U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28233124

Date: OCT. 30, 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 will be inadmissible upon his departure from the United States for having been previously ordered removed and seeks permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The Director of the Newark, New Jersey Field Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant does not contest inadmissibility, which is supported by the record. Rather, he contends that the Director did not properly weigh the favorable factors against the unfavorable 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, as explained below, we will remand the matter to the Director for the entry of a new decision.

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," 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. Noncitizens 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) 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 continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

The Applicant currently resides in the United States, and he is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. The approval of his application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

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.")

The Applicant is a native and citizen of India who entered the United States in March 2002 with a nonimmigrant visa and remained beyond the period of authorized stay. He was apprehended and placed in removal proceedings. In February 2003, the Applicant was granted voluntary departure until June 26, 2003, with an alternate order of removal. The Applicant did not depart the United States pursuant to the voluntary departure order. The Applicant has remained in the United State since being ordered removed and upon his departure he will become inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The issue on appeal is whether the Applicant should be granted conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa. After considering the record in its entirety, we find that the matter should be remanded to the Director for the entry of a new decision.

In the decision to deny the application, the Director acknowledged the Applicant's apparent lack of a criminal record, his gainful employment in the United States, the Applicant's business ownership, his marriage to a U.S. citizen spouse, his U.S. citizen children, and the approved Form I-130, Petition for Alien Relative, on his behalf. Regarding the unfavorable factors in the Applicant's case, the Director noted the Applicant's entry to the United States under false pretense as evidenced by his nonimmigrant visa overstay and his immediate unlawful employment, his failure to depart the United States pursuant to the voluntary departure order, the Applicant's removal order, and his 20 years of unlawful presence and employment in the United States. The Director also stated that despite the Applicant's assertions, he had not provided documentation to establish that he financially supported his children. Moreover, a "site visit previously conducted by USCIS in 2016 found that [the Applicant] was living with" his ex-spouse and children, and not with his claimed U.S. citizen spouse. The Director concluded that considering all factors, the favorable factors did not outweigh the adverse factors in the Applicant's case. The application was denied accordingly.

On appeal, the Applicant contends that the Director's decision was unjust and should be reversed. He maintains that he worked without authorization to "be able to put food on the table for his children." Furthermore, while the Applicant acknowledges that has resided long periods of time in the United States, he explains that he has "attachments which he cannot simply forsake and leave from." The Applicant also maintains that while he is often at his ex-spouse's house because his children need him, he did not live with his ex-wife at the time of the site visit, despite the Director's comments to the contrary.

In addition, the Applicant provides detailed information about the emotional, medical, academic, and financial hardships that his three U.S. citizen children will experience if he were to reside abroad, whether they remained in the United States with their mother or relocated abroad with the Applicant. The Applicant also provides information about the psychological, medical, and medical hardships his spouse would experience, whether she remained in the United States without the Applicant, or relocated abroad. Of particular note, the Applicant states that his spouse was previously diagnosed with ovarian cancer and is receiving treatment as a result.

The Applicant also explains that he and his wife own multiples business and were he unable to remain in the United States, his wife will not be able to sustain the businesses, thereby causing financial hardship to him and his family. The Applicant also details that his ex-wife relies on him for financial support and without his financial contributions, she would not be able to care for herself and the children. The Applicant also outlines the emotional, physical, medical, and financial hardships he would experience were he unable to remain in the United States with this spouse and children.

In addition to the hardships to him and his family, the Applicant maintains that he has long-term ties to the United States, having resided in the United States for more than two decades. He also contends that he is a man of good moral character, as he supports his wife, his children, and his ex-wife; pays taxes in the United States; runs multiple businesses that employ numerous individuals; and has no criminal record.

In support of his contentions on appeal, the Applicant submits an affidavit from his ex-wife detailing his role in her and their children's lives, a letter from the Applicant's accountant confirming that he pay taxes and provides financial assistance to his ex-wife, and mental health documentation detailing that the Applicant's ex-wife and current wife have been diagnosed with depression and anxiety and are being treated for the conditions.

Considering the documentation submitted on appeal, and because the Director's decision did not appear to properly weigh all the positive factors in the Applicant's case, we find it appropriate to remand the matter for the Director to reevaluate the record in its entirety to determine whether the Applicant has established that he merits a favorable exercise of discretion.

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