U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27336972

Date: JULY 12, 2023

Appeal of New York City, 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, who has requested an immigrant visa abroad, seeks advance 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 become inadmissible upon departing from the United States for having been previously ordered removed. 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 New York City, New York Field Office denied the application, concluding that the Applicant did not establish, as required that a favorable exercise of discretion was warranted in his case. The matter is now before us on appeal.

On appeal, the Applicant submits a personal statement with additional tax evidence and reasserts that he merits permission to reapply for admission in the exercise of discretion.

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.

I. LAW

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 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 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).

Equities that came into existence after a noncitizen has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (finding 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) (explaining 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).

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 from the United States. He does not contest that he has an outstanding order of deportation and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs. The only issue on appeal is whether the Applicant has established that approval of his request for permission to reapply for admission is warranted as a matter of discretion. Upon review of the entire record, as supplemented on appeal, we conclude that he has not.

The record indicates that the Applicant, who is a citizen of China, entered the United States in March 1993 and shortly thereafter applied for asylum in the United States, representing that his name was Z-Y-LI-.[1] The Applicant's testimony about the facts and circumstances underlying his asylum claim was found to be not credible, and he was placed in deportation proceedings.[2] The record further shows that while his 1993 asylum request was pending the Applicant filed another asylum application in April 1994 listing his name as C-Y-LA-, and was assigned a different alien registration number. That second asylum application was also denied, and the Applicant was again placed in deportation proceedings in [redacted] 1996.[3] An Immigration Judge found that the Applicant's testimony lacked credibility because of inconsistencies, vague and confusing statements, evasiveness, and absence of corroborating evidence. The Immigration Judge denied the Applicant's requests for asylum and withholding of deportation, but granted him voluntary departure until February 1, 1997, with an alternate order of deportation to China if he failed to depart by that date. The Applicant appealed this decision to the Board of Immigration Appeals (the Board), but in April 1998 the Board dismissed the appeal concluding that the Immigration Judge's adverse credibility determination was supported by the record. Nevertheless, the Board permitted the Applicant to depart from the United States

[1] We use initials to protect the Applicant's privacy.

[2] The proceedings were ultimately terminated in September 1997, after subsequent deportation proceedings against the Applicant commenced in 1996.

voluntarily within 30 days from the date of the order, and advised him that if he did not leave he would be deported to China.

The Applicant did not leave, and has remained in the United States since that time. His sister, mother, and son subsequently immigrated to the United States and later naturalized as U.S. citizens. Each filed a Form I-130, Petition for Alien Relative, on the Applicant's behalf, and the petitions were approved. As stated, the Applicant intends to travel to China to obtain an immigrant visa on that basis and is seeking an exception to his prospective inadmissibility under section 212(a)(9)(A)(iii) of the Act for having been ordered deported in 1997.

The Director denied the application as a matter of discretion, concluding that the favorable factors in the case did not outweigh the unfavorable ones. The Director identified the favorable factors as the Applicant's family ties in the United States, including his girlfriend and their U.S. citizen daughter born in 2015, as well as hardship to his family members, payment of taxes, and adverse conditions in China. The Director found, however, that the weight of these factors was diminished by the Applicant's unlawful presence and unauthorized employment in the United States after he had been ordered deported, and lack of evidence that he disclosed business income when he filed his tax returns. The Director further determined that the Applicant was also inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation because he sought to obtain an immigration benefit under a different identity, and that this inadmissibility along with his noncompliance with the voluntary departure and deportation orders were significant negative factors that outweighed the positive equities in his case.

The Applicant asserts that the Director erred by finding him inadmissible for fraud or misrepresentation, as both names he represented in asylum proceedings, although spelled differently, are his legal names. He further states that he was not required to report business income on his personal tax returns, because the corporation in which he owns some of the shares is a separate entity for tax purposes. Lastly, the Applicant reiterates that he plays an irreplaceable role in his family as both the caretaker and financial provider, and his mother and minor daughter will experience hardship if he must remain abroad for the entire 10-year inadmissibility period.

A. Inadmissibility Finding Under Section 212(a)(6)(C)(i) of the Act

As an initial matter, the record currently does not support a finding that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act on the grounds identified by the Director. As stated, the Director concluded that the Applicant sought to obtain an immigration benefit under another identity, Z-Y-LI-, because he listed that name on the 1993 asylum application and submitted fraudulent birth certificate documents in support. The Applicant states that Z-Y-LI- reflects the Mandarin spelling of his name, while C-Y-LA- is how his name is spelled in the Cantonese dialect. He explains that when he first came to the United States in 1993, he "told the Immigration and Customs officer [his] name," but "the translator at the airport translated [his] name to [C-Y-LA-], which was a Cantonese spelling." The Applicant claims that for this reason he adopted that particular spelling of his name in subsequent immigration proceedings, and that he did not misrepresent his identity.

In making a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, there must be evidence in the record showing that a reasonable person would find that an applicant used fraud or that they

willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the United States, or any other immigration benefit. *See generally* 8 *USCIS Policy Manual* J.3(A)(1), https://www.uscis.gov/policy-manual.

