U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18069146

Date: APR. 20, 2022

Appeal of New York City, New York Field Office Decision

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

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. Permission to reapply for admission is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the New York City, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that the Applicant did not establish that a favorable exercise of discretion was warranted. On appeal, the Applicant submits additional documentation and contends that the Director erred in finding that the unfavorable factors in his case outweighed the favorable factors. We review the questions raised 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 remand the matter to the Director for further proceedings and entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen 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.

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); *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").

The Applicant currently resides in the United States and 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. Approval of the 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.

II. ANALYSIS

As noted, 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. Because he has an outstanding order of removal, he will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[1]

In denying the application, the Director reviewed the following evidence: hardship to the Applicant's U.S. citizen spouse; affidavits; evidence of family unity; and financial documents. The Director found that the Applicant's unfavorable factors included his failure to comply with his removal order, and his inadmissibility under section 212(a)(9)(B)(i) of the Act for unlawful presence and under section 212(a)(9)(A)(i) of the Act for having been ordered removed. The Director concluded that the favorable factors did not outweigh the adverse factors and that a favorable exercise of discretion was not warranted.

On appeal, the Applicant argues that the Director failed to consider all the factors, including those enumerated by policy, while overlooking substantial positive equities and asserts that the written decision provides no basis to ascertain whether the positive equities were considered. The Applicant contends that he sufficiently established hardship to his U.S. citizen spouse and children, and his lawful permanent resident parents. The Applicant states that he provides financially to his family since he is the primary wage earner. In addition, the Applicant notes that he cares for his two children, including his daughter who, due to both lead poisoning and autism spectrum disorder (ASD), presents with developmental and behavioral issues. Moreover, his wife suffers from depression, and he fears that his absence could push her into major depression. Further, the Applicant's mother and father live with him, and he is caring for his father who, after contracting coronavirus, was intubated and is now in need of daily care.

[1] The record indicates that the Applicant entered the United States in 1996 without being inspected, admitted, or paroled. He affirmatively applied for asylum and was referred to the immigration judge in 1997. His asylum application was denied in 2000 and he was ordered removed. The Board of Immigration Appeals dismissed the Applicant's subsequent appeal in 2002. The Applicant did not depart and continues to reside in the United States.

On appeal, the Applicant submits additional documentation regarding his U.S. citizen daughter's medical history, including a blood analysis indicating high levels of lead exposure as well as a psychological evaluation diagnosing her with ASD. He also submits a letter from the [redacted] Department of Education (DOE) regarding his daughter's educational progress. According to the DOE, she had not kept pace with the applicable learning standards and would be required to repeat her then-grade level. The Applicant also submits a letter from a licensed psychologist treating his spouse stating that she had been diagnosed with Adjustment Disorder with Mixed Anxiety and Depression. He also submits medical records for his father regarding the hospital visit during which he tested positive for the coronavirus, was intubated, and was placed on a ventilator. The medical documentation indicates that the Applicant is his father's backup caregiver. The Applicant also submits financial documents such as paystubs and Forms W-2.

When considering whether a request for permission to reapply warrants a favorable exercise of discretion, favorable factors may include hardship to the applicant and U.S. citizen or lawful permanent resident relatives, the applicant's length of residence in the United States, and family responsibilities.

The Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, but did not address, let alone analyze meaningfully, the evidence of record pertaining to several significant favorable factors. First and foremost, we note that the Applicant's daughter – a citizen of the United States – is on the autism spectrum, a factor which alone weighs heavily in his favor and, at minimum, requires careful consideration. Moreover, the Applicant, who has lived in the United States for 26 years, has no apparent criminal history, and has a U.S. citizen spouse and two U.S. citizen children and lawful permanent resident parents in the United States. He contends that if he is removed from the United States his spouse will suffer as her mental health may deteriorate, and his children will suffer as he is a crucial caregiver to them, and he will suffer financial hardship because he earns the majority of his family's income. The previously submitted evidence includes affidavits from the Applicant's spouse addressing hardship to their family if the Applicant is removed; his spouse's psychological report and his daughter's medical records; employment and financial documentation and tax records. The Director must consider and weigh all of these factors.

In light of the shortcomings noted above, and taking into account the new evidence submitted on appeal, we find it appropriate to remand the matter to the Director to determine whether the Applicant warrants a favorable exercise of discretion.

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