U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27166345

Date: JUN. 09, 2023

Appeal of New York, New York Field Office Decision

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

The Applicant, a native and citizen of China, 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 New York, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission to the United States After Deportation or Removal, concluding that the Applicant did not establish a favorable exercise of discretion was warranted. The matter is now before us on appeal. 8 C.F.R. § 103.3. The Applicant asserts the Director did not take into consideration all the relevant positive factors in adjudicating the application and erred as a matter of law in concluding the Applicant failed to establish he merited 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 dismiss the appeal.

Section 212(a)(9)(A)(ii) of the Act provides in relevant part that any noncitizen 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 is inadmissible. 8 U.S.C. § 1182(a)(9)(A)(ii). Noncitizens who are 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 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). Generally, favorable factors that came into existence after a noncitizen has been ordered removed from the United States are given less weight in a discretionary determination. *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (stating that less weight is given to equities after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (finding 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).

The Applicant is currently in the United States and seeks permission to reapply for admission. In or around 1996, the Applicant entered the United States without admission, inspection, or parole, and he subsequently applied for asylum. In [redacted] 1998, an Immigration Judge denied that application for asylum, ordered the Applicant removed, and the Board of Immigration Appeals affirmed that decision. The Applicant also filed three motions to reopen his removal proceedings, all of which were denied. The Applicant indicates that he has not departed the United States since being ordered removed.

The Applicant is married to his lawful permanent resident (LPR) spouse, and together, they have two adult U.S. citizen children. His son was born in [redacted] 1997, and his daughter was born in [redacted] 2002. His U.S. citizen son filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved in July 2019. The Applicant's mother is also an LPR. Now on appeal, the Applicant contends the Director erred in denying his application for permission to reapply for admission, specifically arguing the Director failed to properly consider the evidence of hardship his family members would face and gave too much weight to negative factors.

As a preliminary issue, we note that although individuals who currently reside in the United States may seek conditional approval of a Form I-212 prior to their departure to apply for an immigrant visa pursuant to 8 C.F.R. § 212.2(j), it remains unclear if the Applicant intends to depart the United States and pursue an immigrant visa abroad. In his brief on appeal, the Applicant does not contend he intends to seek an immigrant visa if his Form I-212 is approved, and the Form I-130 filed on the Applicant's behalf indicates he intends to apply for adjustment of status in [redacted] New York. Noncitizens physically present in the United States who are inadmissible under section 212(a)(9)(A) of the Act and applying for adjustment of status with USCIS may seek retroactive permission to reapply for admission pursuant to 8 C.F.R. § 212.2(e). However, they must file the application either concurrently with their Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), or at any time afterward, at the USCIS office with jurisdiction over the adjustment of status application. *See Instructions for Application for Permission to Re-apply for Admission Into the United States After Deportation or Removal – Where to File*, https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf. To date, the Applicant has not filed a Form I-485 to adjust his status. Thus, the record does not establish that the Applicant intends to apply for an immigrant visa and is currently seeking conditional permission to reapply for admission prior to departing the United States. Without a pending Form I-485, the Applicant lacks a means for adjusting his status to that of a lawful permanent resident, or for being admitted into the country pursuant to an immigrant visa. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. §§ 212.2(b)-(j). Accordingly, no purpose would be served in granting the Form I-212. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964) (an application for permission to reapply for admission is properly denied, in the exercise of discretion, where no purpose would be served in granting the application.).

Even considering the Applicant's arguments on appeal, we find no error in the Director's conclusion that the Applicant failed to establish he warranted a favorable exercise of discretion. The Applicant provided an affidavit from his spouse, an affidavit from a psychologist regarding his spouse, copies of his U.S. citizen children's birth certificates, copies of his children's school records, medical records for his mother, and copies of federal income tax returns from 2014 to 2019. The Director weighed all evidence in the record and found the Applicant had not established the positive equities outweighed the negative factors in his case. Specifically, numerous equities were acquired after the entry of his removal order, thus resulting in them being afforded limited weight. *See Tijam*, 22 I&N Dec. at 416. As noted above, the Applicant's asylum application was denied in 1998, at which time he was also ordered removed. While he has had a lengthy residence in the United States, nearly all of this occurred after the entry of his removal order and in violation of that order. Such a lengthy residence in violation of his removal order is evidence of a disregard for the immigration laws of the United States, as the Director concluded. Further, although he married his spouse and his son was born in late 1997, his daughter was born after the entry of the removal order. We note the Applicant provided evidence that he has paid taxes for at least six years, but again, he did this after the entry of his removal order.

We acknowledge the emotional hardship the Applicant, his spouse, and their children would likely suffer upon separation, and we also recognize the evidence the Applicant submitted of his children's academic achievements. However, the Applicant has not provided a complete picture of the household finances, such as monthly expenses, including rent or mortgage costs, which renders us unable to accurately ascertain the potential financial impact – and similarly, the overall impact – the Applicant's absence might have on his family members' lives. Additionally, the Applicant's spouse states in her affidavit that the Applicant provides care for his LPR mother; however, she resides in a nursing home, and the Applicant has not provided evidence or explained how her care and living conditions would be affected if he were not allowed to adjust status and remain in the United States. Therefore, the hardship she would experience is likewise not clear. Ultimately, considering all the evidence provided by the Applicant and the totality of the record, the Applicant provided limited evidence of positive equities in support of his application, such that he has not established a favorable exercise of discretion is warranted in his case.

ORDER: The appeal is dismissed.