U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15843965

Date: APR. 19, 2022

Appeal of Lawrence, Massachusetts Field Office Decision

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

The Applicant seeks advance consent to reapply for admission so that, if he obtains an immigrant visa abroad, he can legally return to the country within 10 years of leaving. *See* Immigration and Nationality Act (the Act) sections 212(a)(9)(A)(ii)(I), (iii), 8 U.S.C. § 212(a)(9)(A)(ii)(I), (iii). The removal order against him became final in 2015, but he remains in the United States.

The Director of the Lawrence, Massachusetts Field Office denied the application as a matter of discretion. On appeal, the Applicant submits additional evidence. He argues that the Director disregarded favorable factors and "pre-determined" his eligibility to waive another inadmissibility ground.

The Applicant bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that the Director overlooked evidence and improperly expected the Applicant to demonstrate that his 10-year absence from the United States would cause his spouse "extreme hardship." We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. THE INADMISSIBILITY GROUND

Noncitizens who have been ordered removed, deported, or excluded from the United States generally cannot gain admission to the country within 10 years of leaving. Section 212(a)(9)(A)(ii)(I) of the Act. They may obtain exceptions to this inadmissibility ground if U.S. Citizenship and Immigration Services (USCIS) consents to their reapplications for admissions before they return to the country. Section 212(a)(9)(A)(iii) of the Act.

The Applicant, a 43-year-old native and citizen of Brazil, concedes that his departure from the United States would trigger his inadmissibility under section 212(a)(9)(A)(ii)(I) of the Act. The record shows that he walked across the border from Mexico to the United States in August 2001 without admission or parole. In [redacted] 2008, U.S. immigration officers apprehended him and placed him in removal proceedings. The Immigration Judge (IJ) denied the Applicant's applications for relief and ordered

him removed to Brazil in [redacted] 2013. In January 2015, the Board of Immigration Appeals (BIA) affirmed the IJ's decision.

Thus, the Applicant is under a final order of removal. His departure from the United States would execute the removal order, *see* section 101(g) of the Act, 8 U.S.C. § 1101(g), and render him inadmissible under section 212(a)(9)(A)(ii)(I) of the Act. As the beneficiary of an approved petition by his U.S.-citizen spouse, the Applicant hopes to obtain an immigrant visa abroad. But to legally return to the United States within 10 years of leaving, he needs an inadmissibility exception under section 212(a)(9)(A)(iii) of the Act.

II. THE DISCRETIONARY DECISION

USCIS may consent to reapplications for admission at its discretion. *See* section 212(a)(9)(A)(iii) of the Act. Thus, applicants must demonstrate that favorable social and humanitarian considerations outweigh adverse evidence in their records. *See Matter of Tin*, 14 I&N Dec. 371, 373 (BIA 1973).

Applicants whose departures from the United States would execute removal, deportation, or exclusion orders may apply for consent to reapply before leaving the country. 8 C.F.R. § 212.2(j). Any approvals, however, would not take effect until their departures. *Id.*

In determining whether to exercise favorable discretion, USCIS should consider: the bases and recency of applicants' removals; the lengths of their U.S. residences; their moral characters and respect for law and order; evidence of their rehabilitations; their family responsibilities; commissions of repeated immigration violations; hardships to themselves or others; close family ties in the United States; needs for their services in the country; and any other relevant factors. *Matter of Tin*, 14 I&N Dec. at 373.

In the Applicant's case, the Director identified the following positive factors: the Applicant's marriage to a U.S.-citizen and the related, approved immigrant visa petition on his behalf; and his lack of criminal convictions. On the other hand, the Director found the following negative factors: the Applicant's illegal entry into the United States; his noncompliance with the final removal order; his employment in the country without authorization; the discovery of false documents in his name at the time of his immigration arrest; his attempt to unlawfully obtain a driver's license; and his prosecution on two occasions for allegedly driving without a valid license.

The Director also expected the Applicant to demonstrate that denial of his application would cause his spouse "extreme hardship." The Director noted that, because the Applicant accrued more than one year of "unlawful presence," his departure from the United States would subject him to another inadmissibility ground. *See* section 212(a)(9)(B)(i)(II) of the Act.[1] The Director found that the Applicant would not likely obtain a provisional unlawful presence waiver, as such a grant would require demonstration of potential, "extreme hardship" to his U.S.-citizen spouse. *See* section 212(a)(9)(B)(v) of the Act (requiring unlawful presence waiver applicants to demonstrate "extreme hardship" to their U.S.-citizen or lawful-permanent-resident spouses or parents). Citing *Matter of J-*

[1] The term "unlawful presence" includes presence in the United States after entry without admission or parole. Section 212(a)(9)(B)(ii) of the Act.

F-D-, 10 I&N Dec. 694 (Reg'l Comm'r 1963), the Director found that the Applicant would not likely resolve all the inadmissibility grounds against him.

