U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16513876

Date: MAY 05, 2022

Appeal of Baltimore, Maryland 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 he is inadmissible for having been previously ordered removed.

The Director of the Baltimore, Maryland Field Office denied the application, concluding that because the Applicant had not remained outside of the United States for at least 10 years, he did not meet the statutory and regulatory requirements for consent to reapply for admission.

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). This office reviews the questions in this matter *de novo*. *See 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 additional review and the entry of a new decision.

I. LAW

The Applicant is seeking permission to reapply for admission to the United States and has been found inadmissible for having been previously ordered removed.

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any alien, other than an arriving alien described in section 212(a)(9)(A)(i), 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible."

Foreign nationals 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) if "prior to the date of the reembarkation 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 foreign national'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 of the application is warranted as a matter of discretion. *See 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. *See Matter of Tin,* 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee*, *supra*, at 278 (Finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience").

II. ANALYSIS

The record reflects that the Applicant entered the United States without inspection in [redacted] 1993. He was detained at the port of entry and placed in deportation proceedings, which he did attend. An order of deportation was issued by an Immigration Judge on [redacted] 1993 and served upon the Applicant.

In an affidavit submitted with his Form I-212, Application for Permission to Reapply for Admission, (Form I-212), the Applicant asserts that he did not depart pursuant to the order of deportation in [redacted] 1993, but remained in the United States until approximately November 1994 when he visited Mexico with his friend for approximately two months. The Applicant further asserts that he returned to the United States without being admitted or paroled on January 25, 1995.[1] In 1999 the Applicant was granted TPS, which he has continued to renew.[2]

The Director determined that since the Applicant has not remained outside of the United States for at least 10 years he does not meet the requirements for consent to reapply for admission. However, the decision does not cite to a specific provision of law that requires the Applicant to remain outside the United States for this period of time. The Director also noted that no purpose would be served in adjudicating the Form I-212, as the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, (Form I-485) was administratively closed.

Although the decision does not cite to a specific provision of law, the Director appears to indicate that the Applicant is permanently barred from seeking admission to the United States under Section

[1] The Applicant has not submitted sufficient evidence to support his assertion that he departed the United States in 1994 and returned in 1995. While counsel for the Applicant points to a printout from a U.S. Citizenship and Immigration Services (USCIS) system showing the Applicant's immigration record obtained through a Freedom of Information Act request, we note that this evidence does not corroborate the Applicant's claimed date of departure or reentry. The information in the USCIS system reflects data provided by the Applicant himself on his initial application for Temporary Protected Status (TPS). The Applicant does not submit evidence that he departed the United States or of his physical presence outside the United States at any time after his order of deportation in [redacted] 1993.

[2] USCIS records reflect that the Applicant last departed the United States on January 19, 2022, and reentered on January 23, 2022 using a Form I-512L, Authorization for Parole of an Alien into the United States.

212(a)(9)(C)(i) of the Act.[3] Here, the Applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act, because there is no evidence in the record that he departed the United States following his order of deportation.

However, even if the Applicant established that he departed the United States and reentered as he claimed, section 212(a)(9)(C)(i)(II) of the Act applies to noncitizens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time *on or after* April 1, 1997. *See* Memorandum from Paul Virtue, Acting Executive Associate Commissioner, INS, HQIRT 50/5.12, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)* (June 17, 1997).[4] Here, the Applicant claims to have attempted to reenter the United States in 1995 without inspection after being ordered deported in 1993. If the Applicant's entry without inspection occurred before April 1, 1997, the effective date of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), he still would not be inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

As noted above, although the Applicant asserts that his departure from the United States in 1994 was an execution of the order of deportation, the record does not support this assertion. We note that the Applicant's claim to have remained in the United States following his order of deportation until November 1994 is inconsistent with a prior claim made before an Immigration Judge in the Applicant's 2011 motion to reopen his deportation proceedings. In his motion to reopen, the Applicant claimed to have departed the United States pursuant to the order of deportation in [redacted] 1993 and remained outside the United States until returning without inspection in January 1995.[5] However, the record demonstrates that the Applicant was physically present in the United States in [redacted] 1994. In his affidavit, the Applicant describes an altercation that led to his arrest and court appearance in [redacted] 1994 in the State of Maryland and he provides evidence of the expungement of police and court records related to this incident. Therefore, the Applicant has not established that he departed the United States subsequent to his order of deportation or that his order of deportation is not outstanding.

Because the Applicant has not established that he executed his deportation order, he is not at this time inadmissible under section 212(a)(9)(A)(ii) of the Act and therefore does not presently require permission to reapply for admission. Upon departure, however, the Applicant will become inadmissible for having been previously ordered removed.

On appeal, counsel for the Applicant states that 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. We acknowledge that Form I-212 may be adjudicated prior to an individual's departure from

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[3] Section 212(a)(9)(C)(i) of the Act. provides that an alien who "has been unlawfully present in the United States for an aggregate period of more than one year, or . . . has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted is inadmissible." Pursuant to section 212(a)(9)(C)(ii) of the Act, there is an exception for any "alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission."

[4] The instructions to the Form I-212 also specify that section 212(a)(9)(C)(i)(II) inadmissibility applies to individuals who were ordered removed from the United States under any provision of the Act or any other provision of law before, on, or after April 1, 1997, and enter or attempt to reenter without admission on or after April 1, 1997.

[5] The Applicant's motion to reopen proceedings was denied by the Immigration Judge in June 2011.

the United States to seek immigrant processing at a U.S. consulate abroad. We note, however, that the approval of the application under these circumstances is conditioned upon the Applicant's actual departure from the United States and would otherwise have no effect if he fails to depart.

Therefore, we deem it appropriate here to remand the case to the Director to review the record, weigh all favorable and unfavorable factors, and determine whether the Applicant merits a conditional approval of his Form I-212 in the exercise of discretion. As noted above, when considering whether a request for permission to reapply merits a favorable exercise of discretion, favorable factors may include hardship to the applicant and others, the applicant's respect for law and order, his moral character, his family responsibilities, and his likelihood of becoming a lawful permanent resident. Here, the Applicant has submitted evidence of his close family ties in the United States, including his spouse and children, ages 19 and 17. He also demonstrates his employment and payment of taxes, and describes hardship to his spouse and son given their medical conditions. The Director should consider these factors and weigh them accordingly with the unfavorable factors, which may include the Applicant's immigration violations and his criminal history.[6]

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

[6] Records reflect that the Applicant was arrested in 1996 for possession of a controlled substance, and again in 2001 for second degree assault. The Applicant did not disclose these arrests on his Form I-485, nor does he mention these incidents in his affidavit submitted with the Form I-212.