U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18849825

Date: APR. 27, 2022

Appeal of New York, 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 she will be inadmissible upon departing from the United States for having been previously ordered removed.

The Director of the New York, New York Field Office denied the Form I-212 application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant contends that the Director erred in finding that the unfavorable factors presented in his application outweighed the favorable factors.

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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.

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.[1] The Applicant's U.S. citizen spouse filed a Form I-130 immigrant petition on the Applicant's behalf, which was approved. He intends to depart the United States in order to apply for an immigrant visa with the U.S. Department of State. 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.[2]

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[1] The approval of his application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

[2] The record indicates that the Applicant entered the United States in May 2002 without being inspected, admitted, or paroled. He was apprehended and served a Notice to Appear (NTA), charging him under section 212(a)(6)(A)(i) of the Act. He was ordered removed to China by an Immigration Judge in [redacted] 2002. He posted a bond and was released from Immigration and Customs Enforcement (ICE) custody. The Board of Immigration Appeals dismissed the Applicant's subsequent appeal in 2004. The Applicant's bond was breached in 2005. In 2010, the Applicant was apprehended and placed into ICE custody. The Applicant filed a petition for review with a stay of removal with the Second Circuit Court of the United States, which the court dismissed in March 2011. In [redacted] 2011, ICE issued an order of supervision and

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, 373-74 (Reg'l Comm'r 1973).

In denying the application, the Director determined that the Applicant's favorable factors, specifically his close family ties to the United States, his current employment status, and the mental health history of his U.S. citizen spouse did not outweigh the unfavorable factors. For instance, the Director noted the Applicant has a young U.S. citizen daughter with his spouse but concluded that the evidence was insufficient to show how his spouse would be negatively affected if he is removed from the United States. The Director also observed in the denial that although the Applicant avers that he is the sole financial provider for the family, the only evidence provided to substantiate this assertion was a hand-written job verification letter.

The Director found that the Applicant's unfavorable factors included his entry into the United States without inspection, his failure to comply with his removal order, and his unlawful presence in the United States. While the Director acknowledged that the Applicant has been present in the United States for 17 years without criminal convictions, he also noted that during that time he was unlawfully present. The Director ultimately concluded after consideration of the record that the favorable factors did not outweigh the unfavorable factors in this case and denied the application as a matter of discretion.

On appeal, the Applicant contends that the Director improperly applied the extreme hardship standard to the Form I-212 adjudication and erred by failing to appropriately consider and weigh the submitted evidence.[3]

Upon review, we agree that the Director did not properly weigh the favorable and unfavorable factors in the record. We first note that while the Director found that the evidence did not establish that the Applicant's spouse would experience extreme hardship should the Form I-212 be denied, unusual or extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Extreme hardship to a qualifying relative is a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act.

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released the Applicant from custody. The Applicant remains subject to ICE's order of supervision; he did not depart and continues to reside in the United States.

[3] The Applicant also noted that the Director erred by indicating that the Form I-212 instructions included "*unusual* hardship to U.S. citizen or lawful permanent resident relatives, yourself, or your employer" as a factor to consider when weighing the equities in a Form I-212 application. (Emphasis added). However, the instructions to the Form I-212 do not list "*unusual* hardship to U.S. citizen [] relatives…."; rather, the instructions simply indicate that hardships to these individuals will be considered as favorable factors within the Form I-212 discretionary analysis. *See* the Form I-212 instructions at https://www.uscis.gov/i-212.

Further, while the Director listed the favorable factors USCIS considers when determining whether a Form I-212 warrants approval as a matter of discretion, the denial did not sufficiently address evidence of additional significant favorable factors in the record. For example, the Applicant, who has lived in the United States for many years, has been subject to ICE's order of supervision since 2011, and has facially complied with ICE's terms and conditions for supervised release from custody, to include checking in with ICE personnel when directed to do so, and continually applying for work authorization with USCIS in order to avoid further unlawful employment in the United States. These are favorable factors which may be considered when contemplating whether the Applicant has respect for law and order, his good moral character, and also whether he has reformed or rehabilitated since his prior immigration violations.

The Applicant also states that it is not possible for his spouse to relocate to China with him because he could not find adequate employment or health care to treat his spouse's physical and mental health conditions. The record reflects that the Applicant's spouse was born with strabismus (cross-eyes), and that her eyesight is deteriorating, and she is being medically treated for this condition. She is also undergoing treatment for her mental health conditions. The Applicant further indicates that his spouse would be unable to care for their (now four-year-old) daughter while also financially supporting herself and her daughter should she remain in the United States upon his removal. The Applicant also contends that he would not be able to provide sufficient financial support to his family through his prospective employment in China. The previously submitted evidence in the record includes affidavits from the Applicant and his spouse addressing the hardships to their family if the Applicant is removed; his spouse's psychological report and medical records; employment and financial documentation; family photographs; and country condition information for China.

As the Director's decision does not reflect a proper analysis of the favorable and unfavorable factors in the Applicant's case, as required, we will remand the matter for the entry of a new decision regarding the Applicant's eligibility.

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