In *J-F-D-*, however, the applicant for consent to reapply was "ineligible" to waive an additional ground of inadmissibility. *Matter of J-F-D-*, 10 I&N Dec. at 695. As the applicant could not possibly eliminate all the barriers to legally return to the United States during the relevant period, the Regional Commissioner found that the application's approval would serve "no purpose." *Id.* In contrast, if USCIS approves this application, the Applicant would be eligible to apply for a provisional unlawful presence waiver. *See* section 212(a)(9)(B)(v) of the Act. Thus, this application potentially serves a purpose, and *J-F-D-* does not apply to the Applicant's case.

Moreover, Form I-212 applications and Form I-601A submissions for provisional unlawful presence waivers are separate filings. Applicants who need to file both types of applications must submit their Form I-212 filings first. *See* 8 C.F.R. § 212.7(e)(4)(iv). Unlike Form I-601A applications, Form I-212 filings do not require demonstration of extreme hardship to qualifying spouses or parents. *See* section 212(a)(9)(iii) of the Act. Rather, when adjudicating Form I-212 applications, USCIS favorably considers any hardship to applicants or others. *Matter of Tin*, 14 I&N Dec. at 373. Thus, the Director erred in expecting the Applicant to meet the extreme hardship standard in these proceedings.

The Director also found that the Applicant "submitted no evidence of paying taxes in the United States during [his] unauthorized employment." The application, however, included copies of joint federal income tax returns of the Applicant and his spouse for 2016 and 2017. On appeal, the Applicant also submits copies of his federal tax returns/U.S. Internal Revenue Service (IRS) tax transcripts from 2009 to 2015 and from 2018 to 2019. We will therefore withdraw this negative factor.

The Director favorably considered the Applicant's marriage and the approved immigrant visa petition for him that stemmed from the relationship. But the Director faulted the Applicant for omitting evidence of the good-faith nature of his marriage, such as copies of "jointly filed taxes." Noncitizens have good-faith marriages if they and their spouses "intended to establish a life together at the time they were married." *Matter of P. Singh*, 27 I&N Dec. 598, 601 (BIA 2019) (citations omitted).

As previously indicated, the Applicant submitted copies of joint federal income tax returns of him and his spouse. Moreover, USCIS approved his spouse's Form I-130 petition for him before the filing of the Form I-212 application. The couple married during the Applicant's removal proceedings. USCIS therefore interviewed them and granted the petition under an exception requiring "clear and convincing evidence" that the marriage was "entered into in good faith and not entered into for the purpose of procuring the alien's entry as an immigrant." *See* 8 C.F.R. § 204.2(a)(1)(iii)(B). Thus, the *bona fides* of the Applicant's marriage was not in doubt. *See* 9 *USCIS Policy Manual* B(4)(A) (stating that "an officer should use the approval of the Petition for Alien Relative (Form I-130) as proof that a qualifying relationship has been established").

The Director also overlooked other evidence in the Applicant's favor. The Director found that the discovery of false documents in the Applicant's name evidenced his "disrespect for U.S. law and

order."[2] But the Director disregarded countervailing evidence that another Brazilian man obtained the false visa and Form I-94 without the Applicant's prior knowledge. Also, the record indicates that the Department of Homeland Security granted the Applicant "deferred action," allowing him to help federal authorities criminally convict the other Brazilian man of transporting noncitizens unlawfully in the United States for financial gain, *see* sections 274(a)(1)(A)(ii), (B)(i) of the Act, 8 U.S.C. §§ 1324(a)(1)(A)(ii), (B)(i), and remove him from the United States.[3] On appeal, the Applicant states: "I do have a respect for the laws of the country, which is why I continued to cooperate with law enforcement in order to convict [the other Brazilian man]."

The Director also disregarded the Applicant's U.S. residence of more than 20 years and his relationships with his two U.S.-citizen stepsons, ages 20 and 16. The Applicant's evidence on appeal includes additional materials regarding potential, emotional and financial hardships to his U.S. family and letters from an associate pastor and members of his church describing volunteer activities by him and his spouse. The Applicant also claims that he did not leave the United States after the removal order became final, in part, because he fears that the other Brazilian man would "potentially kill[]" him and that he "received threats over the telephone from Brazil."

For the foregoing reasons, we will withdraw the Director's decision and remand the matter for reconsideration of discretionary factors. On remand, the Director should review the entire record, including evidence submitted by the Applicant on appeal, and enter a new decision.

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

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[2] The record supports the existence of a false visa and Form I-94, Arrival/Departure Record, in the Applicant's passport. But the Director's list of allegedly false documents also includes "an unlawfully obtained Massachusetts driver's license and a counterfeit Social Security card." The record lacks evidence supporting the invalidity of the Applicant's driver's license or Social Security card. The Social Security card contains an individual taxpayer identification number with which the Applicant claims to have filed federal income tax returns in 2003, 2005, and 2006, before obtaining a Social Security number in 2009. *See generally* IRS, "Taxpayer Identification Numbers (TIN)," https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin

[3] "Deferred action" is a form of prosecutorial discretion, temporarily deferring removals of noncitizens or the initiation of removal proceedings against them. *See* USCIS, Humanitarian, "Frequently Asked Questions," https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.