U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26167332

Date: MAY 3, 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. *See* section 212(a)(9)(A)(ii) of the Act.

The Director of the Philadelphia, Pennsylvania Field Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, counsel for the Applicant submits a brief and maintains that the Applicant has established eligibility for the benefit sought.

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.

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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 found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act if, prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

The Applicant currently resides in the United States, and he is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. The approval of his application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

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 (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.")

Generally, favorable factors that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities") 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 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).

The issue presented on appeal is whether the Applicant should be granted conditional approval of his application for permission to reapply in the exercise of discretion. The Applicant does not contest his inadmissibility, which is supported by the record. After considering the record in its entirety, including documents submitted on appeal, we find that the record continues to be insufficient to show that a favorable exercise of discretion is warranted.

In the decision to deny the application, the Director listed the favorable factors in the Applicant's case, which included his marriage to a U.S. citizen; residence in the United States since 1992; an approved Form I-130, Petition for Alien Relative, on the Applicant's behalf; family ties in the United States, including his parents and sibling; the hardships the Applicant and his family will face if he relocates abroad due to his inadmissibility; business and home ownership; the payment of taxes; the absence of a criminal record in the United States; and the Applicant's compliance with the U.S. Immigration and Customs Enforcement (ICE) Order of Supervision.

Regarding unfavorable factors, the Director detailed the Applicant's entry to the United States without authorization in 1992; his failure to depart the United States pursuant to a voluntary departure order; the deportation order against the Applicant; a bond breach; the Applicant's arrest in 2009 by ICE Fugitive Operations; the Applicant's misrepresentations to the Immigration Court in 2009 by claiming that he had complied with the deportation order when in fact he had not; and periods of unlawful presence and employment in the United States. The Director also stated that the Applicant had accrued the outstanding majority of his equities in the United States after he had failed to depart pursuant to the deportation order. Accordingly, the Director concluded that the unfavorable factors in the Applicant's case outweighed the favorable factors in his case, and the application should be denied as a matter of discretion.

On appeal, the Applicant asserts that the Director did not give sufficient weight to the positive equities in his case. He again asserts that he has extensive community and family ties in the United States and presents no threat or harm to society. Further, the Applicant maintains that he co-owns a business and is a hardworking individual. The Applicant also states that he takes care of his U.S. citizen father and lawful permanent resident mother, who are suffering from numerous medical conditions that require his daily care and support. Further, he contends that he is a law-abiding member of society with no criminal record, pays his taxes, and owns a home and rental properties.

We adopt and affirm the Director's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS,* 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS,* 87 F3d 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case.") Although we are sympathetic to the Applicant and his family's circumstances and the favorable factors detailed by the Director, we do not find that the positive factors, the outstanding majority which came into existence after the Applicant failed to depart the United States pursuant to the deportation order, outweigh the negative factors in this case. As previously outlined by the Director, the negative factors include the Applicant's entry to the United States without authorization in 1992; his failure to depart the United States pursuant to a voluntary departure order; the deportation order against the Applicant; a bond breach; the Applicant's arrest in 2009 by ICE Fugitive Operations; the Applicant's misrepresentations to the Immigration Court in 2009 by claiming that he had complied with the deportation order when in fact he had not; and periods of unlawful presence and employment in the United States.

We also note that despite the Applicant's assertion on appeal that he does not have a criminal record, he previously indicated in immigration documents that he "was arrested for DUI sometime around the year 2004. I paid a fine to the police. I hired a lawyer and this incident resulted in me having my license suspended for one year, and after the one year I paid another file and had the license returned to me." Driving under the influence of alcohol is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of our discretion. *See Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018) (finding DUI a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI").

The Applicant has not shown the Director incorrectly balanced the positive and negative factors in his case. A favorable exercise of discretion is therefore not warranted, and the Applicant's request for permission to reapply for admission to the United States remains denied.

ORDER: The appeal is dismissed.