Here, the Director did not explain how the different names the Applicant listed on his 1993 and 1994 asylum requests were material to his eligibility for asylum or any other immigration benefit. Nor is there evidence that the 1993 birth certificate the Applicant submitted in support of his 1993 asylum request is not a copy of a genuine Chinese document or was fraudulently obtained. Rather, the Applicant's name in that certificate's English translation was transcribed as Z-Y-LI-, consistently with how his name is listed in the 2014 passport issued to him by the Chinese consulate general in New York. Thus, the inconsistencies in the Applicant's name alone, although significant, are not sufficient to support a finding of inadmissibility for fraud or misrepresentation of facts material to his eligibility for a visa, other documentation, admission into the United States, or any other immigration benefit, including asylum. Accordingly, we withdraw the Director's determination of the Applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act on that particular basis.

However, the record contains other inconsistent information that the Applicant has not yet addressed. Specifically, while the Applicant states on appeal that his name was incorrectly translated as "C-Y-LA-" *at the airport* when he came to the United States in 1993, and that he has been using that spelling since, the record shows that he listed his name as "Z-Y-LI-"on his first asylum application (filed in June 1993) and submitted the 1993 birth certificate with the English translation reflecting that his name was "Z-Y-LI-." Moreover, while the Applicant initially indicated on that application that he was admitted to the United States in March 1991 as a "visitor" at a New Mexico port of entry, he later testified during an interview with an asylum officer that he arrived in the United States in March 1993 without inspection "by boat." In addition, the Applicant stated at the time that he spoke Mandarin Chinese, and was provided a Mandarin-speaking interpreter. In view of this evidence, the Applicant's explanation on appeal that he adopted a Cantonese spelling of his name because that is how the translator at the airport spelled it raises questions about the circumstances of his entry into the United States and his true identity. We also note that aside from the Applicant's statement there is no evidence that C-Y-LA- is in fact his name in the Cantonese dialect, as the record does not include any documents issued to the Applicant by the Chinese government listing his name as C-Y-LA-. And, the Applicant did not include the alternate spelling of his name, Z-Y-LI-, on the 1994 asylum application or any other requests for immigration benefits he filed thereafter. Lastly, while the Applicant indicated in the instant proceedings that he only has one son born in 1991 from his previous marriage, he testified in both asylum proceedings that he had a second child born in China in 1992. The Applicant must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the Applicant has not provided such evidence.

Nevertheless, we need not determine as an initial matter whether the Applicant may be inadmissible for fraud or misrepresentation based on those unresolved inconsistencies. Rather, as he intends to apply for an immigrant visa abroad, the U.S. Department of State will make the final determination concerning the Applicant's eligibility for a visa, including whether he is subject to inadmissibility under section 212(a)(6)(C)(i) or any other provisions of the Act.

We will therefore only determine whether the Applicant has shown that he otherwise merits permission to reapply for admission to the United States in the exercise of discretion.

B. Positive Factors

As stated, the Applicant's immediate family members, including his sister, mother, adult son, minor daughter, and girlfriend reside in the United States. He is also the beneficiary of three separate approved immigrant visa petitions filed by his sister, mother, and son. In addition, the Applicant has been living in the United States for the past 30 years; he pays taxes and has no apparent criminal history. The Applicant's mother suffers from various physical and mental health conditions, and the Applicant provides some financial support for his mother and helps in her care. In 2019, the Applicant and his girlfriend started a child day care business in their home. We consider these equities to be positive factors in the case.

However, we cannot afford them full weight, as the Applicant's relatives did not immigrate to the United States until after he was ordered deported from the country in 1997,[4] his daughter was born in 2015, his residence in the United States has been unlawful, and his employment unauthorized. Furthermore, we note that the Applicant's sister sponsored their mother to immigrate to the United States, and the Applicant has not demonstrated that she or other family members would not be able to support and provide care for the mother if he must remain in China for the entire 10-year inadmissibility period after departure. Lastly, although the Applicant's family members describe him as hardworking, caring, and loving individual, he has not provided evidence to show the extent of his ties to the community, and the need for his services in the United States.

B. Negative Factors

The most significant negative factors are the Applicant's noncompliance with the voluntary departure and deportation orders, and his unlawful residence and unauthorized employment in the United States for over 25 years. In addition, the Applicant has been found not to be credible and ineligible for asylum in two separate proceedings, which weighs against him as well. Lastly, the Applicant provided conflicting statements about the timing and manner of his entry into the United States, and his explanation as to why he listed two distinct names on two asylum applications filed within a year of each other is not consistent with the evidence in the record. These inconsistencies are additional adverse factors weighing against the Applicant in the discretionary evaluation, as they remain unresolved and raise concerns about his truthfulness and identity.

Consequently, although we are sympathetic to the claims of hardship to the Applicant and his family members in the United States if he is not granted permission to reapply for admission before the expiration of the 10-year inadmissibility period, the positive factors in his case considered individually and cumulatively do not outweigh the substantial negative factors discussed above.

[4] Specifically, his sister was admitted to the United States for lawful permanent residence in 1999, and his son and mother both immigrated to the United States in 2006. The Applicant's girlfriend adjusted her status to that of a lawful permanent resident in the United States in 2017, and naturalized as a U.S. citizen in 2022.

The Applicant therefore has not established that he warrants a favorable exercise of discretion, and his Form I-212 remains denied.

ORDER: The appeal is dismissed.