U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27773027

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, who has requested an immigrant visa abroad, seeks advance permission to reapply for admission 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 departure from the United States for having been previously ordered removed. Permission to reapply for admission 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 Form I-212, concluding that the negative factors in the case outweighed the positive ones, such that a favorable exercise of discretion was not warranted. On appeal, the Applicant submits a brief, references previously submitted evidence, and reasserts eligibility.

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 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.

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).

II. ANALYSIS

The Applicant is currently in the United States and seeks advance permission to reapply for admission pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing from the United States to obtain an immigrant visa abroad. He does not contest that he has an outstanding order of removal and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[1] The issue on appeal is whether the Applicant has met his burden of proof to show that he merits a grant of permission to reapply for admission in the exercise of discretion.

The record reflects the Applicant's testimony that he initially entered the United States without inspection and admission or parole in September 2007. He was arrested by the U.S. Customs and Immigration Enforcement in 2011 and placed in removal proceedings. In 2016, the Applicant married a naturalized U.S. citizen, who subsequently filed immigrant visa petitions[2] for the Applicant and his two children from a previous relationship living in Guatemala with his mother. The visa petitions were approved, and in January 2020 an Immigration Judge granted the Applicant's request for voluntary departure[3] from the United States until May 26, 2020, with an alternate order of removal to Guatemala if he failed to depart by that date. The Applicant did not depart. In March 2020, his son was admitted to the United States as a lawful permanent resident.[4]

The Applicant is currently residing in the United States with his spouse, his son (born in 2004), and his stepson (born in 2003). In support of the instant request for permission to reapply for admission the Applicant previously provided a personal declaration and affidavits from his family members; medical, school and criminal records; tax and financial documents; family photos, and letters of support.

The Director identified the positive factors in the case as the Applicant's marriage, family ties in the United States, employment, payment of taxes, as well as economic detriment to his family and medical

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

[2] Form I-130, Petition for Alien Relative.

[3] A grant of voluntary departure allows a noncitizen who is facing removal from the United States to leave at their own expense and avoid having an order of removal on their immigration record. *See* section 240B(a) of the Act, 8 U.S.C. § 1229c(a).

[4] USCIS records indicate that the Applicant's daughter was lawfully admitted to the United States for permanent residence in December 2022, while the appeal was pending. The Applicant has not provided any additional information concerning his daughter after he filed the appeal.

hardships to his spouse, son, and stepson. Nevertheless, the Director determined that these favorable considerations did not outweigh the negative factors; specifically: the Applicant's initial entry without inspection, unlawful residence in the United States, unauthorized employment, a conviction for driving under the influence and, most significantly, his failure to comply with the voluntary departure order. Thus, the Director concluded that the Applicant did not merit approval of the Form I-212 as a matter of discretion.

The Applicant does not submit any additional evidence on appeal. He asserts that the Director's decision was in error, because he had previously provided evidence of favorable factors USCIS considers in making discretionary determinations, including a combination of witness declarations, evidence of his family and community ties, employment, and hardship to his family members. He indicates that the negative factors the Director weighed against him, "i.e. undocumented entry, employment without authorization, an old arrest, etc.," are present in many similar cases and can be overcome by positive equities. With respect to his noncompliance with the voluntary departure order the Applicant avers that he had previously explained that the immigration attorney he and his spouse had retained "steered [them] in the wrong direction," and the Director unfairly balanced his reliance on the attorney's bad advice against him. He states that a proper weighing of negative and positive factors in his case warrants a grant of his request for permission to reapply for admission. We have reviewed the record, as supplemented on appeal, and conclude that the Applicant has not overcome the reasons for the Director's adverse decision.

We acknowledge that there are favorable considerations in the case, including hardships to the Applicant and his family members, the Applicant's consistent employment, payment of taxes, and residence in the United States for over 16 years. However, the fact that the Applicant's longtime residence in the United States has been unlawful and his employment unauthorized diminishes the weight of these positive factors. Moreover, as the Applicant's son was admitted to the United States after the Applicant requested and was granted voluntary departure, the weight of any hardships to the son is similarly lessened.

The negative factors are significant, and include the Applicant's disregard for U.S. immigration laws, criminal history, and insufficient evidence of rehabilitation. As an initial matter, we are not persuaded by the Applicant's explanation of the reason he did not comply with the voluntary departure order. Specifically, the record reflects that in February 2020, one month after the voluntary departure grant, the Applicant filed a motion to substitute counsel, a motion to reopen, and a motion for a stay of removal with the Immigration Court asserting, in part, that he felt that the attorney who previously represented him gave him incorrect advice, that he was not informed of all his options, and that he "did not accept voluntary departure knowingly and voluntarily under these circumstances." In April 2020, the Immigration Judge granted the Applicant's motion to substitute counsel, but denied his motion to reopen the proceedings, terminated the prior voluntary departure grant, and converted it into an order of removal upon finding that the Applicant "has indicated that he does not intend to depart as ordered by May 26, 2020." The Applicant does not explain why he elected not to leave the United States voluntarily to seek an immigrant visa abroad as a spouse of a U.S. citizen despite given an opportunity to do so before he was ordered removed, and chose to remain in the country instead. Consequently, the Applicant has not established mitigating circumstances for his noncompliance with the voluntary departure order, which we consider to be a substantial negative factor.

Nor has the Applicant demonstrated rehabilitation and reformation of character. Specifically, the record reflects that in [redacted] 2018 the Applicant was arrested and charged with several offenses, including operating a motor vehicle under influence of liquor or drugs (DUI) in violation of the New Jersey Statutes Annotated (N.J. Stat. Ann.) § 32:4-50. He was convicted of this offense upon a plea of guilty in [redacted] 2019;[5] his driver's license was revoked for three months, and he was ordered, in part, to attend a mandatory intoxicated driving program. In addition, the record shows that in [redacted] 2015 the Applicant was arrested and charged with "harassment-communication in a manner to cause alarm" in violation of N.J. Stat. Ann. § 2C:33-4A, but the charge was dismissed two months later. The Applicant provided court dispositions for these arrests, but he did not explain the underlying circumstances, and he did not express any remorse or acknowledge responsibility for his actions. Rather, the Applicant's characterization of his criminal history on appeal as "an old arrest" indicates that he does not recognize the serious nature of his DUI conviction and attempts to minimize the negative impact of his criminal history. However, DUI is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of discretion. *See Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018) (finding driving under the influence of alcohol (DUI) to be a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI"). Although the Applicant previously submitted numerous letters describing him as a dedicated worker, a helpful person, and a valuable member of his church and community, none of the letters address his criminal history. We therefore cannot conclude that the Applicant has established that he has been rehabilitated.

In conclusion, although we recognize that there are favorable factors in the Applicant's case, they are insufficient to outweigh the negative impact of his initial entry into the United States without inspection, his unlawful presence and unauthorized employment in the United States, failure to comply with the voluntary departure order, criminal history, and insufficient evidence of rehabilitation. Consequently, the Applicant has not met his burden of proof to establish that he merits permission to reapply for admission to the United States in the exercise of discretion when all positive and negative factors are weighed together.

ORDER: The appeal is dismissed.

[5] The Director mistakenly indicated in the denial that the Applicant was convicted of DUI in 2015.