U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20173377

Date: DEC. 1, 2023

Appeal of Los Angeles, California Field Office Decision

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

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 deported. 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 Los Angeles, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212), concluding that the negative factors in the case outweighed the positive ones, and a favorable exercise of discretion therefore was not warranted.

On appeal, the Applicant submits a brief, references previously provided 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 deported or removed,[1] 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

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), which took effect on April 1, 1997, eliminated the distinction between deportation and exclusion proceedings by merging them into removal proceedings for all noncitizens regardless of whether they were charged as being inadmissible or deportable from the United States.

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 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.[2] 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 that in November 1991 the Applicant entered the United States without having been inspected and admitted or paroled. He was subsequently placed in deportation proceedings and requested asylum and withholding of deportation. An Immigration Judge denied the request in April 1992, but granted the Applicant permission to voluntarily depart from the United States within 30 days, with an alternate order of deportation to El Salvador if he failed to do so. The Applicant appealed the decision to the Board of Immigration Appeals (the Board). The Board dismissed the appeal on December 21, 1998, advising the Applicant that he was permitted to depart the United States voluntarily within 30 days of the order (by January 20, 1999), or any subsequent extension beyond that time as may be granted, and that in the event of failure to so depart he would be deported as provided in the Immigration Judge's order. The Applicant did not depart and did not request an extension of the voluntary departure period. Nor did he report for deportation scheduled in April

[2] 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.

1999.[3] In 2003 the Applicant was granted Temporary Protected Status (TPS) in the United States and has been maintaining his status since that time.

The Applicant married his noncitizen spouse in California in [redacted] 1996, and has two adult children born in the United States in 1997 and 2001. The Applicant is also the beneficiary of an approved Form I-130, Petition for Alien Relative, affording him classification as the parent of a U.S. citizen. He filed the instant Form I-212 indicating that he would seek an immigrant visa abroad on that basis. In support, the Applicant submitted a personal declaration and a joint statement from his two children; employment, tax, and financial records; evidence of family ties, photographs, and letters of support; a country conditions report for El Salvador, and a court record of his 1997 conviction for driving while having a blood alcohol concentration of 0.08 percent or more, in violation of the California Vehicle Code § 23152(b) (DUI).

In denying the Form I-212, the Director acknowledged that the Applicant's family ties in the United States were favorable factors, but found that they had diminished weight in the discretionary analysis because they were created after the Applicant had been ordered deported. The Director further noted that at the time of the decision, the Applicant's spouse also had an outstanding order of deportation to El Salvador, and the Applicant's claim of prospective hardship upon return to El Salvador was neither persuasive nor sufficiently established. Lastly, the Director pointed out that the Applicant's children were adults and, although they indicated in their joint statement that the Applicant supported them financially, they did not identify any notable hardships they might experience in the event he were to remain abroad for the entire inadmissibility period.

The Director found the negative factors to include the Applicant's noncompliance with the voluntary departure and deportation orders, his apparent misrepresentation concerning his familial status in deportation proceedings, and his DUI conviction. Specifically, the Applicant represented on his asylum application that he was married and that his spouse and child, born in 1989, resided in El Salvador. He confirmed this during his deportation hearing in [redacted] 1992, but claimed no prior marriages on the 1996 California marriage license application. The Director also determined that the Applicant's DUI conviction was of public safety concern, and that given the totality of circumstances, he did not meet his burden of proof to show that a favorable exercise of discretion was warranted in his case. The Applicant has not overcome this determination on appeal.

The Applicant avers that his statements before the Immigration Court were not willful misrepresentations of material facts for the purpose of obtaining an immigration benefit, because they were irrelevant to the statutory requirements for voluntary departure. He asserts that his conduct therefore does not fall within the inadmissibility provisions of section 212(a)(6)(C)(i) of the Act.[4] He further states, referencing, in part, *Kungys v. United States*, 485 U.S. 759, 771 (1987), that without proof that a misrepresentation is directly linked to a statutory requirement, or that knowledge of the true facts would have uncovered facts linked to a statutory requirement, the government cannot meet its burden of establishing a material misrepresentation, and the Director's decision was therefore in

[3] The record indicates that in March 1999 former Immigration and Naturalization Service notified the Applicant by certified mail of the date time and place he was to report for deportation, but the Applicant refused the notice.

[4] Section 212(a)(6)(C)(i) of the Act provides that any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act, is inadmissible.

error. We note, however, that the Form I-212 denial does not include a finding of inadmissibility for fraud or misrepresentation. Rather, the Director determined only that the Applicant's inconsistent testimony concerning his marital history and the number of children was a negative discretionary factor. Although the inconsistency may not have been material to the Applicant's eligibility for asylum, withholding of deportation, or voluntary departure, it is relevant to the validity of the Applicant's current marriage under state law and, consequently, his moral character and respect for the law. The Applicant must resolve discrepancies 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). The Applicant does not explain whether he was previously married and if he has a child in El Salvador, as he had claimed in deportation proceedings and, if so, whether his prior marriage was legally terminated before he married his current spouse in 1996. We consider this unresolved inconsistency to be a significant negative factor.

The Applicant further states that the Director failed to consider all evidence, which he claims shows that he and his family will suffer extreme hardship if his request for permission to reapply for admission is denied. He asserts generally that his inability to remain in the United States would cause extreme hardship not only to him, but also to his spouse and two U.S. citizen children. 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 such permission 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).

We do not dispute that the Applicant and his family will experience emotional and financial hardships if he departs from the United States and must remain in El Salvador until the 10-year inadmissibility period expires. As stated, however, those hardships need not be accorded full weight because the Applicant's family ties came into existence after he had been ordered deported. Moreover, while we recognize that the Applicant has been residing and working in the United States for the past 32 years, his residence was unlawful and his employment unauthorized until he was granted TPS in 2003, except for the three-month period from January to April 1992 when his asylum application was pending.

Lastly, the Applicant avers that his DUI conviction should not preclude him from receiving permission to reapply for admission because he has had no other issues with the law, and USCIS previously chose to exercise its discretion favorably in granting him TPS. We recognize that the Applicant has no apparent criminal history aside from his 1997 DUI conviction. We also acknowledge his prior statements that he has complied with the terms set by the court and is no longer on probation; that he is employed as a truck driver, has learned from his mistake, and knows that he "can never allow anything like that to ever happen again." DUI is both a serious crime and a significant negative factor in evaluating whether the Applicant warrants a favorable exercise of discretion. *See Matter of Siniauskas*, 27 I&N Dec. 207, 208-209 (BIA 2018) (finding 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"). While the record includes previously submitted letters from the Applicant's friends and a church minister who described him as a hard worker, a responsible family

man, and a caring and helpful person, this evidence pointing to the Applicant's rehabilitation does not overcome the negative factors discussed above.

In conclusion, although we recognize that there are favorable factors in the Applicant's case, they are not sufficient, considered individually and cumulatively, to outweigh the negative impact of his failure to comply with the voluntary departure and deportation orders, the unresolved inconsistencies concerning his prior marriage and familial status, longtime unlawful residence, and unauthorized employment in the United States. 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, and his Form I-212 will therefore remain denied.

ORDER: The appeal is dismissed.