U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21780956

Date: JULY 18, 2022

Appeal of Los Angeles, California Field Office Decision

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

The Applicant, a citizen and resident of Mexico, seeks permission to reapply for admission to the United States under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(ii), because he is inadmissible for attempting to enter the United States without being admitted after having previously been ordered removed. The Director of the Los Angeles, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212). The Applicant filed an appeal of that decision with this office. We review the questions raised 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 remand the matter to the Director for further proceedings.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i), 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 (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of a noncitizen convicted of an aggravated felony) 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) 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.

Section 212(a)(9)(C)(i)(II) of the Act provides that any noncitizen who has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible. Noncitizens found inadmissible under section 212(a)(9)(C)(i)(II) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii), which provides that inadmissibility shall not apply to a noncitizen seeking admission more than ten years after the date of last departure from the United States if, prior to the reembarkation at a place outside the United States or attempt to be readmitted from a 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, 373-74 (Reg'l Comm'r 1973). The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The record reflects that between 2003 and 2008, the Applicant made multiple attempts to enter the United States without inspection and was voluntarily returned on each occasion. In October 2008, he attempted to enter the United States without inspection, and in [redacted] 2008, he was expeditiously removed. In [redacted] 2009, the Applicant again attempted to enter the United States without inspection and was returned to Mexico. The Applicant claims that he has remained outside the United States since his last departure.

In 2018, a U.S. Department of State consular officer found that the Applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act for attempting to enter the United States without being admitted after having been ordered removed. To avoid inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, it must be the case that the noncitizen's last departure was at least 10 years ago, and USCIS has granted them permission to reapply for admission into the United States.[1] Id.

The Director concluded that the record lacked sufficient evidence demonstrating that the Applicant remained outside of the United States for 10 years following his [redacted] 2009 departure from the United States. In addition, the Director conducted a discretionary analysis and listed the Applicant's unfavorable factors as his repeated attempts to enter the United States without inspection; his removal from the United States and subsequent attempt to reenter the United States; and his misrepresentation regarding his immigration history in the statement accompanying his Form I-212,[2] which renders him inadmissible under section 212(a)(6)(C)(i) of the Act.[3] The Director listed the Applicant's favorable factors as his family ties in the United States, including his lawful permanent resident spouse (LPR),

[1] We note here that, under recent policy guidance, for noncitizens inadmissible under section 212(a)(9)(C)(i)(I) of the Act (entry or attempted reentry after accrual of more than one year of unlawful presence), it is immaterial whether the noncitizen has spent the 10-year period in or out of the United States. See 8 USCIS Policy Manual O.6(B), https://www.uscis.gov/policymanual (discussing, as guidance, the effect of seeking admission following accrual of unlawful presence).

[2] In his statement, the Applicant asserted that he only attempted to enter the United States on one occasion. With his appeal, he states that he admitted his prior attempts to enter the United States unlawfully during his consular interview, and the statement in his Form I-212 is inaccurate due to translation issues. We will not address the Applicant's potential inadmissibility under section 212(a)(6)(C)(i) of the Act because that inadmissibility can only be waived by the filing and approval of a Form I-601, Application for Waiver of Grounds of Inadmissibility.

[3] With the Form I-212, the Applicant submitted a "residence constancy" document and a letter from the Public Lands Commissary as evidence of his residency in Mexico.

LPR son, and U.S. citizen daughter; claimed hardship to his spouse; and apparent lack of a criminal history. With respect to hardship, the Director stated that while the Applicant claimed that his spouse would suffer extreme financial hardship if the waiver is not granted, the evidence submitted indicated that his spouse is employed, currently rents a room, and sends the Applicant remittances, and there is no significant evidence that she will suffer financial hardship if the waiver is not granted. With respect to the Applicant's spouse's concerns for the Applicant's safety, the Director stated, "there is no significant evidence that you or your spouse are at direct risk of harm in your particular situation." The Director further noted that "USCIS recognizes the absence of immigration violations in your case since [redacted] 2009. However, this is only one factor to be considered in the totality of circumstances." The Director denied the Form I-212 concluding that the favorable factors did not outweigh the unfavorable factors in the Applicant's case.

On appeal, the Applicant contends that the Director erred by failing to appropriately consider and weigh the submitted evidence. He also reasserts that he has remained outside of the United States since his departure and submits new evidence supporting his claim of continual residency in Mexico since 2009, including documentation relating to his membership in a local cattle association, utility records, and medical documentation regarding treatment he received from 2016 to 2020.

Here, while the Director referenced hardship that the Applicant's spouse is experiencing due to separation from the Applicant, the Director did not consider the length of the Applicant's spouse's marriage (38 years); hardship to the Applicant himself if he is denied admission; or the Applicant's spouse's claim that in addition to sending the Applicant money for his living expenses, she also covers the Applicant's out-of-pocket medical expenses. As stated above, when considering whether a request for permission to reapply merits a favorable exercise of discretion, favorable 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. There is no specific requirement that an applicant show extreme hardship, as referenced 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 Act. In the adjudication of a Form 1-212, any hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis.

In light of the foregoing, we find it appropriate to remand the matter to the Director to reevaluate the submitted evidence, including that submitted on appeal, and determine whether the Applicant warrants 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.