U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27156938

Date: AUG. 14, 2023

Appeal of New York, New York Field Office Decision

Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal

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), for having been ordered removed. *See* section 212(a)(9)(A)(ii) of the Act. The Director of the New York, New York Field Office denied the application, concluding that the record did not establish that the Applicant's favorable factors outweighed the unfavorable factors in his case, such that a grant of his application as a matter of discretion would be warranted. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions 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 dismiss the appeal.

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 of the Act, 8 U.S.C. § 1229a, or any other provision of law, or who 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 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.

The Applicant currently resides in the United States, and 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. The approval of his 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.

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 (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).

The Applicant is currently in the United States and seeks permission to reapply for admission. In or around 2016, the Applicant entered the United States without admission, inspection, or parole, and he subsequently applied for asylum. An Immigration Judge denied that application for asylum, and in [redacted] 2019, the Immigration Judge ordered the Applicant removed. The Applicant appealed that decision to the Board of Immigration Appeals, which dismissed the appeal and affirmed the Immigration Judge's decision. The Applicant indicates that he has not departed the United States since being ordered removed.

The Applicant is married to his U.S. citizen spouse. His spouse filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved in August 2018. Now on appeal, the Applicant contends the Director erred in denying his application for permission to reapply for admission, specifically arguing the Director failed to properly consider the evidence of positive equities and of hardship his spouse would face.

As a preliminary issue, we note that although individuals who currently reside in the United States may seek conditional approval of a Form I-212 prior to their departure to apply for an immigrant visa pursuant to 8 C.F.R. § 212.2(j), it remains unclear if the Applicant intends to depart the United States and pursue an immigrant visa abroad. In his brief on appeal, the Applicant does not contend he intends to seek an immigrant visa if his Form I-212 is approved, and the Form I-130 filed on the Applicant's behalf indicates he intends to apply for adjustment of status in [redacted] New York. Noncitizens physically present in the United States who are inadmissible under section 212(a)(9)(A) of the Act and applying for adjustment of status with U.S. Citizenship and Immigration Services (USCIS) may seek retroactive permission to reapply for admission pursuant to 8 C.F.R. § 212.2(e). However, they must file the application either concurrently with their Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), or at any time afterward, at the USCIS office with jurisdiction over the adjustment of status application. *See Instructions for Application for Permission to Re-apply for Admission Into the United States After Deportation or Removal – Where to File*, https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf. To date, the Applicant has not filed a Form I-485 to adjust his status. Thus, the record does not establish that the Applicant intends to apply for an immigrant visa and is currently seeking conditional permission to reapply for admission prior to departing the United States. Without a pending Form I-485, the Applicant lacks a means for adjusting his status to that of a lawful permanent resident, or for being admitted into the

country pursuant to an immigrant visa. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. §§ 212.2(b)-(j). Accordingly, no purpose would be served in granting the Form I-212. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964) (explaining that an application for permission to reapply for admission is properly denied, in the exercise of discretion, where no purpose would be served in granting the application.).

Even considering the Applicant's arguments on appeal, we find no error in the Director's conclusion that the Applicant did not establish he warranted a favorable exercise of discretion. The Applicant provided affidavits from himself and his attorney; his removal order from [redacted] 2019; a psychological assessment report regarding his spouse; a copy of his marriage certificate; copies of his spouse's paystubs, lease agreement, bills, and rent payment receipts; Honduran country conditions evidence; and copies of federal income tax returns from 2017 and 2018. The Director weighed all evidence in the record and found the Applicant had not established the positive equities outweighed the negative factors in his case. Some equities were acquired after the entry of his removal order, thus resulting in them being afforded limited weight. *See Tijam*, 22 I&N Dec. at 416. He has resided in the United States for a brief period, and nearly all of this occurred after the entry of his removal order and in violation of that order. His continued residence in violation of his removal order is evidence of a disregard for the immigration laws of the United States. On appeal, the Applicant provided additional evidence in support of his Form I-212, including copies of federal tax returns for 2019 and 2020, a letter from a doctor regarding the Applicant's spouse's medical concerns, and a bank deposit receipt. We note the Applicant provided evidence that he has paid taxes for at least two years, but again, he did this after the entry of his removal order.

We acknowledge the emotional hardship the Applicant and his spouse would likely suffer upon separation, and we also recognize the evidence the Applicant submitted of his spouse's medical concerns. However, the Applicant has not provided a complete picture of the household finances, such as monthly expenses, which renders us unable to accurately ascertain the potential financial impact – and similarly, the overall impact – the Applicant's absence might have on his spouse's life. The Applicant's spouse is the only tenant listed on the lease agreement, and she is the sole account holder on the utility bills; it is not clear what, if any, contribution the Applicant makes to any of these expenses nor whether his spouse would be able to afford those payments without him. The record does not contain a statement from the Applicant's spouse describing any hardship she would face in the Applicant's absence. Therefore, the hardship she would experience is not clear. Ultimately, considering all the evidence provided by the Applicant and the totality of the record, the Applicant provided limited evidence of positive equities in support of his application, such that he has not established a favorable exercise of discretion is warranted in his case.

ORDER: The appeal is dismissed.