U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18269394

Date: MAY 2, 2022

Appeal of Queens, 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. *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 Queens, New York Field Office denied the Form I-212, concluding that the Applicant did not establish a favorable exercise of discretion was warranted. On appeal, the Applicant asserts that the Director erred by failing to consider the totality of positive factors in her case.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. 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 relevant part that any noncitizen who has been ordered removed, 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of a noncitizen convicted of an aggravated felony) is inadmissible.

Noncitizens who are inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) if prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous 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 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).

Favorable factors that came into existence after a noncitizen has been ordered removed are generally given less weight in a discretionary determination. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (less weight given to equities acquired after entry of a deportation order); *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).

II. ANALYSIS

The Applicant is currently in the United States and seeks conditional permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before she departs.[1] She does not contest that she will be inadmissible under section 212(a)(9)(A)(ii) of the Act upon departure for having been previously ordered removed. The only issue on appeal is whether the Applicant has demonstrated that approval of her Form I-212 is warranted as a matter of discretion.

The record reflects that the Applicant, a national and citizen of China, entered the United States without inspection and admission or parole on or about [redacted], 2006, and was placed in removal proceedings. She was ordered removed in [redacted] 2007. The Applicant subsequently filed a timely appeal with the Board of Immigration Appeals (Board), and in May 2009, the Board dismissed the appeal and ordered her removed. The Applicant did not leave and has been residing in the United States since that time. In 2010, she married a U.S. citizen who subsequently filed an immigrant visa petition on her behalf. The immigrant petition was approved in April 2016, and she filed the instant petition in March 2017.

In support of the instant Form I-212, the Applicant submitted statements from her spouse and family members; her spouse's psychological evaluation; tax, employment, and financial records; family photographs; documents showing family ties to the United States including certificates of naturalization for her spouse, two children, bother-in-law, sister-in-law, father-in-law and mother-in-law; and articles regarding living conditions in China that discuss wages, environmental concerns, hospital conditions, and treatment of the mentally ill. The Director acknowledged that there were favorable considerations in the Applicant's case, including her family ties in the United States, apparent lack of criminal history, and the length of time living in the United States. The Director also noted that the Applicant has two U.S. citizen children and a U.S. citizen spouse but nevertheless determined that those equities should be accorded less weight in the discretionary analysis because they were created after she had been ordered removed and were therefore after-acquired equities. The Director determined that these positive factors were insufficient to overcome the negative impact of

[1] The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if she failed to depart.

the Applicant's entry into the United States without inspection, non-compliance with the removal order, and unlawful residence in the United States. The denial highlighted that the record did not contain documentary evidence to support the claim of medical hardship. Specifically, the Director noted that the submitted evidence regarding the spouse's diagnosis of mental health included a psychological report that appeared to be written for immigration purposes rather than an unbiased medical diagnosis, and, that the psychiatrist that wrote the report has written several reports for immigrant matters that contain the same boilerplate language. The Director also determined that the Applicant did not appear to be eligible for a provisional waiver of inadmissibility for her unlawful presence in the United States based on extreme hardship to her spouse.[2] *See* section 212(a)(9)(B)(i), (v) of the Act. The denial states that because the Applicant is unlikely to qualify for a waiver for her unlawful presence, the remaining ground of inadmissibility is a negative factor that in itself supports denial of the Form I-212 as a matter of discretion.

On appeal, the Applicant contends that the Director erred by failing to appropriately consider and weigh the submitted evidence of the positive factors in her case, specifically the Applicant's lengthy residence in the United States, her two U.S. citizen children, and her spouse who suffers from medical and psychological issues. She further contends that the Director gave too much weight to her prior immigration violations since every individual seeking permission to reapply for admission has violated immigration laws. She reiterates that if such permission is not granted, her spouse will suffer extreme pain and pressure since he suffers from major depressive disorder, severe and anxiety disorder, and she supports and cares for him. She also said that he may not receive the proper treatments in China for his mental condition. The Applicant further states that she is the care giver of her two U.S. citizen children since her spouse works. In addition, she contends that her children would need to be enrolled in a private school in China since they do not speak Chinese, and lower wages in China would make it difficult to provide schooling for both children. Finally, the Applicant states that she has no criminal history.

While the Director found it unlikely the Applicant would establish extreme hardship to her spouse in order to qualify for a provisional waiver for her unlawful presence ground of inadmissibility, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Further, a provisional waiver application is a separate application for relief, and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver.[3] 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.[4]

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[2] *See* Instructions for Form I-601A, Application for Provisional Unlawful Presence Waiver at 7, https://www.uscis.gov/i-601a.

[3] The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) for unlawful presence will be needed after the Applicant departs and regardless of whether she obtains a provisional waiver. *See* Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal – Where to File, https://www.uscis.gov/i-212.

[4] *See Matter of Tin*, 14 I&N Dec. at 373.

There is no dispute that the Applicant's prolonged absence from the United States will have a negative impact on her and her family; however, she has not demonstrated that the claimed hardships to herself and her spouse, and children and other positive considerations outweigh the negative factors in her case. Moreover, we agree with the Director that such hardship has a diminished weight in the discretionary analysis, because the Applicant's marital relationship and related equities came into existence after she had been ordered removed.

We recognize that the Applicant's spouse was diagnosed with major depressive disorder, severe and anxiety disorder, and that he may face emotional difficulties without the Applicant. However, the evidence shows that the spouse's father, mother, brother and sister-in-law live in the United States and there is nothing in the record to suggest that they would be unwilling or unable to provide him with emotional support. Regarding the claimed medical hardship to the Applicant's spouse, the mental health evaluation does not show that he has any conditions that require specialized treatment or that he would be unable to receive adequate health care if the Applicant must remain abroad until her inadmissibility period expires. In addition, while the spouse's psychotherapist states that the spouse reported anxiety, depression, nightmares, and insomnia with the possibility of being separated from the Applicant, the record does not show that the spouse's mental health conditions and related symptoms significantly impact his ability to continue employment, care for his children, and perform daily tasks, or that the Applicant provides him with assistance in managing these symptoms aside from her general emotional support. The Applicant does not contest the Director's determination concerning the insufficiency of evidence to establish the submitted psychological report is credible.

We acknowledge evidence of other favorable factors in the Applicant's case, including letters attesting to her good character and church membership, and information about conditions in China. This evidence, however, is insufficient to overcome the adverse impact of the Applicant's non-compliance with the removal order, and her unlawful presence in the United States since 2006.

As a general matter, the Applicant has not submitted new or updated evidence regarding her character, family responsibilities, hardship involved to the Applicant or others, or other factors supporting a favorable exercise of discretion. Although we are sympathetic to the claims of hardship to the Applicant and her family members in the United States if her application is denied, the positive factors do not outweigh the negative factors in evaluating whether the Applicant warrants a favorable exercise of discretion.

Consequently, we agree with the Director that the Applicant has not demonstrated that the positive factors in her case considered individually and, in the aggregate, 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.