U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16998222

Date: MAY 05, 2022

Appeal of Newark, New Jersey Field Office Decision

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

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),

The Director of the Newark, New Jersey Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding the Applicant did not establish that a favorable exercise of discretion is warranted in his case. On appeal, the Applicant contends the Director erred in finding that the unfavorable factors in his case outweighed the favorable factors and improperly determined that he is required to establish extreme hardship to a qualifying relative.

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.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that any noncitizen who has been ordered removed, or 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 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,

373-74 (Reg'l Comm'r 1973). The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

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 to apply for an immigrant visa abroad.[1] 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]

In denying the application, the Director reviewed evidence concerning the Applicant's family ties to the United States, medical records for the Applicant's spouse and son, and financial records, but determined that the Applicant's favorable factors did not outweigh the unfavorable factors in his case. The Director determined that the positive factors in the Applicant's case relate to his marriage to a U.S. citizen and the fact that he is a parent of two U.S. citizen children (ages 7 and 9) but emphasized that his marriage occurred after he was ordered removed and is thus an after-acquired equity that carries less weight in determining whether the favorable factors in his case outweigh the negative factors. The Director acknowledged that the Applicant documented ongoing medical conditions suffered by his spouse and son and noted that this is a favorable factor that would be heavily weighed. The Director also determined that, although the Applicant had demonstrated that the loss of his income would be detrimental to his family's financial circumstances, the "mere showing of economic detriment to qualifying relatives is insufficient to warrant a finding of extreme hardship."

The Director concluded that a favorable exercise of discretion was not warranted, citing as negative factors the Applicant's unlawful entry without inspection in 1994, his failure to attend his 1995 deportation hearing, and a history of working in the United States without authorization. In reaching his conclusion that the negative factors outweigh the positive in this case, the Director observed that the evidence did not demonstrate "the hardship your spouse would endure would be beyond what would reasonably be expected with the removal of a spouse."

On appeal, the Applicant contends the Director erroneously applied an "extreme hardship" standard in evaluating the positive factors in his case. We agree with the Applicant's assertion that there are several statements in the Director's decision that suggest the improper application of such standard. The requirement of establishing extreme hardship to a qualifying relative (or qualifying relatives) does not apply to noncitizens who seek permission to reapply for admission to the United States after deportation or removal.[3] Rather, as stated above *any* hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis. Here, the record does not indicate that the

[1] The approval of this 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 was apprehended by immigration officials after entering the United States without being inspected in [redacted] 1994, when he was 18 years old. An immigration judge ordered the Applicant deported *in absentia* in [redacted] 1995 when he failed to appear for his scheduled deportation hearing. The Applicant's motion to reopen his deportation proceedings was denied by the immigration judge in November 2018. He did not depart and continues to reside in the United States.

[3] Extreme hardship to a qualifying relative applies to inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act.

Director applied the correct standard in evaluating the claims of general hardships to the Applicant's family members in the event the Applicant is not permitted to re-enter the United States before his inadmissibility period expires.

The Applicant further maintains that the Director did not follow guidelines provided by precedent law in weighing the positive and negative factors presented in the record. Specifically, the Applicant maintains that the Director erred by giving very little weight to his family ties and responsibilities on the grounds that many of the positive factors in his case are after-acquired equities. In addition, the Applicant asserts that the Director appears to have equated his immigration-related violations with a lack of good moral character, contrary to case law. *See Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character").

While it is true that favorable factors ("equities") acquired after an order of deportation, exclusion, or removal has been entered may be given less weight in assessing favorable factors in the exercise of discretion, they should not be dismissed as such, and they must still be considered and balanced against the adverse factors in the totality of circumstances. *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). Thus, depending on the specific facts, such as the length of time since the removal order, or the number and strength of the equities (e.g., longstanding demonstration of good moral character, family ties, contributions to the community, business ownership, etc.) after-acquired equities may be sufficient to outweigh the negative factors. *Garcia-Lopes v. INS*, 923 F.2d at 76; *Matter of Tijam*, 22 I&N Dec. at 417. Here, despite listing more positive factors than negative factors present in the case and indicating that some of those positive factors could be weighed heavily in the Applicant's favor, it is unclear how the Director reached his conclusion that the negative factors outweigh the positive. As noted, the Director's decision reflects the application of an extreme hardship standard which may have unduly influenced how the positive and negative factors were weighed.

Finally, the Applicant contends that the Director did not consider information contained in his spouse's detailed affidavit concerning the family's circumstances and her lack of prior knowledge of his removal order, the length of his residence in the United States, his lack of a criminal record, his lack of repeated immigration violations, his remorse for his sole unlawful entry, and his explanation for not attending his deportation hearing in 1995. We agree with the Applicant that this relevant information and evidence was not addressed in the Director's decision.

In light of the deficiencies noted above, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence and 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.