U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34652463

Date: DEC. 19, 2024

Appeal of New York, New York Field Office Decision

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

The Applicant, a native and citizen of the People's Republic of China (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 application, concluding that the record did not establish a favorable exercise of discretion was warranted. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3. On appeal, 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 did not 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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) (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) (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 pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing the United States.[1] The Applicant entered the United States without admission or inspection in 1993 and sought asylum before an immigration judge. In 1999, following the denial of his asylum application, the Applicant was granted an order of voluntary departure by an immigration judge. Because he did not depart during the allowed period, that order became a final removal order. The Applicant has not departed the United States since his initial entry, and the removal order remains in effect. Because he has an outstanding order of removal, he will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.

The Applicant married his lawful permanent resident spouse in 2001. His spouse filed a Form I-130, Petition for Alien Relative, on his behalf, and that petition has been approved. The Applicant filed his Form I-212, which the Director denied in June 2024. The Applicant appealed that denial, arguing the Director erred in finding he did not merit a favorable exercise of discretion.

On appeal, the Applicant argues the Director failed to accurately consider the positive equities and misapplied the law to his case. In denying the Form I-212, the Director acknowledged the evidence the Applicant presented of his favorable factors, including: statements from the Applicant and his spouse, copies of the Applicant's birth certificate and marriage certificate, copies of the Applicant's spouse's birth certificate and permanent resident card, letters of support from family members, copies of the spouse's medical records, income tax returns from 2016 to 2020, and country conditions evidence for China. With respect to hardship to the Applicant's family, the Director concluded that the Applicant's spouse's emotional suffering in the case of relocation "would not be extreme." The Director determined that the Applicant's positive factors were insufficient to overcome the negative impact of the Applicant's non-compliance with the grant of voluntary departure and resulting removal order, unlawful presence in the United States, and future inadmissibility under section 212(a)(9)(A)(ii) of the Act.

When considering whether a request for permission to reapply merits a favorable exercise of discretion, positive factors may include hardship to the applicant and other U.S. citizen or lawful permanent resident relatives, the applicant's respect for law and order, and family responsibilities. *Matter of Tin*, 14 I&N Dec. at 373-74. However, there is no specific requirement that an applicant show extreme hardship, as alluded to by the Director. *Id.* Extreme hardship to a qualifying relative is a requirement for inadmissibility waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the

[1] The approval of his application is conditioned upon departure from the United States and would have no effect if the Applicant does not depart.

Act. In the adjudication of a Form I-212, any hardship to the applicant or their family members is a factor to be considered in the discretionary analysis.

Here, the record does not indicate that the Director applied the correct standard in evaluating the claims of general hardships to the Applicant and his family members, including emotional and financial hardship upon relocation resulting from the Applicant's spouse having to leave her home and adjust to conditions in China after residing in the United States for much of her adult life. Indeed, there is nothing in the Director's decision to indicate any hardship to either the Applicant himself, his U.S. citizen child, or his U.S. citizen grandchildren was considered in rendering the decision. Further, the Director seems to have applied a higher standard – extreme hardship – to the analysis in this case, as particularly noted in the finding that "although [the Applicant's] removal could have some emotional consequences for [his] spouse and [his] children, those consequences would not be extreme." The Director also did not specifically address evidence of additional significant positive factors in the record, including the Applicant's lack of a criminal record and evidence of positive moral character, as evidenced through letters of support from family, friends, and community members.

In light of the deficiencies noted above, we will remand the matter for the entry of a new decision. It will remain the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

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