U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21700036

DATE: JUL. 19, 2022

Appeal of Queens, New York Field Office Decision

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

The Applicant, a native and citizen of China, seeks conditional approval of his application for 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); 8 C.F.R. § 212.2(j), for having been previously ordered removed. The Director of the Queens, New York Field Office denied the Form I-212, Application for Permission to Reapply for Admission (application for permission to reapply), concluding that the Applicant's unfavorable factors outweighed his favorable factors and he therefore did not merit a favorable exercise of discretion. On appeal, the Applicant submits a brief and evidence asserting his eligibility. 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 remand the matter to the Director for the entry of a new decision.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a foreign national who has been ordered removed under section 240 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. 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.

8 C.F.R. § 212.2(j) provides that a foreign national whose departure will execute an order of deportation shall receive a conditional approval depending upon their satisfactory departure. However, the grant of permission to reapply does not waive inadmissibility under section 212(a)(9)(A) of the Act resulting from exclusion, deportation, or removal proceedings which are instituted subsequent to the date permission to reapply is granted.

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) (discussing

the different factors to be considered in the discretionary determination of whether an applicant merits approval of an application to permission to reapply). 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). 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) (noting that less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (noting 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).

Under section 212(a)(9)(B)(i)(II) of the Act, a foreign national who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of their departure or removal from the United States, is inadmissible. A foreign national may seek a waiver for this inadmissibility under section 212(a)(9)(B)(v) of the Act if they establish that the inadmissibility will cause their U.S. citizen or legal permanent resident spouse or parent(s) extreme hardship. Pursuant to 8 C.F.R. § 212.7(e), some foreign nationals who would become inadmissible for unlawful presence upon departure from the United States may apply for a provisional unlawful presence waiver prior to departing. However, a foreign national who is subject to an administratively final order of removal, deportation, or exclusion under any provision of law is ineligible for a provisional unlawful presence waiver under 8 C.F.R. 212.7(e), unless they file, and U.S. Citizenship and Immigration Services approves, an application for permission to reapply under section 212(a)(9)(A)(iii) of the Act and 8 C.F.R. § 212.2(j).

In these proceedings, the burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. 8 C.F.R. § 214.11(d)(5); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). An applicant may submit any credible evidence for us to consider in our *de novo* review; however, we determine, in our sole discretion, the weight to give that evidence. 8 C.F.R. § 214.11(d)(5).

II. ANALYSIS

The record reflects that the Applicant entered the United States without inspection in May 2000, he applied for asylum in April 2008, and he was referred to an immigration judge for adjudication of his asylum application in June 2008. After being placed in removal proceedings in [redacted] 2008, the immigration judge denied the Applicant's asylum application, he was ordered removed in [redacted] 2009, the Board of Immigration Appeals (the Board) dismissed his appeal in April 2011, and the Board denied his motion to reopen in January 2012. As such, the Applicant would become inadmissible under section 212(a)(9)(A)(ii) of the Act upon his departure from the United States. The Applicant does not contest this finding. The issue on appeal is whether the Applicant merits conditional approval of his application for permission to reapply as a matter of discretion.

The Director concluded that the Applicant is not eligible for permission to reapply for admission as a matter of discretion. Specifically, the Director determined that the Applicant would become inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having accrued more than one year of unlawful presence upon departing the United States and since it is unlikely he would receive an approved Form I-601A, Application for Provisional Unlawful Presence Waiver (provisional unlawful presence waiver), he would remain inadmissible even if his application for permission to reapply was granted. In addition, the Director stated that the unlawful presence ground of inadmissibility is a negative factor that in itself supports denial of the application for permission to reapply as a matter of discretion. The Director cited *Matter of J-F-D-*, 10 I&N Dec. 694 (INS 1963) in support of the basis of denial.

In *Matter of J-F-D-*, the Board determined that the denial of an application for permission to reapply could be based on an applicant being subject to a ground of inadmissibility that does not have a waiver available. *Id.* In doing so, the Board noted that no purpose would have been served in granting an application for permission to reapply because the applicant would remain inadmissible and most importantly, the inadmissibility was not waivable. *Id.* at 695. Here, however, while the Applicant will become inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence upon departing the United States, a provisional unlawful presence waiver is available. Therefore, the Applicant's case is distinguishable from *J-F-D-* and it should not have been denied on this basis.

Next, we note that pursuant to 8 C.F.R. § 212.7(e)(4)(iv), an individual who is inadmissible for having been ordered removed must obtain permission to reapply before seeking a provisional unlawful presence waiver. Upon his departure, the Applicant will become inadmissible under section 212(a)(9)(A)(ii) of the Act and he may apply for conditional approval of his application for permission to reapply under the regulation at 8 C.F.R. § 212.2(j) before departing the United States. The approval of the application for permission to reapply under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart. According to the regulations, only after the Applicant has obtained consent to reapply for admission, may he file a provisional unlawful presence waiver, which is a separate application for relief. 8 C.F.R. § 212.7(e)(4)(iv). The Director's decision erroneously adjudicated the Applicant's eligibility for a provisional unlawful presence waiver by concluding "[a]lthough refusal of your admission would undoubtedly affect your entire family, only the potential hardship of your qualifying relatives can be considered. After review, it has been determined that the evidence is insufficient to show that your spouse would experience extreme hardship if you were refused admission." Because the Director erroneously adjudicated the Applicant's eligibility for a provisional unlawful presence waiver and used it as basis to deny his application for permission to reapply as a matter of discretion, we are withdrawing the Director's decision, and remanding it for the Director to consider whether the Applicant merits a favorable exercise of discretion for his application for permission to reapply.

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