U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21500538

Date: APR. 19, 2022

Motion on Administrative Appeals Office Decision

Form I-485, Application for Adjustment of Status of a U Nonimmigrant

The Applicant seeks to become a lawful permanent resident (LPR) under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m), based on his "U" nonimmigrant status as a victim of qualifying criminal activity. The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), we dismissed a subsequent appeal, and the matter is now before us on a motion to reopen and a motion to reconsider. Upon review, we will dismiss the motions.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if they meet all other eligibility requirements and, "in the opinion" of USCIS, their "continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest." Section 245(m) of the Act. The applicant bears the burden of establishing their eligibility, section 291 of the Act, 8 U.S.C. § 1361, and must do so by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This burden includes establishing that discretion should be exercised in their favor, and USCIS may take into account all relevant factors in making its discretionary determination. 8 C.F.R. §§ 245.24(b)(6), (d)(11).

A favorable exercise of discretion to grant an applicant adjustment of status to that of an LPR is generally warranted in the absence of adverse factors and presence of favorable factors. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Favorable factors include, but are not limited to, family unity, length of residence in the United States, employment, community involvement, and good moral character. *Id.*; *see also* 7 *USCIS Policy Manual* A.10(B)(2), https://www.uscis.gov/policy-manual (providing guidance regarding adjudicative factors to consider in discretionary adjustment of status determinations). However, where adverse factors are present, the applicant may submit evidence establishing mitigating equities. *See* 8 C.F.R. § 245.24(d)(11) (providing that, "[w]here adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate").

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). The motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The Applicant was granted U-1 status from October 2013 through September 2017. He timely filed his U adjustment application in December 2016, which the Director denied in July 2020 determining that the positive and mitigating equities in the Applicant's case were outweighed by the adverse factors. As a result, the Director concluded the Applicant did not establish that he warranted adjustment of status to that of an LPR as a matter of discretion.

In the decision dismissing the Applicant's appeal, we determined that he did not overcome the Director's determination. Specifically, we considered the Applicant's positive and mitigating equities, including his residence in the United States as well as his work history, payment of taxes for multiple years, family ties in the country, compliance with court ordered conditions, victimization and assistance to law enforcement, and his efforts to abstain from alcohol. However, we determined that such equities were outweighed by the recency and serious nature of the Applicant's criminal history.

The Applicant filed this motion to reopen and reconsider that decision. On motion, the Applicant claims he is rehabilitated as it relates to alcohol, his domestic assault charge was dismissed, he has demonstrated good moral character, and that we did not afford sufficient evidentiary weight to the positive and mitigating factors in his case. As discussed below, although the Applicant has submitted additional evidence with his motion, such evidence is not sufficient to demonstrate his eligibility for the benefit sought. Likewise, the Applicant has not established that our prior decision was based on an error of law or policy, or was otherwise incorrect based on the record at the time of the decision.

On motion, the Applicant first claims that he is rehabilitated from his alcohol use and that we erred in determining otherwise. In support, he submits a new assessment and additional statements from himself and others. As it relates to the assessments, the applicant underwent two Rule 25 Assessments to evaluate any present chemical dependency issues. At his 2017 assessment, the Applicant received a recommendation for a one-day alcohol related program that he completed. In the assessment performed in November 2021, he was classified as "non chemically dependent," and the evaluator did not find that he required any further treatments. The Applicant notes that this was an improvement and the determination that he is not dependent on alcohol, coupled with no alcohol related incidents in six years, speaks to his rehabilitation and should result in a favorable exercise of discretion. The Applicant notes that his alcohol related driving incidents spanned a six-year period, with his most recent event occurring in 2015. He further notes that he has not had any further incidents, he sought two alcohol assessments, and he has attended alcohol related programs.

