U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27772923

Date: SEPT. 15, 2023

Appeal of Newark, New Jersey Field Office Decision

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

The Applicant 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 Newark, New Jersey Field Office denied the application as a matter of discretion, concluding that the negative factors in the case, which included a finding of the Applicant's prospective inadmissibility upon departure under section 212(a)(6)(B) of the Act for failure to attend a removal hearing, outweighed the positive factors. The matter is now before us on appeal.

On appeal, the Applicant submits a brief, and asserts that the Directly applied an incorrect standard in evaluating the hardship evidence and did not properly weigh the positive and negative factors in his case.

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 in relevant part that a noncitizen 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.

A noncitizen who is 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.

In addition, section 212(a)(6)(B) of the Act, as in effect since April 1, 1997, renders inadmissible any noncitizen who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine their inadmissibility or deportability and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal. Neither the Act nor the regulations provide for an exception or a waiver of this inadmissibility ground.

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); *see also Matter of Lee*, *supra*, at 278 (finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character, and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience.")

II. ANALYSIS

The Applicant, a national of Guatemala, is the beneficiary of an approved Form I-130, Petition for Alien Relative, his U.S. citizen spouse filed on his behalf. He currently resides in the United States and seeks conditional approval of his request for permission to reapply for admission under the regulation at 8 C.F.R. § 212.2(j) before he departs.[1] The Applicant does not contest that he has an outstanding removal order and that his departure will trigger inadmissibility under section 212(a)(9)(A)(ii) of the Act. The only issue on appeal is whether the Applicant merits permission to reapply for admission in the exercise of discretion.

The record reflects that the Applicant entered the United States without inspection and admission or parole in March 1999, when he was 15 years of age.[2] He was apprehended by U.S. Customs and Border Protection officers in Arizona and placed in removal proceedings as an unaccompanied minor. The Applicant was personally served with a Form I-862 Notice to Appear in Removal Proceedings under Section 240 of the Immigration and Nationality Act (NTA), which indicated that he would be notified of the date and location of his removal hearing. In April 1999 the Applicant was released from immigration custody to his U.S. citizen godmother, who provided her mailing address and

[1] The approval of the Form I-212 under these circumstances is conditioned upon the Applicant's departure from the United States and will have no effect if he does not depart.

[2] The Applicant claimed to be a year older when he was apprehended, and provided a different first name.

contact information in New Jersey. A review of the record further shows that the Applicant did not appear for a removal hearing in [redacted] 2000 and an Immigration Judge in New Jersey ordered him removed in absentia to Guatemala.[3] A copy of the removal order was sent to the Applicant at an address in Georgia (which does not appear on any other documents in his immigration file), and subsequently returned to the Department of Homeland Security as undeliverable. In 2018, the Applicant filed a motion to reopen the removal proceedings, asserting that he never received a notice of the [redacted] 2000 removal hearing. However, an Immigration Judge declined to reopen the proceedings as a matter of discretion, finding that the Applicant "learned of his [removal] order in [redacted] of 2017, when he was approximately 35 years old, but took no action until 1 year later," and "[n]o explanation was provided on why the lack of due diligence."

The Applicant subsequently filed the instant Form I-212, indicating that he would apply for a provisional waiver of unlawful presence[4] before he travels abroad to obtain an immigrant visa. In his personal statement the Applicant explained that he was 15 years old when he came to the United States, and was not aware that a removal order against him was issued until he got married and hired immigration attorneys to check into his status in the country. He stated that he and his spouse have been together for 13 years and worked for the same company; if he were to return to Guatemala and remain there for the entire inadmissibility period, his spouse would experience emotional and financial hardship. The Applicant explained that because he had left Guatemala at a young age he had no work history there and would have difficulty finding employment. He further stated that his family in Guatemala would not be able to support him because they were already suffering extreme economic hardship due to the poor conditions in the country and depended on his financial support. The Applicant also described the emotional and financial hardships both he and his spouse would experience if they were to be separated, or if his spouse, who was born in Puerto Rico, were to accompany him to Guatemala. The evidence in support of these statements included affidavits from the Applicant's spouse and her family members in the United States; letters from friends and coworkers; employment, tax, financial, and residential records; monthly expenses chart and money transfer receipts; and the U.S. Department of State's travel advisory and human rights report for Guatemala.

