.

Now on motion, the Applicant contends we should reopen and reconsider our prior decision. However, the Applicant does not reference any new facts to be proved, and he does not submit any new evidence to be considered. As such, the brief and motion to reopen do not meet the requirements of a motion

[1] The Applicant filed the Form I-589, Request for Asylum, with USCIS, and his prior deportation order was not disclosed. USCIS therefore accepted the Form I-589 filing and processed the application as an affirmative asylum application, despite lacking jurisdiction due to the prior order of deportation.

to reopen, as set out in regulations. 8 C.F.R. § 103.5(a)(2). Therefore, the motion to reopen must be dismissed.

On motion, the Applicant further argues we should reconsider our prior decision because he merits a favorable exercise of discretion, as he is rehabilitated, and he asserts that we erred in our prior decision in finding he may be inadmissible under section 212(a)(6)(B) of the Act. As to our prior finding regarding a potential additional ground of inadmissibility, we withdraw that finding. The Applicant would not be subject to inadmissibility under section 212(a)(6)(B) of the Act for failure to appear at his removal hearing, as that section does not apply to removal proceedings initiated prior to April 1, 1997. As the *in absentia* order of deportation in the Applicant's case was entered in 1994, he would not be inadmissible under section 212(a)(6)(B) of the Act. However, despite noting in our prior decision the additional ground of inadmissibility may apply upon the Applicant's departure from the United States, we ultimately did not base our decision on that finding.

The Applicant asserts that he merits a favorable exercise of discretion, as he is rehabilitated. We acknowledge the positive equities the Applicant presents, including that he has continuously resided in the United States since 1991, he is married to a U.S. citizen, he has worked to provide for himself and his family, and he has developed ties to his community and worked to integrate into society in the United States. However, as stated in our prior decision, many of the positive equities he presents were acquired after the entry of his order of deportation in 1994 and are therefore accorded diminished weight. *See Carnalla-Munoz v. INS, supra.* The positive equities the Applicant presents must be weighed against his negative factors, specifically, his *in absentia* removal order, his failure to depart on a grant of voluntary departure, his lengthy history of unlawful presence in the United States, his false testimony in support of his asylum application, and his lack of reasonable explanation and potential inadmissibility for this false testimony.

We acknowledge the Applicant's argument on motion about his testimony related to his asylum application in 1994. However, while acknowledging in our prior decision that the Applicant was only 17 years old at the time of his asylum application, we noted that his statement in support of his Form I-212 appeared to contain a misleading explanation for his misrepresentations on his asylum application and interview. The Applicant claimed he used the services of a notario, believing that he was applying for a work permit, and that he was unaware that he had applied for asylum. However, the record indicates that when he appeared for his asylum interview, he testified falsely under oath concerning his arrival in the United States and being persecuted in Mexico on account of his political affiliation and activities. The Applicant did not provide a reasonable explanation for these misrepresentations or fully acknowledge that he willfully provided false testimony at his asylum interview. In addition, we found that when the Applicant applies for his immigrant visa, the U.S. Department of State could find the Applicant inadmissible under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting material facts in an attempt to obtain an immigration benefit. We concluded that his false testimony and failure to provide a reasonable explanation, as well as his potential inadmissibility for these actions, were significant unfavorable factors in the balancing of the Applicant's favorable versus unfavorable equities.

Considering the entire record in this case, we find no error in our previous decision that the positive equities do not outweigh the negative factors. We will therefore dismiss the motion to reconsider as the Applicant has not demonstrated that he merits a favorable exercise of discretion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.