U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8360107

Date: JUNE 16, 2020

Appeal of Newark, New Jersey 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 departure from the United States for having been previously ordered removed.

The Director of the Newark, New Jersey Field Office denied the application, concluding that the positive factors in the Applicant's case did not indicate a hardship beyond that which could be reasonably expected upon separation and did not therefore outweigh the negative impact of his failure to comply with voluntary departure and the resulting removal order.

On appeal, the Applicant asserts that the Director applied incorrect legal standard in the discretionary analysis, as permission to reapply for admission does not require a showing of extreme or unusual hardship, but is based on balancing positive factors against the negative ones. He reasserts that he merits a favorable exercise of discretion because of his long-time residence and family ties in the United States, good moral character, and financial hardship to his family if he were to return to Ghana and remain there for the entire inadmissibility period.

The burden of proof in these proceedings rests with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for the entry of a new decision consistent with our analysis below.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that an alien, other than an "arriving alien," 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. An alien 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 alien's reapplying for admission.

II. ANALYSIS

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 from the United States.[1] He does not contest that he has an outstanding order of removal and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs. The issue on appeal is whether the Applicant has established that he merits approval of the application as a matter of discretion.

The record reflects that the Applicant was admitted to the United States in 2003 as a nonimmigrant visitor (B-2). He subsequently married his first spouse and applied for adjustment of status to that of a lawful permanent resident based on the marriage. After the application was denied, the Applicant was placed in removal proceedings, and in [redacted] 2007 an Immigration Judge granted his request for voluntary departure with an alternate order of removal to Ghana. The Applicant did not depart, as required, and instead filed a motion to reopen the removal proceedings, which the Immigration Judge denied. The Board of Immigration Appeals (the Board) dismissed the Applicant's appeal of that decision in 2008, and dismissed his second motion to reopen removal proceedings in December 2017.

In [redacted] 2007, the Applicant married his current spouse, with whom he has three children. He is seeking lawful permanent resident status based on an approved immigrant visa petition that the spouse filed on his behalf. The Director identified positive factors in the Applicant's case as his family ties in the United States, consistent authorized employment, payment of taxes, lack of criminal history, and financial detriment to his spouse if he were to return to Ghana. Nevertheless, the Director denied the application concluding, in part, that the mere showing of economic detriment to a qualifying relative was insufficient to warrant a finding of extreme hardship, and that the positive factors considered in the aggregate did not indicate a hardship beyond what could be reasonably expected with the departure of a spouse.

However, we agree with the Applicant that the requirement of establishing extreme hardship to a qualifying relative (or qualifying relatives) does not apply to aliens seeking permission to reapply for admission to the United States after deportation or removal; rather, it applies to aliens who file Form I-601, Application for Waiver of Grounds of Inadmissibility.

Grant of an application for permission to reapply is discretionary, and any unfavorable factors must 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

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

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.")

Accordingly, *any* hardship to the Applicant or his family members is a factor to be considered in the discretionary analysis. Although equities that came into existence after an alien has been ordered removed from the United States ("after-acquired equities"), including family ties, have diminished weight for purposes of assessing favorable factors in the exercise of discretion,[2] the record reflects that the Applicant's first child was born in [redacted] 2006,[3] before he was placed in removal proceedings, and the Applicant married his current spouse in [redacted] 2007, prior to the voluntary departure grant and the subsequent removal order. Thus, any hardships to those family members are significant factors that should be given full weight in the discretionary analysis.

The Applicant's spouse and his three minor children are U.S. citizens. The Applicant asserts that his spouse only works part-time because she takes care of the children and will not be able to support the family without the Applicant's income. He states further that he has no criminal history and, although he will be inadmissible for unlawful presence once he departs from the United States, he is eligible to seek a provisional waiver of this inadmissibility. The Applicant also claims that he is a person of good moral character who has maintained steady employment and never relied on government assistance. The evidence includes previously submitted affidavits from the Applicant's friends and family attesting to his character, as well as employment, residential, and financial records to establish the claimed financial hardship.

The record does not show that the Director considered the general hardships the Applicant claims he and his family will experience if he must remain abroad after being removed for the entire 10-year inadmissibility period. We will therefore return the matter to the Director to determine whether the Applicant merits approval of his request for permission to reapply for admission as a matter of discretion when all favorable factors, including hardships to the Applicant and his family members are weighed against the adverse factors.

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

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[2] *See Garcia-Lopes v. INS*, 923 F.2d 72, 74 (7th Cir. 1991) (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) (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).

[3] We note that the child was born while the Applicant was still married to his first spouse. In addition, the record contains two affidavits the Applicant's current spouse provided in proceedings concerning the Applicant's first marriage, where she indicated that she and the Applicant were siblings to explain why they rented an apartment together in 2005. The Applicant asserts that any issues concerning the *bona fide* nature of his first marriage have since been resolved, as the visa petition filed on his behalf by his current spouse has been approved.