U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16287915

Date: MAY 23, 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 he 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 to the United States 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 application, concluding that the Applicant was ineligible because approving his application would serve no purpose since he was inadmissible for unlawful presence and had not established extreme hardship to his qualifying relative spouse.[1] The Director also denied his application because the Applicant is required to file a waiver application (Form I-601A) for having accrued unlawful presence. The matter is now before us on appeal.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review 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, and for the following reasons, we will remand the matter to the Director for entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any noncitizen, 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." Noncitizens 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

[1] The Director erroneously concluded that the Applicant's parents are not qualifying relatives for purposes of a future waiver application. On appeal, the Applicant provides evidence that his parents are U.S. lawful permanent residents.

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 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).

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).

Under section 212(a)(9)(B)(i)(II) of the Act, a foreign national (other than one lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such individual's departure or removal from the United States, is inadmissible. A foreign national may seek a waiver for this inadmissibility under section 212(a)(9)(B)(v) of the Act (the unlawful presence waiver) if they establish that the inadmissibility will cause their U.S. citizen or legal permanent resident spouse or parent(s) extreme hardship. Pursuant to 8 C.F.R. § 212.7(e), some foreign nationals who are inadmissible for unlawful presence may apply for a provisional unlawful presence waiver prior to departing the United States. However, a foreign national who is subject to an administratively final order of removal, deportation, or exclusion under any provision of law is ineligible for a provisional unlawful presence waiver under 8 C.F.R. 212.7(e), unless they file, and USCIS approves, an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 C.F.R. § 212.2(j).

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 because he will become inadmissible upon departing under section 212(a)(9)(A)(ii) of the Act.

The record shows that the Applicant, a native and citizen of China, entered the United States on or about May 1, 2001. The Applicant applied for asylum and his application was referred to the Immigration Court. On [redacted] 2003, an Immigration Judge denied the Applicant's application for asylum and related relief and ordered him removed to China. On March 23, 2004, the Board of Immigration Appeals (Board) affirmed the Immigration Judge's decision. Consequently, the Immigration Judge's removal order became final. However, the Applicant has remained in the United

States, and upon his departure, he will become inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The record indicates that the Applicant is seeking conditional approval of his application under 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. The approval of this 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.

The Director denied the application, concluding that the Applicant was not eligible for permission to reapply for admission because upon departing the United States, he would become inadmissible for having accrued more than one year of unlawful presence, and because he does not have qualifying family members, other than his spouse. (As noted above, the Director erred in this conclusion because the evidence shows the Applicant's parents are legal permanent residents of the United States.) Furthermore, the Director denied the Applicant's application because "[i]n order to re-enter the United States, you will need an approved Form I-601A [provisional unlawful presence waiver] to waive your inadmissibility for unlawful presence." The Director erred in denying the Applicant's application for the following reasons.

To start, the Director erred when stating the following:

> After review, it has been determined that the evidence is insufficient to show that your spouse would experience extreme hardship if you were refused admission. . . . Although a showing of extreme hardship is not required for a Form I-212 to be approved, it is required for the waiver of unlawful presence. Since it is unlikely that you will qualify for such a waiver and will remain inadmissible even if USCIS were to grant your Form I-212, the remaining grounds of inadmissibility is a negative factor that in itself supports denial of this Form I-212 as a matter of discretion. *See Matter of J-F-D-*, 10 I&N Dec. 694 (INS 1963).

The Board in *Matter of J-F-D-* determined that the denial of an application for permission to reapply for admission could be grounded in the fact that the Applicant was subject to a ground of inadmissibility that does not have a waiver available. In *J-F-D-*, no purpose would have been served in granting an application for permission to reapply for admission because the applicant would remain inadmissible and most importantly, the inadmissibility is not waivable. Here, however, while the Applicant will become inadmissible for unlawful presence upon departing the United States, a provisional unlawful presence waiver is available. Therefore, the case is distinguishable from *J-F-D-* and it should not have been denied on this basis.

We note further that the Director's decision erroneously adjudicated the Applicant's eligibility for a provisional unlawful presence waiver by concluding "[a]lthough refusal of your admission would undoubtedly affect your entire family, only the potential hardship of your qualifying relative, your spouse, can be considered. After review, it has been determined that the evidence is insufficient to show that your spouse would experience extreme hardship if you were refused admission." Because the Director inappropriately adjudicated the Applicant's eligibility for a provisional unlawful presence waiver, we are withdrawing the Director's decision, and remanding it for the Director to consider whether the Applicant merits a favorable exercise of discretion on his application for permission to reapply for admission, without more.

Finally, the Director incorrectly determined that the Applicant's application must be denied because he needs to file a provisional unlawful presence waiver (Form I-601A). Pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual, like the Applicant, who is inadmissible for having been ordered removed must obtain permission to reapply for admission before seeking a provisional unlawful presence waiver. Here, the Applicant expresses his intention to complete his immigration process through consular processing. Upon his departure, the Applicant will become inadmissible under section 212(a)(9)(A) of the Act and therefore, he may apply for conditional approval of his Form I-212 application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States. 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 he fails to depart. According to the regulations, only after he has obtained consent to reapply for admission, the Applicant may file a provisional unlawful presence waiver under section 212(a)(9)(B)(v) of the Act, which is a separate application for relief. *See* 8 C.F.R. § 212.7(e)(4)(iv). Therefore, the Director erred in considering the fact that the Applicant would have to apply for a Form I-601A, provisional unlawful presence waiver, in denying his application.

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). 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).

We find it appropriate to remand the matter to the Director to determine whether the Applicant warrants a favorable exercise of discretion. The Director should weigh all favorable and unfavorable factors, and in doing so, the Director may identify and discuss the evidence underlying any inadmissibility as well as any potential waivers or exceptions and consider those factors in a broader discretionary determination. However, the Director should not ground the denial of this application solely on the Applicant's eligibility for a waiver for which he has not yet applied.

III. CONCLUSION

In accord with the foregoing analysis, we hereby withdraw the Director's decision and remand the matter for further action. The Director may request any additional evidence considered pertinent to the new determination and any other issue.

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