U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22756456

Date: OCT. 17, 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 he had not established extreme hardship to his qualifying relative. The Director also denied his application because the Applicant is unlikely to prevail on his waiver application (Form I-601A) for his 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 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 noncitizen (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 their departure or removal from the United States is inadmissible. A noncitizen 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 their inadmissibility will cause their U.S. citizen or legal permanent resident spouse or parent extreme hardship. Pursuant to 8 C.F.R. § 212.7(e), some noncitizens who are inadmissible for unlawful presence may apply for a provisional unlawful presence waiver prior to departing the United States. However, one 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 the United States 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 December 1, 1992. On [redacted] 2000, an Immigration Judge ordered the Applicant to voluntarily depart the United States by [redacted] 2000. Because he did not depart the United States, the Immigration Judge's order became a final order of removal on [redacted], 2000. On February 28, 2000, the Applicant filed an appeal of the Immigration Judge's decision, which the Board of Immigration Appeals dismissed on March 22, 2006. 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. 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 "the evidence is insufficient to show that your spouse would experience extreme hardship if you were refused admission because the mental health issues her doctor describes are common among people facing family separation." Furthermore, the Director denied the Applicant's application because "it is unlikely that you will qualify for a waiver of unlawful presence and will remain inadmissible even if USCIS were to grant your Form I-212 . . .." The Director erred in denying the Applicant's application for these reasons.

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 the matter for the Director to consider whether the Applicant merits a favorable exercise of discretion on his application for permission to reapply for admission, and to enter a new decision.

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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 that he has not yet applied for.

III. CONCLUSION

In accord with the foregoing analysis, we withdraw the Director's decision and remand the matter. The Director may request any additional evidence considered pertinent to the new determination and any other issue. We express no opinion regarding the ultimate resolution of this case on remand.

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