U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25074732

Date: MAR. 06, 2023

Appeal of Brooklyn, New York Field Office Decision

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

The Applicant, a citizen of China currently residing in the United States, 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). The Director of the Brooklyn, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission, as a matter of discretion, concluding that the favorable factors did not outweigh the unfavorable factors in the case. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Applicant asserts that the Director erred by not giving sufficient weight to the positive factors in his case that warrant a favorable 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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.

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 of the application is warranted as a matter of discretion. See 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. See Matter of Tin, 14 I&N Dec. 371 (Reg'l Comm'r 1973).

II. ANALYSIS

The record reflects that the Applicant enter the United States without inspection in 1998. In 2006, he was placed in removal proceedings, and in 2008, he was ordered removed.[1]

In denying the Form I-212, the Director acknowledged two favorable factors, the Applicant's marriage to his U.S. citizen spouse and their two U.S. citizen children, but did not afford them considerable weight because the Applicant married his spouse after he was ordered removed. The Director also determined that the tax and financial records submitted by the Applicant were not evidence of positive factors, stating "[e]ven assuming that these documents are submitted as evidence of your economic ties to the United States the documents alone are not indicative of a positive factor." With respect to hardship to the Applicant's family, the Director concluded that the Applicant's spouse's statement "did not specify how she would specifically be affected if she were to return to China, aside from facing potential economic hardship and loss of educational opportunities for your children." The Director further indicated that the psychological evaluation relating to the Applicant's spouse's mental health provided "limited support for the positive factor in your case . . . the evaluation does not support the claims made by you and your wife that your wife's condition is severe to the point of being dependent on you for support."

The Director determined that the Applicant's positive factors were insufficient to overcome the negative impact of the Applicant's non-compliance with the removal order and unlawful residence in the United States. The Director also determined that the fact that the Applicant's asylum application was denied based upon the lack of credible testimony and corroborating evidence indicated a "lack of credibility which can be considered on future applications," and deemed this issue of credibility to be a significant negative factor. In addition, the Director viewed the denial of the Applicant's asylum application as a basis to refute the Applicant's claim that he would suffer hardship if he returned to China on account of his Christian religion.

When considering whether a request for permission to reapply merits a favorable exercise of discretion, positive 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. However, there is no specific requirement that an applicant show extreme hardship, as alluded to by the Director. Id. Extreme hardship to a qualifying relative is

[1] The Applicant's subsequent appeal to the Board of Immigration Appeals and petition for review to the Second Circuit Court of Appeals were dismissed, in 2009 and 2010 respectively.

a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act. In the adjudication of a Form I-212, any hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis.

Here, the record does not indicate that the Director applied the correct standard in evaluating the claims of general hardships to the Applicant and his family members, including emotional and financial hardship upon separation due to his role as the primary caregiver for their children[2] and emotional and financial hardship upon relocation resulting from their children having to leave their school and home and adjust to conditions in China after residing in the United States their entire lives. In addition, the Director considered an adverse credibility determination made in connection with the Applicant's asylum application to be a significant negative factor; however, the asylum credibility determination is based upon specific criteria under section 208 of the Act and not directly applicable to the instant application which is a separate proceeding under the Act. The Director also did not specifically address evidence of additional significant positive factors in the record, including the Applicant's lack of a criminal record and primary support to the couple's children.

In light of the deficiencies noted above, we will remand the matter for the entry of a new decision. As always in these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

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

[2] In her statement, the Applicant's spouse asserts that because the Applicant does not have employment authorization, he is a stay-at-home father. She also contends that without his support, she would be unable to afford childcare for their children while maintaining fulltime employment, due to their limited finances, as evidenced by the submitted bank statement and tax documentation.