U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
Washington, DC 20529

U.S. Citizenship and Immigration Services

CHEN

FLUSHING NY 11355

DATE: SEPT. 24, 2020

FILE #: A' 087
I-290B RECEIPT #: MSC 19645

IN RE: CHEN

ON BEHALF OF APPLICANT:

ALAN LEE, ESQUIRE
ALAN LEE ATTORNEY AT LAW
408 8TH AVE STE 5A
NEW YORK NY 10001

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Please direct any further inquiries to that office.

Sincerely,

Susan Dibbins
Chief, Administrative Appeals Office (Acting)

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9072079

Date: SEPT. 24, 2020

Appeal of New York, New York District Office (Queens 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. Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

The Director of the New York, New York District Office denied the application, concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. On appeal, the Applicant contends that the Director erred in finding that the negative factors in his case outweighed the positive equities.

The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, as explained below, we will sustain the appeal because the Applicant has met this burden.

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 the United States.[1] He does not contest that he has an outstanding order of deportation and will be inadmissible under section 212(a)(9)(A)(ii) of the Act once he departs.[2]

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

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

[2] The record indicates that on May 1, 1996, the immigration judge granted the Applicant voluntary departure from the United States until February 1, 1997, with an alternate order of deportation. The Applicant filed a motion to reopen with the Immigration Court, which was denied on October 29, 1996. The Applicant did not depart and continues to reside in the United States.

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").

In denying the application, the Director determined that the Applicant's favorable factors, specifically his family ties to the United States, did not outweigh the negative equities. The Director accorded these positive equities less weight because his spouse immigrated to the United States in 2006, subsequent to his 1996 deportation order. The Director also determined that the Applicant did not appear to be eligible for a provisional waiver regarding his unlawful presence in the United States because the record did not establish extreme hardship to his lawful permanent resident spouse.[3] The Director indicated that although the spouse's hardships without the Applicant were considered, their U.S. citizen daughter is expected to provide her with financial and physical support because she filed the immigrant visa petition on her behalf, which included a contract detailing her obligation to financially support the Applicant's spouse. The denial also stated that because the Applicant is unlikely to qualify for a waiver for his unlawful presence, he would likely remain inadmissible even if his Form I-212 were approved.

On appeal, the Applicant contends that the Director erred by failing to appropriately consider and weigh the submitted evidence. He asserts that the Director incorrectly accorded his spouse's claimed hardship less weight because she immigrated to the United States after his 1996 deportation order. The Applicant further contends that the denial only addressed the spouse's financial and physical hardship and did not consider the emotional hardship she would suffer without her spouse of 49 years. In addition, he asserts that the Director erred by speculating on the adjudicative outcome of a future provisional waiver application.

The Director determined that the Applicant's family ties to the United States and the claimed hardships to his spouse are equities that are given less weight because his spouse immigrated to the United States subsequent to his deportation order. We note, however, that relevant case law refers to after-acquired equities as equities that came into existence after a foreign national has been ordered removed from the United States and therefore diminish their weight as favorable factors.[4] Here, the record reflects that the Applicant married his spouse in 1971, 25 years prior to his 1996 deportation order, and their four children were born prior to the deportation order. Thus, the record does not indicate that the

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[3] *See* page 7, *Instructions for I-601A, Application for Provisional Unlawful Presence Waiver*, https://www.uscis.gov/i-601a.

[4] Equities that came into existence after a foreign national 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. *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).

Applicant's family ties are "after-acquired equities" that came into existence after his deportation order.

In addition, while the Director found that it is unlikely the Applicant would establish extreme hardship to his spouse in order to qualify for a provisional waiver, extreme hardship to a qualifying relative is not a requirement for permission to reapply for admission. Further, a provisional waiver application is a separate application for relief, and, pursuant to the regulation at 8 C.F.R. § 212.7(e)(4)(iv), an individual inadmissible under section 212(a)(9)(A) of the Act for having been ordered removed must obtain permission to reapply for admission before applying for a provisional waiver.[5] When considering whether a request for permission to reapply for admission to the United States merits a favorable exercise of discretion, positive factors may include the applicant's respect for law and order, family responsibilities, and hardship to the applicant and other U.S. citizen or lawful permanent resident relatives.[6]

Though the Director listed the favorable factors USCIS considers when determining whether a Form I-212 merits approval as a matter of discretion, the denial did not fully consider evidence of significant positive equities in the record. The record indicates that the Applicant, who has lived in the United States for 30 years, has no apparent criminal history, has paid taxes, and assists community and family members. He states that separation from his wife and family would be devastating and that he worries his spouse's poor health would worsen without his daily physical and emotional support. The Applicant indicates that if he is forced to leave the United States, he fears he can never have his entire family together again, and that he loves his family and will do anything for them. He notes that he provides care for his wife, uses his construction skills to assist friends and neighbors, and helps his son in his restaurant.

Further, the Director did not fully consider evidence of the spouse's claimed hardships. While the denial indicated that the spouse's financial and physical challenges were considered, the Director's conclusion that their U.S. citizen daughter is expected to provide the spouse with financial and physical support does not address the spouse's claimed emotional hardship without the Applicant. For example, the spouse states that the Applicant provides her with constant, loving care; she needs him by her side to provide daily emotional and physical support; and he is always willing to help others, including herself and their children, grandchildren, and neighbors.

The submitted evidence also includes the spouse's medical report and psychological evaluation that indicate she suffers from health conditions, such as hepatitis B, osteoporosis, hypertension, and diabetes, and was diagnosed with anxiety and depression. The spouse notes that she would suffer medical hardship without the Applicant because he does everything he can to keep her healthy and comfortable, including taking her to medical appointments, grocery shopping, and assisting with household chores. Further, the spouse states that she would suffer emotionally if she returned to China

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[5] The Applicant may seek conditional permission to reapply for admission prior to departure, irrespective of whether a waiver under section 212(a)(9)(B)(v) for unlawful presence will be needed after the Applicant departs and regardless of whether he obtains a provisional waiver. *See Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal – Where to File,* https://www.uscis.gov/i-212.

[6] *See* page 14, *Instructions for Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal*, https://www.uscis.gov/i-212.

with the Applicant because she would miss her family members in the United States and she fears returning to the country where she was forcibly sterilized.

In addition, the Director's decision does not consider the submitted evidence regarding the Applicant's claimed hardship to his U.S. citizen and lawful permanent resident children and grandchildren and to himself. The Applicant's U.S. citizen son and grandson submitted affidavits that indicate he assists his ailing spouse and other family members by helping with daily tasks and working in his son's restaurant; that his spouse, children, and grandchildren would be deprived of his love and support if he is denied admission; and that his family members would suffer extreme anxiety because they would worry about the emotional and physical health of the 71-year-old Applicant if he is forced to leave his family behind and return to China.

The negative factors in the Applicant's case include his deportation order and failure to depart the United States and his subsequent unlawful presence and unauthorized employment. However, as stated above, the Applicant has resided in the United States for 30 years, has paid taxes, and does not have a criminal record. In light of his age and his extensive ties to the United States, as well as the hardship to his spouse that would result from long-term separation after nearly 50 years of marriage, we find that the positive equities in his case outweigh the negative factors.

As the record supports a finding that the balancing of the positive equities in this case against the negative factors warrants a favorable exercise of discretion, the Applicant's request for permission to reapply for admission merits approval, and we withdraw the Director's decision.

ORDER: The appeal is sustained.

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ORDER: The appeal is sustained.