U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-M-P-

DATE: JULY 8, 2019

APPEAL OF NEWARK, NEW JERSEY FILED OFFICE DECISION

APPLICATION: FORM I-212, APPLICATION FOR PERMISSION TO REAPPLY FOR ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR REMOVAL

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.

The Director of the Newark, New Jersey Field Office denied the application as a matter of discretion, concluding that the negative factors in the Applicant's case outweighed the positive ones and that he was also inadmissible for failing to attend a removal hearing under section 212(a)(6)(B) of the Act, a ground of inadmissibility for which there is no waiver available.

On appeal, the Applicant asserts that he had reasonable cause for failing to attend his removal hearing, as he was a child at the time, did not understand the proceedings, and could not travel alone to the Immigration Court. He further states that he merits a favorable exercise of discretion because these events occurred a long time ago, and he has since developed strong family and community ties and has a history of gainful employment in the United States.

The burden of proof in these proceedings rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will sustain the appeal because the Applicant has met this burden.

I. LAW

Section 212(a)(9)(A)(ii) of the Act provides, in part, that a foreign national, 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. Foreign nationals who are inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 2 l 2(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 foreign national's reapplying for admission.

Section 212(a)(6)(B) of the Act provides that any foreign national who, without reasonable cause, fails to attend or remain in attendance at a proceeding to determine the foreign national's inadmissibility or deportability, and who seeks admission to the United States within five years of the foreign national's subsequent departure or removal, is inadmissible. There is no waiver available for this ground of inadmissibility.

II. ANALYSIS

The Applicant is currently in the United States and seeks conditional approval of his application pursuant to the regulation at 8 C.F.R. § 212.2(j) before departing the United States. The approval of his application is conditioned upon departure from the United States and will have no effect if the Applicant does not depart. The Applicant 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 only issue on appeal is whether he merits conditional approval of his request for permission to reapply for admission to the United States in the exercise of discretion.

A. Inadmissibility Under Section 212(a)(6)(B) of the Act

The record reflects that the Applicant entered the United States without inspection in May 1999 under an assumed name, with an individual who claimed to be his father. They were apprehended by border patrol agents and individually served with a Form I-862, Notice to Appear (NTA), which ordered them to appear before an Immigration Judge in [redacted] Texas on [redacted] 1999. The Applicant did not appear for the scheduled court hearing, and the Immigration Judge ordered him removed from the United States *in absentia*.

The Director determined that the Applicant will be inadmissible under section 212(a)(6)(B) of the Act upon departure for failing to attend his removal proceedings without reasonable cause. The Applicant asserts on appeal that he could not have been reasonably expected to comply with the NTA because he was 15 years old and living in New Jersey at the time, and he did not have the capacity to travel to Texas without the consent and support of his family. He claims that because his family refused to travel with him to Texas or change venue, he has established reasonable cause for failing to attend removal proceedings, and his departure will not therefore trigger inadmissibility under section 212(a)(6)(B) of the Act.

We need not determine at this time whether the Applicant has demonstrated reasonable cause for his failure to attend removal proceedings. The record reflects that he has an approved family-based immigrant visa petition and intends to apply for an immigrant visa abroad. Accordingly, the U.S. Department of State (DOS) will make the final determination concerning the Applicant's eligibility for a visa, including whether he is subject to inadmissibility under section 212(a)(6)(B) or any other provisions of the Act. We will therefore address only whether the Applicant has shown that he otherwise merits permission to reapply for admission to the United States in the exercise of discretion.

B. Discretion

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 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.") Generally, favorable factors that came into existence after a foreign national has been ordered removed from the United States ("after-acquired equities") 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 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).

The Director found that the favorable factors in the Applicant's case, which included his marriage to a U.S. citizen, U.S. citizen children, and apparent lack of criminal history, did not outweigh the negative impact of his unlawful entry under an assumed name, failure to attend the removal hearing, and misrepresentation concerning the removal order on a previous application for a provisional waiver of unlawful presence.

