



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 20221221

Date: JUL. 22, 2022

Appeal of Los Angeles, California Field Office Decision

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

The Applicant seeks 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), because he will be inadmissible upon departing from the United States for having been previously ordered removed. *See* section 212(a)(9)(A)(ii) of the Act.

The Director of the Los Angeles, California Field Office concluded that the Applicant's favorable factors did not outweigh his adverse factors and denied the application as a matter of discretion. On appeal, the Applicant asserts that the Director overemphasized perceived negative factors and did not give sufficient weight to positive equities. The Applicant contends that the application should be approved as a matter of discretion.

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for additional review and the entry of a new decision.

## I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a noncitizen 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.

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); *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 currently resides in the United States and 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 the 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

## II. ANALYSIS

The record reflects that the Applicant, a native of Guatemala, entered the United States in 1995 and filed a Form I-589, Application for Asylum and for Withholding of Removal, in 1996. Later that same year, the Applicant withdrew the Form I-589 and was granted voluntary departure, with an alternate order of removal if he did not depart. The Applicant did not voluntarily depart as requested and was therefore ordered deported in [redacted] 1996. The Applicant has not left the United States since his initial unlawful entry and is seeking conditional approval of the instant application under the regulation at 8 C.F.R. § 212.2(j) before departing from the United States to seek an immigrant visa at a U.S. consulate abroad, as he will be inadmissible upon his departure. *See* section 212(a)(9)(A)(ii) of the Act. The Applicant will also be inadmissible under section 212(a)(9)(B) of the Act for accruing unlawful presence in the United States once he departs. The Applicant concedes that he will be inadmissible for accruing unlawful presence upon departure but indicates he would seek a provisional waiver, asserting that his spouse would suffer extreme hardship if he was refused admission.<sup>1</sup> The issue on appeal is whether the Applicant has established that he merits approval of the Form I-212 as a matter of discretion.

In denying the application, the Director stated the Applicant did not demonstrate, as claimed, that his U.S. citizen spouse would become a public charge if he were removed to Guatemala, pointing to submitted evidence indicating that she was the sole income earner for their family. The Director further determined that the Applicant did not sufficiently establish that he could not live safely and earn income in Guatemala, as he had asserted. The Director also pointed to the Applicant's prior asylum application, noting it had been withdrawn and further discussed his failure to comply with the voluntary removal order in 1996. In addition, the Director stated that the Applicant's marriage in 2007 was an equity acquired after his deportation; and therefore, it was given less positive weight. The Director also emphasized the Applicant's entry without inspection, his long presence in the United States in unlawful status, and his unlawful employment in this country. Lastly, the Director indicated that the Applicant provided an incorrect birth year and differing names to immigration officials when

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<sup>1</sup> An applicant may file Form I-601A, Application for Provisional Unlawful Presence Waiver, to request a provisional waiver of the unlawful presence grounds of inadmissibility under section 212(a)(9)(B) of the Act before they depart the United States to appear for an immigrant visa interview.

he was apprehended in 1995. In sum, the Director concluded that the Applicant's negative equities outweighed his positive factors.

On appeal, the Applicant contends that the Director omitted important positive factors and improperly inferred negative ones. The Applicant asserts that the Director did not give proper weight to his lack of a criminal record while residing in the United States. The Applicant also states that the Director improperly considered his "unlawful employment" in the United States, while minimizing his spouse's hardship by emphasizing his lack of employment. Further, the Applicant contends that the Director gave improper negative weight to him providing a one-year mistake in his birthdate and slightly different names to immigration officials when he was apprehended in 1995.

As the Director's decision does not reflect a proper analysis of the favorable and unfavorable factors in the Applicant's case, as required, we will remand the matter for entry of a new decision regarding his eligibility for permission to reapply for admission. Again, when considering whether a request for permission to reapply merits a favorable exercise of discretion, positive factors may include hardship to the applicant and others, the applicant's respect for law and order, his moral character, his family responsibilities, and his likelihood of becoming a lawful permanent resident. Here, while the Director briefly mentioned the Applicant's marriage to a U.S. citizen spouse, his approved Form I-130, Petition for an Alien Relative, his "family ties" in the United States, his lack of a criminal record, and general potential hardship to his family, the denial did not fully analyze the evidence of his favorable factors.

For instance, the decision did not discuss the affidavits submitted by the Applicant and his spouse addressing the childcare he provides to his two U.S. citizen children and other support he provides for his U.S. citizen spouse and her immediate family. Further, the Director did not analyze or mention a psychological evaluation submitted for the Applicant's spouse, indicating that she suffers from generalized anxiety disorder resulting from the prospect of her spouse being removed to Guatemala and the loss of his family and emotional support. Likewise, the Director did not discuss in detail the Applicant's two U.S. citizen children and the potential impact on them if their father were removed to Guatemala. Although we acknowledge the Director's determination that the Applicant did not sufficiently demonstrate that his spouse would become a "public charge" as claimed if he were removed to Guatemala, the Director also did not give sufficient consideration to the other negative impacts on the Applicant's spouse and children if he were removed. As such, the Director did not appear to give proper weight and consideration to the Applicant's family ties and the need for his service in the United States. We acknowledge that the Applicant's marriage is an after-acquired equity; however, this does not mean that equities acquired after his removal should be given no weight and consideration.

The Director also gave improper weight to certain perceived negative equities. For example, the Director emphasized that the Applicant withdrew his asylum application and appeared to treat this as a negative factor. However, we do not agree that voluntary withdrawal of an asylum application should be considered a negative equity. Likewise, the Director also pointed to the Applicant's unlawful employment in the United States, despite the record being unclear as to whether he was unlawfully employed in the United States. In addition, the Director further stated that the Applicant provided an incorrect birthdate and differing names to immigration officials when he was apprehended in 1995, noting that this was "certainly not a positive equity." However, the record is also unclear as to whether Applicant deceived immigration officials when he was apprehended more than 25 years

prior to the date of the Director's decision. Further, this perceived negative factor stands in contrast to his apparent good character while residing in the United States during this time.

In light of the deficiencies noted above, we are remanding the matter to the Director to reevaluate the submitted evidence and determine whether the Applicant merits a conditional approval of his Form I-212 in the 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.