U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15776959

Date: APR. 20, 2022

Appeal of Queens, New York 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 she obtains an immigrant visa abroad, she may legally return to the United States within 10 years of leaving. *See* Immigration and Nationality Act (the Act) sections 212(a)(9)(ii)(I), (iii), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), (iii). She received a final order of removal in 2001 but has not left the country.

The Director of the Queens, New York Field Office denied the application as a matter of discretion. On appeal, the Applicant asserts that the Director overlooked equities favoring her. She also contends that he improperly "assumed" that her 10-year absence from the United States would not cause her lawful-permanent-resident spouse "extreme hardship."

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 will sustain the appeal.

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. This inadmissibility ground, however, does not apply if U.S. Citizenship and Immigration Services (USCIS) consents to noncitizens' reapplications for admission before they return to the country. Section 212(a)(9)(A)(iii) of the Act.

The Applicant, a 61-year-old native and citizen of China, concedes that her departure from the United States would render her inadmissible under section 212(a)(9)(A)(ii)(I) of the Act. She entered the country in March 1998 without admission or parole. The immigration service did not approve her application for asylum, *see* section 208 of the Act, 8 U.S.C. § 1158, and forwarded the filing to an Immigration Judge (IJ) for consideration in removal proceedings. In [redacted] 1999, the IJ denied her applications for relief and ordered her removed to China. The Board of Immigration Appeals (BIA) affirmed the IJ's decision in January 2001.

Thus, the Applicant is under a final order of removal. Her departure from the United States would execute the order, *see* section 101(g) of the Act, 8 U.S.C. § 1101(g), and render her inadmissible under section 212(a)(9)(ii)(I). She is the beneficiary of an approved Form I-130 petition by one of her daughters and hopes to obtain an immigrant visa abroad as the "immediate relative" parent of a U.S. citizen. *See* section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i). To legally immigrate to the United States within 10 years of her departure, however, the Applicant needs an inadmissibility exception under section 212(a)(9)(A)(iii).

II. THE DISCRETIONARY DETERMINATION

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

Applicants whose departures would execute orders of removal, deportation, or exclusion may seek consent to reapply for admission before leaving the United States. 8 C.F.R. § 212.2(j). Any approvals, however, would not take effect until the applicants' departures from the country. *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; or other relevant factors. *Matter of Tin*, 14 I&N Dec. at 373.

The Director found the following factors favoring the Applicant: her close ties to relatives in the United States; her lengthy residence in the country; and her lack of a criminal record. On the other hand, the Director found the following negative factors: the Applicant's illegal entry into the United States; her noncompliance with the removal order; and her subsequent "unlawful presence" in the country.[1]

The Director also found another negative factor: the Applicant's purported inability to demonstrate that denial of her application would cause "extreme hardship" to her spouse. The Director noted that, because the Applicant has accrued more than one year of "unlawful presence," her departure from the United States would subject her to another inadmissibility ground. *See* section 212(a)(9)(B)(i)(II) of the Act. The Director found that the Applicant would not likely obtain a provisional unlawful presence waiver, as it would require demonstration of potential, "extreme hardship" to her lawful-permanent-resident spouse. *See* section 212(a)(9)(B)(v) of the Act (requiring applicants seeking unlawful presence waivers to demonstrate "extreme hardship" to their U.S.-citizen or lawful-permanent-resident spouses or parents). Citing *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg'l Comm'r 1963), the Director stated:

[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.

> Since it is unlikely that you will qualify for a waiver of unlawful presence and will remain inadmissible even if USCIS were to grant your Form I-212, the remaining ground of inadmissibility is a negative factor that in itself supports denial of this Form I-212 as a matter of discretion.

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 his legal return to the United States during the relevant period, the Regional Commissioner found that approval of the Form I-212 application would serve "no purpose." *Id.* In contrast, if USCIS approves this application, the Applicant would qualify 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, a Form I-212 application and a Form I-601A submission for a provisional unlawful presence waiver 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). Form I-212 applications do not require demonstrations of "extreme hardship" to qualifying spouses or parents. *See* section 212(a)(9)(iii) of the Act. Rather, Form I-212 applicants may show hardships to themselves or others that do not rise to the extreme level. *See generally 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.

Also, the Director did not give full evidentiary weight to the Applicant's ties to her relatives in the United States. Her U.S. relatives include: her 66-year-old spouse; their three, adult children, ages 37 to 40, who are all either U.S. lawful permanent residents or U.S. citizens; and their two, U.S. citizen grandsons, ages 10 and 6. The Director noted that the Applicant married her spouse in 2014, after the removal order against her became final in 2001. *See, e.g., Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) (giving diminished, evidentiary weight to favorable, discretionary factors acquired after the issuance of a final, deportation order). But copies of Chinese government certificates identify the Applicant's spouse as the father of all three of her children. The couple did not formally register their first marriage in China. But another pending Form I-130 petition for the Applicant contains a copy of the couple's 1999 divorce certificate, in which a Chinese court recognizes their prior "*de facto* marriage" as beginning in 1979. Thus, the Applicant had close ties to her U.S. relatives before receiving the final removal order, and this positive factor merits full, evidentiary weight.

Further, the Director did not fully consider hardship to the Applicant's family. The Director concluded that the Applicant did not demonstrate potential, "extreme hardship" to her spouse. But the Director did not credit other, unusual hardship to her spouse. Documentation establishes that, while the Applicant's spouse was working as a carpenter in the United States in December 2002, a chainsaw severed his left hand from his body. Doctors surgically reattached his hand. But medical and psychiatric reports state that a lengthy, painful period of rehabilitation has left the Applicant's spouse with not only a severely weakened hand, but also chronic depression and insomnia. Additionally, the record shows that the Applicant regularly cares for her two grandsons, indicating that denial of her application would likely cause hardship to her two daughters (her grandsons' mothers), their spouses, and her grandsons.

Upon review of the discretionary factors, we find that the positive equities outweigh the negative ones. The Applicant committed serious U.S. immigration violations, including her noncompliance with the final removal order against her. But the record shows that she has: close family ties in the United States; no criminal record; and residence in the country of more than 20 years. Evidence also demonstrates that denial of her application would cause unusual hardship to her family in the United States, and copies of U.S. Internal Revenue Service transcripts and tax returns establish her continuous payment of federal income taxes from 2000 through the application's filing.

For the foregoing reasons, we will sustain the appeal.

ORDER: The appeal is sustained.