The Applicant asserts on appeal that his unlawful entry and removal order occurred almost 20 years ago, when he was a teenager. He now has a family and a strong work history, and has been residing in the United States lawfully for the past several years as the beneficiary of Deferred Action for Childhood Arrivals (DACA). The Applicant further explains that he was not aware of the nature of the proceedings or the *in absentia* removal order and did not intend to misrepresent any facts before USCIS in applying for the provisional waiver.

The record reflects that the Applicant and his spouse have been married since 2013 and have a five-year-old daughter together. The Applicant also has three minor children from previous relationships and a 15-year-old stepson. He states that he is close to his family, his spouse and children rely on his emotional and financial support, and they will be worried if he has to remain in Honduras for a prolonged period because of violence and dangerous conditions in that country. In addition, he claims that his spouse has medical problems, depends on him for help, and will experience psychological and emotional hardship if he is not allowed to return to the United States before the inadmissibility period expires. The Applicant's spouse states that she and the Applicant have been together since 2009, and denial of his request for permission to reapply for admission will have a devastating effect on the whole family, as the Applicant is a loving husband and an excellent father. She states that being apart

from him will cause her a great deal of anxiety and depression and that because of the close relationship the Applicant has with his sons, separation will be extremely stressful and difficult for the children as well. The spouse avers that it will be hard for her to take care of the children without the Applicant's help, and his absence will also negatively affect the family's financial situation. In support of these statements, the record includes the children's birth certificates and school records; tax, financial, medical, and employment documents; child support orders and payments; photographs, letters from family and friends; and DOS travel warning for Honduras.

The tax and related employment documentation shows that the Applicant's spouse makes a little over $27,000 a year, and the Applicant makes $650 weekly (close to $34,000 per year) as a construction worker. Their expenses amount to approximately $3,500 a month. They include rent, insurance, and car payments, as well as the Applicant's child support obligations of $860 a month. The Applicant has also submitted medical records, which indicate that his spouse suffers from hypertension, hyperthyroidism, hyperlipidemia, and anxiety disorder. The Applicant's eldest son states in his letter that the Applicant works hard to provide for him and his brother, spends time with them whenever he can, and supports him and his siblings emotionally. The Applicant's mother and sister describe the Applicant as a loving son and father who is responsible and who takes good care of his family. The Applicant's friends similarly attest that the Applicant is a hard worker, family man, and dependable member of his church and community. The record also indicates that DOS has issued a travel warning for Honduras due to high crime and violent gang activity, which remains in effect at this time.

The favorable factors are the hardships to the Applicant's U.S. citizen spouse and children if the Applicant must stay in Honduras for the entire 10-year inadmissibility period after his departure from the United States. In addition, the preponderance of the evidence indicates that the Applicant is currently employed, his earnings constitute over half of his household income, and he would be unlikely to meet his child support obligations if he remains in Honduras. The Applicant also plays an integral role in his children's lives, and his prolonged absence from the United States would affect them adversely. The record does not reveal any criminal history for the Applicant, except two traffic violations, and the letters from his family and friends attest that he is a hard-working, responsible person of good moral character with strong family and community ties in the United States.

While these factors are "after-acquired equities," we nevertheless find that they are sufficiently meritorious to overcome the negative impact of the Applicant's illegal entry into the United States and the *in absentia* removal order, both of which occurred almost 20 years ago and are mitigated to some degree by his young age at the time. In addition, although the Applicant has been unlawfully present in the United States for many years, USCIS recently granted him benefits under DACA, which include temporary relief from removal and work authorization.

In view of the above, we find that the positive factors in the Applicant's case outweigh the negative ones, and a favorable exercise of discretion is therefore warranted in his case.

ORDER: The appeal is sustained.

Cite as *Matter of A-A-M-P-*, ID# 3792836 (AAO July 8, 2019)