U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
5900 Capital Gateway Drive, Mail Stop 2090
Camp Springs, MD 20588-0009

U.S. Citizenship and Immigration Services

LIN

FLUSHING NY 11355

DATE: MAY 06, 2021

FILE #: A028 776 573
I-290B RECEIPT #: AAO 19900 01161

IN RE: LIN (A.K.A. LIN)

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

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5511191

Date: MAY 06, 2021

Appeal of Queens, New York 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 Queens, New York Field Office denied the application as a matter of discretion, finding that the Applicant's favorable factors did not outweigh the unfavorable factors. On appeal, the Applicant submits additional evidence and asserts that the Director misinterpreted relevant facts and the law in weighing equities.

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews the questions in this matter *de novo*. *See 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 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 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) 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.

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 is a native and citizen of China who entered the United States without inspection in August 1992, was placed in deportation proceedings, and was ordered deported *in absentia* by an Immigration Judge in August 1993.[1] The Applicant has not departed the United States and seeks conditional approval of the instant application before departing to seek an immigrant visa at a U.S. consulate abroad as he will be inadmissible upon his departure due to a prior removal order.[2] The issue on appeal is whether the Applicant has established that he merits approval as a matter of discretion.

With the application the Applicant submitted a self-affidavit; an affidavit from his spouse; a psychological evaluation and medical records for his spouse; a death certificate for the couple's newborn child; school records for the couple's son; financial records; letters of support; civil documents; and country conditions information for China. On appeal the Applicant supplements the record with updated affidavits; copies of immigration forms and excerpts from the U.S. Department of State Foreign Affairs Manual; copies of the spouse's passports showing her travel; and death certificates for the spouse's parents in China.

In denying the application, the Director identified the favorable factors as the Applicant's lack of criminal activity; length of residence in the United States, though illegal; immediate family in the United States; employment; good moral character; involvement in the community; payment of taxes and rent; and extreme hardship to his U.S. citizen spouse. The Director then identified the unfavorable factors as the Applicant's unexecuted deportation order and his repeated violations of U.S. immigration law. The Director determined that in December 1992 the Applicant filed an asylum

[1] The Director incorrectly determined that the Applicant was ordered removed under Section 235(b)(1) of the Act, which pertains to expedited removal of certain inadmissible individuals.

[2] Once he departs the Applicant will also be inadmissible under section 212(a)(9)(B) of the Act for accruing unlawful presence in the United States and indicated his intent to file Form I-601A, Application for Provisional Unlawful Presence Waiver.

application claiming he entered the United States in October 1993 and indicated no arrests or detentions, and failed to disclose on the asylum application or during an asylum interview that he entered in August 1992, was detained, and did not attend his hearing. The Director found the Applicant inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to obtain asylum by fraud or misrepresentation and concluded that the Applicant's misrepresentation, unauthorized employment, disregard of deportation proceedings, and deportation order were extremely negative factors.

The Director further determined that the Applicant's favorable factors of family and employment were acquired after he was placed in deportation proceedings,[3] that his spouse had knowledge of his possible removal, and that the claim of extreme hardship to his spouse due to socioeconomic factors in China was greatly diminished because she has made several trips there. The Director concluded that the Applicant's positive factors were not sufficiently meritorious to overcome serious negative factors.

On appeal, the Applicant highlights his positive factors and argues that the Director erred by identifying negative factors of misrepresentation, skipping a court date, and repeated immigration violations. The Applicant asserts that inadmissibility for misrepresentation is not sustainable because it is chronologically illogical, immigration form questions were vague and have since been amended to clear up misunderstandings, and his answers were not material. The Applicant claims that he had no knowledge of his deportation proceedings because his attorney had withdrawn when the Applicant relocated and was granted a change of venue, that notices were sent under the wrong name to where he no longer resided, and that he does not recall providing differing entry information at his asylum interview. The Applicant concedes his ongoing unlawful employment but argues it is not a highly unfavorable factor given his length of residence, employment, and payment of taxes, and that his occupation is not taking away jobs from U.S. workers. He further maintains that he has had no immigration violations since 1996.

