U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16974498

Date: APR. 07, 2022

Appeal of Newark, New Jersey Field Office Decision

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

The Applicant, who has an outstanding removal order, 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 Newark Field Office denied the Form I-212, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case.

On appeal, the Applicant claims that the Director did not properly weigh all the positive factors in his case, and that he merits a favorable exercise of discretion.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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 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.

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).

II. ANALYSIS

In this case, the record reflects that 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.[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. We have reviewed the entire record, including the additional evidence submitted on appeal, and for the reasons explained below conclude that it is insufficient to establish that a favorable exercise of discretion is warranted.

The record reflects that the Applicant entered the United States without inspection in 2002. In 2007, an Immigration Judge granted the Applicant voluntary departure until [redacted] 2007, with an alternate order of removal to Ecuador if he failed to depart by that date. The Applicant did not depart and continues to reside in the United States. When the Applicant did not comply with the grant of voluntary departure it was converted to a removal order in [redacted] 2007. In [redacted] 2018 the Applicant married his U.S. citizen spouse, who then filed an immigrant visa petition on his behalf which was approved on June 12, 2019. The Applicant and his spouse have a six-year-old U.S. citizen son born in 2015. In support of his Form I-212, the Applicant previously submitted evidence including his sworn affidavit, his spouse's sworn affidavit, his son's 2019-2020 Individualized Education Program, proof of health insurance, bills, letters of support from his in-laws, proof of income and employment for the Applicant and his spouse, information about general conditions in Ecuador, and proof that the spouse is a full-time student at [redacted] University.

The Director denied the application as a matter of discretion. The Director acknowledged that there were favorable considerations in the Applicant's case, including his family ties in the United States, the claimed emotional and financial hardship to him, his spouse, and child, inferior economic conditions in Ecuador, and payment of taxes. The Director found that these positive factors were insufficient to overcome the negative impact of the Applicant's unlawful entry into the United States, longtime unlawful residence in the country, noncompliance with the grant of voluntary departure, and unauthorized employment. The Director further determined that the evidence submitted lacked

[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 the Applicant does not depart.

[2] The Applicant indicates his intention to file a Form I-601A, Application for Provisional Unlawful Presence Waiver, if the instant Form I-212 is approved.

"indicators of extreme hardship," and "does not indicate a hardship beyond what could be reasonably expected with the departure of a spouse."

On appeal, the Applicant submits a brief in which he argues that the Director erred in not taking into account the totality of the discretionary factors and asserts he is deserving of a favorable exercise of discretion when all positive and negative factors are weighed together. He states that although he worked without authorization in the United States, he did so to provide for his family and he had no other recourse. The Applicant further asserts that the Director gave too much weight to his prior immigration violations, because every individual seeking permission to reapply for admission has violated immigration laws. In addition, the Applicant indicates he has no criminal history and that the letters show that he is a person of good character. Further, he states that despite his unlawful employment he has been paying taxes and he submits his 2019 income tax returns. Moreover, the Applicant asserts that there is no requirement that an I-212 applicant show extreme hardship to a qualifying relative. The Director erred in requiring a showing of extreme hardship, as any hardship can be considered in a Form I-212 discretionary analysis. *Matter of Tin, supra.* However, after considering the record in its entirety, we agree with the Director that the evidence is insufficient to show that a favorable exercise of discretion is warranted, for the reasons explained below.

The most significant negative factors in the Applicant's case are his unlawful entry into the United States, unlawful presence in the United States, non-compliance with his grant of voluntary departure and the resulting removal order, and unauthorized employment. The positive factors include the Applicant's longtime residence and family ties in the United States, payment of taxes, apparent lack of criminal history, and difficult conditions in Ecuador.

We recognize that the Applicant's son has received specialized academic instruction; however, the record does not show that he would be unable to receive adequate educational support if the Applicant must remain abroad until his inadmissibility period expires. In addition, although the Applicant reasserts that separation would cause significant emotional hardship to his spouse and child, the evidence shows that the spouse's mother, father, sister, and extended family live in the United States and there is nothing in the record to suggest that they would be unwilling or unable to provide them with emotional support in his absence.[3]

The Applicant reiterates that his spouse will suffer severe economic hardship as she depends on his financial support. In addition, the Applicant, who is 40 years old, claims that he would have difficulty finding work in Ecuador, "considering my lack of recent work experience as well as my age." The spouse states that she is dependent on the Applicant's earnings as a construction worker, and she would not be able to cover the monthly household expenses of $2,000 without his income. She explains that she is employed on a parttime basis because she is studying to be a medical laboratory technician and has an expected graduation date of August 2020. The proof of income in the record, including on appeal, indicates that the Applicant and his spouse, respectively, earned $31,340 and $11,753 in 2018 and $46,874 and $5,188 in 2019.

[3] The record shows that before residing with the Applicant the spouse lived with her parents from 2010 to 2016.

We acknowledge the Applicant's claim that he is the primary wage earner and that his spouse will experience financial hardship without his income, but the evidence is insufficient to show the specific impact the loss of the Applicant's income would have on his spouse's overall economic situation. There is nothing in the record to suggest that the spouse would not be able, in the Applicant's absence, to supplement her current income or increase her income upon completion of her studies, or that her family would be unwilling or unable to provide her with financial support. The Applicant also claims that he will suffer hardship if his Form I-212 is denied because, being 40 years old, he would have difficulty finding work in Ecuador "considering my lack of recent work experience as well as my age," and any employment would not provide sufficient earnings. We acknowledge the submitted country reports for Ecuador and recognize that the Applicant may experience financial difficulties if he must remain there for the entire inadmissibility period. However, we note that the Applicant lived in Ecuador until he was 20 years old, and that his family continues to live there. Thus, the evidence considered in its totality is insufficient to show the extent of the claimed economic hardship to the Applicant, his spouse, and child that would result from his absence.

We recognize that there are several favorable factors in the Applicant's case, including his family ties in the United States, the emotional and financial support he provides his family, and the emotional and economic hardship he and his family will experience as a result of separation. However, we agree with the Director that such hardship has a diminished weight in the discretionary analysis, because the Applicant's family ties came into existence after he had been ordered removed and were therefore "after-acquired equities." We acknowledge evidence of other favorable factors in the Applicant's case, including letters attesting to his good character. This evidence, however, is insufficient to overcome the negative factors. The Applicant has been unlawfully present in the United States since 2002, did not comply with the voluntary departure and removal orders, worked without authorization for the past 20 years, and did not provide evidence that he paid taxes at any time before 2018. Further, we note that the Applicant does not explain why he did not comply with the grant of voluntary departure or express remorse for his immigration violations on appeal.

Consequently, we agree with the Director that the Applicant has not demonstrated that the positive factors in his case, considered individually and in the aggregate, outweigh the negative factors. 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.