U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28769596

Date: NOV. 21, 2023

Appeal of U.S. Customs and Border Protection Decision

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

The Applicant, a native of China and citizen of Canada, was found inadmissible for five years after departing the United States under an order of expedited removal and now seeks permission to reapply for admission to the United States. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). 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 U.S. Customs and Border Protection Admissibility Review Office denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal (application for permission to reapply), concluding the record did not establish that the Applicant's favorable factors outweighed his favorable factors and therefore he did not merit a favorable exercise of discretion. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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)(i) of the Act provides, in relevant part, that a noncitizen who has been ordered removed under section 235(b)(1) of the Act, 8 U.S.C. § 1225(b), as an "arriving alien" through an expedite removal order, and who seeks admission within five years of the date of such removal, is inadmissible. Foreign nationals 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 foreign national'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. *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); *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 arrived in the United States on December 6, 2021, sought admission with a B1/B2 nonimmigrant visa, received an expedited order of removal on that date, and was removed from the United States. Therefore, the Applicant is inadmissible to the United States for five years from the date of his removal under section 212(a)(9)(A)(i) of the Act. He filed an application for permission to reapply which the Director denied. In making this decision, the Director detailed the Applicant's travel history to and from the United States, reviewed the evidence he submitted, and analyzed relevant discretionary factors. Specifically, the Director noted the Applicant was previously in the United States from June 16, 2019, until October 29, 2019, and he returned on November 2, 2019, with an authorized period of stay until May 1, 2020. He filed for an extension of stay, and his authorized period of stay in B-2 nonimmigrant status was extended until November 1, 2020. However, the Director noted he overstayed his authorized period of stay as he did not depart the United States until December 28, 2020. The Applicant then returned to the United States on June 12, 2021, and remained until December 1, 2021. The Applicant again applied for admission on December 6, 2021, while not being in possession of a return ticket. The record reflects that the Applicant possessed a B1/B2 nonimmigrant visa, and his prior admissions and periods of authorized stay were as a B-2 nonimmigrant visitor. On December 6, 2021, the Applicant provided a sworn statement before an immigration officer in which he admitted to owning a company called [redacted] working for his company in the United States without authorization, being paid for his work, and being aware that he was required to have employment authorization to work in the United States. Next, the Director mentioned the Applicant did not submit any reference letters; he submitted banking and tax records; and he claimed to have never engaged in unauthorized employment, rather he previously traveled to the United States seeking an investment that would qualify him for E-2 nonimmigrant investor status and was only conducting steps to get his business up and running. Finally, the Director addressed the Applicant's discretionary factors in detail, including the lack of sufficient time to establish his reformation of character, his unauthorized employment, his overstaying his authorized period of stay, his lack of remorse, the lack of hardship to himself or others, and the lack of need for his services in the United States. Upon weighing the above factors, the Director concluded that the Applicant's favorable factors were outweighed by his unfavorable factors and therefore he did not merit a favorable exercise of discretion.

The issue on appeal is whether the Applicant merits a favorable exercise of discretion. Our decision is based on a review of the record, which includes, but is not limited to, the Applicant's brief, statement, financial records, and immigration records.

On appeal, the Applicant contends he did not have an unauthorized period of stay. The Applicant mentions that on July 20, 2020, while he was in status, he filed a change of status application from B-2 nonimmigrant status to E-2 nonimmigrant status, and the application was pending when he departed the United States in December 2020. Therefore, he claims that he was never out of status as he had a change of status application pending when he departed the United States. Next, the Applicant asserts that he did not engage in unauthorized employment. He states that his involvement in [redacted] was permissible and in compliance with his nonimmigrant status, as he never engaged in unauthorized employment. Rather, he claims that he engaged in permissible business activities which included searching for an office and warehouse, meeting potential business partners, inspecting car conditions, and purchasing cars. The Applicant points to the definition of employment in 8 C.F.R. § 274a.1(h), which defines employment as "any service or labor performed by an employee for an employer within the United States." Furthermore, the Applicant refers to the definition of employee and employer, which are defined in 8 C.F.R. § 274a.1(f), (g) in part, as an "individual who provides services or labor for an employer for wages or other remuneration" and "a person or entity . . . who engages the services or labor of an employee . . . for wages or other remuneration." The Applicant states he was seeking to qualify for an E-2 nonimmigrant investor visa, the E-2 nonimmigrant visa requires that he invested or is actively in the process of investing in a business in the United States, and that is what he was doing on his trips to the United States. He asserts he was conducting preliminary steps to get his business up and running so he could apply for an E-2 nonimmigrant visa. Finally, the Applicant states that he was going to invest $167,569 in the United States, he would not become an illegal immigrant, and he would experience great hardship if his application for permission to reapply is not approved due to being delayed in his investment.

We will now address the Applicant's unfavorable and favorable factors. First, we agree with the Applicant that he had a change of status application pending at the time he departed the United States on December 28, 2020. Therefore, he did not have a period of unauthorized stay from November 1, 2020, until December 28, 2020. However, the record reflects that he engaged in unauthorized self-employment in the United States, which violated the terms of his B-2 nonimmigrant visitor status. We consider this an unfavorable factor as it shows a lack of respect for U.S. immigration law. In his sworn statement from December 6, 2021, the Applicant admitted to the inspecting officer that he owned a company in Canada which bought and sold cars, and he had a subsidiary company in the United States. He stated that he operated the business in the United States, and his duties in the United States included figuring out what cars clients wanted to purchase, finding sellers and helping them buy cars, and inspecting cars. He further mentioned that he had a bank account in the United States that sellers deposited money into, and he was aware he was working in the United States. The Applicant's sworn statement contradicts his claim on appeal that he was engaging in permissible business activities and was only conducting preliminary steps to get his business up and running. The Applicant's other unfavorable factors include his lack of remorse for his prior actions and lack of rehabilitation. The Applicant's favorable factors include his lack of a criminal record. The Applicant has not provided supporting documentary evidence of other relevant favorable factors including, but not limited to, family ties or responsibilities in the United States, hardship to himself or others, the need for his services in the United States, or good character.

Viewing the totality of the circumstances, we determine that the Applicant has not established that his favorable factors outweigh the unfavorable factors. Therefore, a favorable exercise of discretion is not warranted, and the application will remain denied.

ORDER: The appeal is dismissed.