U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22698064

Date: SEPT. 14, 2022

Appeal of Newark, New Jersey Field Office Decision

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

The Applicant, a citizen of the Philippines, 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), as a matter of discretion, concluding that the favorable factors did not outweigh the unfavorable factors in the case. The Applicant filed an appeal of the decision with this office. On appeal, the Applicant submits new evidence and contends that he has established eligibility for the benefit sought. 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 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 a noncitizen 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) 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 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, 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 record reflects that in August 2006, the Applicant entered the United States with a visitor's visa with authorization to remain in the United States until February 2007. In [redacted] 2007, he was apprehended by immigration officials and placed into removal proceedings. In [redacted] 2008, he failed to appear at his removal hearing, and the Immigration Judge ordered him removed from the United States in absentia. The Applicant remained in the United States, and in [redacted] 2017, he married his U.S. citizen spouse.

In denying the Form I-212, the Director listed the Applicant's favorable factors as his marriage to a U.S. citizen, potential deterioration of his spouse's mental health upon separation,[1] and his stepson's developmental concerns. The Director listed the Applicant's unfavorable factors as the overstay of his visitor's visa and his failure to appear at his removal hearing. The Director concluded that the favorable factors did not outweigh the unfavorable factors, finding that the Applicant did not establish that the hardship his spouse "would endure would be beyond what would reasonably be expected with the removal of a spouse," and that the Applicant's "main positive factor," his U.S. citizen spouse, was an after acquired equity, which diminished its weight.

On appeal, the Applicant asserts that the Director failed to consider all evidence submitted, particularly the medical and related documentation regarding his stepson's condition and the role that the Applicant plays in his stepson's life. The Applicant further asserts that the Director erred by not addressing all the favorable factors in the record and according diminished weight to his relationship with his spouse. He also submits additional evidence, including updated medical documentation regarding his stepson.

While the Director indicated that the Applicant did not establish that his spouse would experience a level of "hardship beyond what would reasonably be expected with the removal of a spouse," when considering whether a request for permission to reapply merits a favorable exercise of discretion, favorable factors may include hardship to the applicant and other U.S. citizen or lawful permanent resident relatives, the applicant's respect for law and order, and family responsibilities. Matter of Tin, 14 I&N Dec. at 373-74. There is no specific requirement that an applicant show extreme hardship, as referenced by the Director. Id. Extreme hardship, defined as hardship that exceeds that which is usual or expected, is a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act.[2] In the adjudication of a Form 1-212, any hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis.

Further, 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

[1] Specifically, the Director stated that the Applicant's "spouse suffers from anxiety, panic, and depression. The psychiatrist indicated that your spouse's condition could deteriorate if you were removed."

[2] See Matter of Pilch, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected.).

the unfavorable factors in the totality of circumstances. See Garcia Lopes v. INS, 923 F.2d 72, 74 (7th Cir. 1991) (noting that 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) (noting that 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 unfavorable factors. Garcia-Lopes v. INS, 923 F.2d at 76; Matter of Tijam, 22 I&N Dec. at 417.

Here, while the Director listed the Applicant's spouse's psychological conditions and Applicant's stepson's developmental concerns as favorable factors, the decision does not reflect that the Director fully considered the Applicant's spouse's claimed hardships with respect to her mental health, reliance upon the Applicant in caring for her son, and the impact of a separation from the Applicant in light of her son's medical condition and required care. Specifically, the Director did not address or consider medical documentation in the record indicating that the Applicant's 15-year-old stepson suffers from Angelman Syndrome, a genetic disorder that causes lifelong disabilities including delayed development, problems with speech and balance, and intellectual disability. The record also contains documentation indicating that the Applicant's stepson is non-verbal, visually impaired, has difficulty ambulating, suffers from recurrent seizures, and functions at the approximate mental age of a three-year-old. With the appeal, the Applicant submits additional evidence indicating that the Applicant's stepson's mobility has deteriorated, and he often requires a wheelchair.

In light of the foregoing, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence, including that submitted on appeal, 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.