In denying the Form I-212, the Director determined that although the Applicant's 2013 marriage, as well as hardships to the Applicant and his spouse were positive factors, the marriage had limited weight because it occurred after the Applicant had been ordered removed. The Director further found that "the mere showing of economic detriment to qualifying relatives [was] insufficient to warrant a finding of extreme hardship." The Director also determined that the Applicant would be inadmissible upon departure under section 212(a)(6)(B) of the Act, because he failed to appear for the removal hearing; although he filed a motion to reopen the removal proceedings claiming he was unaware of the hearing, the "Immigration Judge determined that [the Applicant] was given adequate notice of hearing and the motion to reopen was dismissed." Thus, the Director concluded that the Applicant's additional inadmissibility, for which no waiver is available, his initial entry without inspection, unlawful presence, and unauthorized employment were negative factors that weighed heavily against

[3] We note that the record does not contain a copy of the removal hearing notice.

[4] A provisional waiver is a separate form of relief and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), a noncitizen inadmissible under section 212(a)(9)(A) of the Act must obtain permission to reapply for admission before applying for a provisional waiver. *See also* Instructions for Form I-601A, at 2, https://www.uscis.gov/i-601a.

him, and the evidence he submitted did not show that the hardship his "parent and child would endure would be beyond what would reasonably be expected with the removal of a parent and child."[5]

On appeal, the Applicant reiterates that he was very young when he arrived in the United States and did not speak English; he never received the hearing notice, and he did not become aware of the in absentia removal order until many years later. He states that the Director erred by not considering these mitigating factors in finding him inadmissible under section 212(a)(6)(B) of the Act, and improperly minimized the positive value of his marriage and the emotional and financial toll of a prolonged separation. The Applicant further points out that the Director incorrectly evaluated the positive factors in his case in terms of extreme hardship, and did not give proper weight to his good moral character and lack of criminal history.

As an initial matter, *extreme* hardship is not a requirement for a grant of permission to reapply for admission. Rather, when evaluating whether an applicant merits a grant of permission to reapply in the exercise of discretion, positive factors may include *any* hardship to the applicant and their U.S. citizen or lawful permanent resident relatives. *See Matter of Tin*, 14 I&N Dec. at 373 (stating, in part, that a noncitizen who has a bona fide reason for wanting to immigrate to the United States may be granted permission to reapply for admission even though the hardship to their U.S. citizen relative would not be unusual, absent any adverse factors). Here, the record does not indicate that the Director evaluated the claims of general hardships to the Applicant and his spouse in the event the Applicant is not permitted to reapply for admission to the United States before the expiration of the 10-year inadmissibility period. Moreover, although equities acquired after a removal order had been entered may be given less weight in the discretionary analysis,[6] the Director did not specify how much weight, if any, was afforded the Applicant's family ties in the United States, his consistent employment with the same company for over 22 years, apparent lack of criminal history, family responsibilities, community involvement, and payment of taxes. Furthermore, the Director's statement indicating that the Applicant would be inadmissible under section 212(a)(6)(B) of the Act upon departure for failure to appear because the Immigration Judge "determined that [he] was given adequate notice of hearing," does not accurately reflect the basis for the dismissal of the Applicant's motion. Rather, as stated, the Immigration Judge declined to reopen the removal proceedings as a matter of discretion finding that the Applicant did not explain why after becoming aware of the in absentia removal order in 2017, he took no action until 2018; the order does not contain any findings concerning the adequacy of service of the removal hearing notice. Lastly, the Form I-212 denial does not indicate that the Director considered the Applicant's explanation for his failure to appear at the removal hearing, nor does it include a finding as to whether the Applicant established "reasonable cause" for the non-appearance.[7]

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[5] We note that there is nothing in the record to suggest that either of the Applicant's parents is residing in the United States or that the Applicant and/or his spouse have any children.

[6] *See, e.g., 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).

[7] Although there is no statutory definition of the term "reasonable cause," as used in section 212(a)(6)(B) of the Act, USCIS policy guidance provides that "it is something not within the reasonable control of the [noncitizen]." *See* Memorandum from Lori Scialabba, Associate Director for Refugee, Asylum & International Operations Directorate, et al., USCIS, HQ 70/21.1 AD07-18, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators. Revisions to the Adjudicator's Field Manual (AFM) to Include a New Chapter 40.6* (AFM Update AD07-18) (Mar. 3, 2009).

In view of the deficiencies noted above, we will return the matter to the Director to again review the record and to determine whether the Applicant merits a conditional approval of his Form I-212 in the exercise of discretion when all favorable and unfavorable factors are considered.

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