U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14720176

Date: JUN. 23, 2022

Appeal of Newark, New Jersey 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), for having been previously ordered removed from the United States.

The Director of the Newark, New Jersey Field Office denied the application. The Director concluded that the Applicant had not shown that a favorable exercise of discretion is warranted. On appeal, the Applicant argues that the Director 1) did not give sufficient weight to favorable discretionary factors and 2) reviewed the Applicant's hardships under an incorrect standard of proof.

The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal because the Applicant has not met this burden.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen who has been ordered removed, or who departed the United States while an order of removal was outstanding, is inadmissible for 10 years after the date of departure or removal.

A nnoncitizen 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 re-embarkation 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.

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. The approval of his 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.

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).

II. ANALYSIS

The Applicant, a national and citizen of Haiti, is currently in the United States and seeks permission to reapply for admission. The Applicant indicated that he was filing Form I-212 in order to seek permanent resident status. He does not contest that he has an outstanding order of removal and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs. The Applicant does not contest his inadmissibility on appeal.

The record reflects that the Applicant entered the United States without inspection in or around August 2004. The Applicant filed a Form I-589, Application for Asylum and for Withholding of Removal (asylum application) before USCIS in August 2003 and was referred to the Immigration Judge in 2005. He was subsequently found ineligible for asylum and ordered removed by an Immigration Judge in [redacted] 2007. The Board of Immigration Appeals (Board) dismissed a subsequent appeal of this decision, and he was ordered removed in [redacted] 2008. However, the record shows the Applicant did not depart the United States and has resided in the United States since then. In December 2016, the Applicant's wife filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved in January 2019.

In denying the application, the Director determined that the Applicant's favorable discretionary factors were not enough to outweigh the negative equities in his case. Specifically, the Director found that the favorable factors in the Applicant's case were his wife in the United States, his employment and apparent tax payments, apparent lack of a criminal record, and the country conditions in Haiti. The Director noted that the Applicant married his spouse in [redacted] 2016, years after his removal order in 2008. While the Director acknowledged that the Applicant's and his spouse's household income would be impacted if he is removed, the Director stated that economic detriment to his qualifying relative is "insufficient finding of extreme hardship." Regarding unfavorable factors, the Director concluded the Applicant entered the United States without inspection, failed to execute his removal order, and was inadmissible for fraud and misrepresentation under section 212(a)(6)(C)(i) of the Act. Regarding his fraud and misrepresentation, the Director indicated that the Applicant provided fraudulent information by 1) on his asylum applicant and admitting the information regarding his presence in the United States in 2004 was fraudulent and 2) failing to disclose he had another sister in the United States when applying for a non-immigrant visa.

On appeal, the Applicant submits a brief and additional evidence including subsequent supplemental documents, such as new articles on country conditions in Haiti and a notice from USCIS indicating

the continuation of temporary protected status (TPS) for certain Haitians.[1] The Applicant argues the Director gave more weight to the negative discretionary factors and did not appropriately balance all the discretionary factors. While the Applicant states the weighing of the positive discretionary factors was appropriate, he contends that there is no requirement that an I-212 applicant show extreme hardship to a qualifying relative. Moreover, the Applicant states that his misrepresentation was not flagrant, did not involve false documentation, and did not involve any other egregious form of fraud. The Applicant asserts that he is the primary wage earner and that country conditions in Haiti are "horrendous."

We have reviewed the entire record, and for the reasons explained below agree with the Director that the evidence is insufficient to show that a favorable exercise of discretion is warranted.

As a preliminary matter, we agree that extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission; rather, any hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis. See Matter of Tin, supra. Nevertheless, we have reviewed the entire record, and for the reasons explained below, agree with the Director that the evidence is insufficient to show that a favorable exercise of discretion is warranted.

Next, we retract the Director's finding that the Applicant is inadmissible for fraud and misrepresentation under section 212(a)(6)(C)(i). We note that if the Applicant departs the United States and applies for an immigrant visa, a U.S. Department of State consular officer will make a final determination of the Applicant's admissibility under section 212(a)(6)(C)(i) and any other applicable section of the Act at that time.

The negative factors in the Applicant's case include his unlawful entry into the United States and unlawful presence; and his provision of inconsistent information in his asylum application and interview before an Immigration Judge.[2]

In this case, the Applicant's positive factors are his U.S. citizen spouse, hardship to his spouse, apparent lack of a criminal record, and country conditions in Haiti.[3]

While there is no dispute that the Applicant's spouse in the United States will be negatively affected if she must remain abroad for the entire inadmissibility period, the Applicant's marital ties and any hardships related to his spouse carry diminished weight in our discretionary analysis, because the Applicant's marital relationship and any related equities came into existence in 2016, after he had been

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[1] The Applicant submitted his appeal in November 2019. The Applicant submitted supplemental information in August 2021 and November 2021.

[2] On his asylum application and interview, the Applicant claimed that he left Haiti on April 2004 in his asylum application and in his interview. However, Government records indicate the Applicant applied for a visa in Haiti in August 2004. In addition, the Applicant under oath in immigration court stated he was not harmed on March 3, 2004, which contradicts the information on his asylum application. The Director also notes that the Applicant did not disclose an additional sibling when applying for a non-immigrant visa.

Misrepresenting a material fact would render a noncitizen inadmissible under section 212(a)(6)(C)(i) of the Act.

[3] We considered the Director's finding that the Applicant appeared to pay taxes. While the Applicant has provided evidence of his 2017 and 2018 tax returns, the record does not establish the Applicant had paid his taxes, when eligible, throughout his time in the United States.

ordered removed in 2008. Generally, favorable factors that came into existence after a noncitizen has been ordered removed from the United States, 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).

Although not discussed by the Director, the submitted financial documents are insufficient to substantiate the extent of the claimed financial hardship. Specifically, the Applicant's affidavit indicated that his and his spouse's monthly expenses include $600 in rent and $430 clothing, but the record does not clearly demonstrate these expenses. Also regarding the clothing expense, the record does not demonstrate why this would be a recurring monthly expense. At the time of his June 2019 affidavit, the Applicant claimed he and his spouse work each work at one job and that the couple's approximate bi-weekly wage is approximately $1,500 and $800 respectively.[4] However, their 2017 W-2, Wage and Tax Statements, indicate that both worked multiple jobs, and that the spouse had another employer in addition to the employer stated in the Applicant's affidavit. Currently, the record does not establish if the spouse is still working multiple positions and receives additional wages beyond that claimed.

We acknowledge evidence of the favorable factors in the Applicant's case, including his appearance of no criminal record and information about conditions in Haiti. This evidence, however, is insufficient to overcome the adverse impact of the Applicant's unlawful entry, unlawful presence in the United States, and provision of inconsistent information for immigration benefits.

Consequently, the Applicant has not demonstrated that the positive factors in his case 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.

[4] As evidence of their wage and employment, the Applicant provided two of his spouse's 2018 paystubs and three 2018 bank statements from their joint account showing the Applicant received direct deposits.