The Applicant also contends that the Director failed to mention hardship to his U.S. citizen son and lawful permanent resident parents if the Form I-212 is not granted and erred by giving diminished weight to the hardship his spouse would face because of her trips to China. He refers to his spouse's affidavit where she explains she went to China after the birth of their son and when each of her parents died. The Applicant submits copies of his spouse's passports and her parents' death certificates.

With the application the Applicant submitted an affidavit describing his extended family in the United States and addressing hardship to his spouse and son if they remained in the United States without him or relocated to China with him. In her affidavit the spouse described the Applicant as caring for the home and their son while also working part time, and that their family would be torn apart without him. The Applicant and his spouse asserted that the spouse has a family history of mental health disorders, that the spouse suffers after the death of their newborn child in 2014, and that she depends on the Applicant. In an evaluation of the spouse, a psychologist diagnosed her with major depression, generalized anxiety disorder, post-traumatic stress disorder, avoidant personality disorder, dependent personality traits, and schizoid personality features. The evaluation indicates that the spouse suffered a series of family traumas in China and the death of her second baby after birth, and that the Applicant is the strongest person she relies on. The Applicant and his spouse also asserted that the spouse has a

[3] Legal decisions have established the general principle that less weight is given to equities acquired after a removal order had been entered.

family history of breast cancer and that she has tumors that require follow up medical visits. The Applicant expressed concern for his spouse's access to psychological or medical health care in China.

The Applicant asserted that he has no family in China as his parents and siblings are in the United States, and that he left China at 19 years old because he had no future or freedom. He maintained that he now has no contacts there to find a job, that he has education only through the second year of middle school and his spouse only graduated middle school, and that they would not be entitled to public benefits. The Applicant stated that he fears for his son's education in China where the son does not know the culture and would be leaving his grandparents and other relatives. The spouse stated that she also fears sanitary conditions in China and does not want to give up U.S. citizenship.

In weighing favorable and unfavorable factors the Director identified only the Applicant's immigration violations as negative factors. 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 the Applicant's eligibility for permission to reapply for admission.

The Director found the Applicant inadmissible for misrepresentation, which the Applicant contests on appeal. As the Applicant indicated that he intends to depart the United States and apply for an immigrant visa based on a petition filed by his U.S. citizen spouse and is not currently seeking admission, so we need not determine at this time whether he is inadmissible under section 212(a)(6)(C)(i) of the Act. The U.S. Department of State would determine the Applicant's eligibility for a visa and direct him to file a Form I-601, Application for Waiver of Grounds of Inadmissibility, if required. Although the Director also determined the Applicant's final order of removal as a negative factor, having a final order of removal is prerequisite to seeking permission to reapply for admission and thus should not constitute a negative factor against a favorable exercise of discretion. The Director also weighed negatively the Applicant's unlawful employment, although also conceding as positive factors the Applicant's employment and payment of taxes. The Director does not appear to have weighed favorably the Applicant's employment and multiple years of tax filing.

While hardship to the Applicant's spouse and son are "after-acquired equities," neither the Act nor case law indicates that for hardships to be fully considered as positive factors in a discretionary context they must reach a level of hardship. Here the Director acknowledged extreme hardship to the spouse, but then accorded it diminished weight due to her visits to China. The decision therefore does not appear to fully address the evidence submitted about hardship to the Applicant's family, particularly in view of the psychological evaluation of the spouse, and how it affects the weighing of positive and negative factors.

Moreover, the Director erred by not considering other significant favorable factors including hardship the Applicant would experience in China where he left nearly 30 years ago at 19 years of age, could face difficulty finding employment or other support, and would be separated from his immediate family. When considering whether the Applicant's request for permission to reapply for admission to the United States merits a favorable exercise of discretion, positive factors may include hardship to the Applicant as well as his respect for law and order, good moral character, family responsibilities, and his likelihood of becoming a lawful permanent resident.

While the Director referenced the Applicant's family, employment and paying taxes, the denial did not fully evaluate the evidence of those favorable factors. In light of the deficiencies noted above, we find it appropriate to remand the matter to the Director to review the positive and negative factors in the record 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.