In our prior decision, we acknowledged and considered evidence in the record of the Applicant's rehabilitative efforts and the progress he has made overcoming his problems with alcohol. We again

acknowledge and consider as a positive and mitigating equity the Applicant's continued efforts to rehabilitate himself from his issues with alcohol, as evidenced by the updated documentation submitted on motion. Nonetheless, the Applicant's efforts do not overcome the serious nature of his recidivist criminal history. In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, recency, and seriousness" of the relevant offenses. *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978).

In this case, a review of the evidence indicates that the Applicant has three separate driving while impaired (DWI) arrests and convictions. DWI is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of our discretion. *See Matter of Siniauskas*, 27 I&N Dec. 207, 209 (BIA 2018) (finding that a driving under the influence (DUI) charge to be a significant adverse consideration in determining a respondent's danger to the community); *Matter of Castillo-Perez*, 27 I&N Dec. 664, 666, 671 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI" and concluding that evidence of two or more DUI convictions establishes a rebuttable presumption that an individual lacks good moral character under section 101(f) of the Act). Given the seriousness and repeated nature of the Applicant's DWI arrests and convictions, his criminal history is a serious adverse factor and demonstrates a disregard for U.S. criminal laws and the well-being of others in his community.

Moreover, after his first incidents involving DWIs and after completing court-ordered rehabilitative treatments, the Applicant engaged in the same or similar criminal behavior and was again arrested and convicted for DWI in 2015. Moreover, the offense occurred during the time he held U nonimmigrant status. The fact that the Applicant is a repeat offender and committed one of these crimes while he maintained U nonimmigrant status are additional adverse factors to be considered when determining whether to exercise favorable discretion in his case.

The Applicant next asserts that the 2019 domestic violence charges against him should be afforded minimal weight because the charges were dismissed and there are conflicting police reports in the record. In support, the Applicant submits several documents, including the conflicting police reports, law enforcement records, court records, and a statement from his girlfriend, S-G-.[1] This evidence reflects, *inter alia*, that all charges against the Applicant stemming from the incident were dropped per S-G-'s urging and that the Applicant and S-G- have since reconciled.[2]

We acknowledge that the Applicant was not convicted of any domestic violence charges stemming from the 2019 incident. However, the fact that the Applicant was not convicted of the charges does not equate with a finding that the offense or associated behavior in question did not, in fact, occur and USCIS may consider behavior and criminal conduct that does not result in a conviction. *See* 8 C.F.R. § 245.24(d)(11) (providing that USCIS "will generally not exercise its discretion favorably in cases where the applicant has *committed* or been convicted of" various offenses) (emphasis added); *see also Matter of Thomas*, 21 I&N Dec. 20, 23–24 (BIA 1995) (holding that evidence of criminal conduct that

[1] We use initials to protect the privacy of individuals.

[2] On motion, the Applicant submits an order from the court dated approximately a month and a half after the incident. The order indicates that S-G- appeared in court and sought to dismiss the Order for Protection because she felt safe and that such an order was no longer needed. The court order further reflects that S-G- reported that she was not being threatened or coerced into dismissing the order.

has not culminated in a final conviction may nonetheless be considered in discretionary determinations).

We also acknowledge that the police reports in the record are conflicting as to the victim; one police report lists S-G- as the victim and indicates that, during a domestic dispute, the Applicant assaulted and strangled S-G- several times, resulting in bruises, scratches, and red marks around her neck area. The other report lists the Applicant as the victim and indicates he suffered minor injuries. Nonetheless, the Applicant does not allege that the contents of the reports are inaccurate, and nothing precludes us from considering otherwise reliable police records and arrests in our exercise of discretion. *See Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988) ("[T]he admission into the record of . . . information contained in the police reports is especially appropriate in cases involving discretionary relief . . . , where all relevant factors . . . should be considered to determine whether an [applicant] warrants a favorable exercise of discretion."); *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) (citing to *Grijalva*, 19 I&N Dec. at 722 and *Thomas*, 21 I&N Dec. at 23–24, in finding that consideration of police records and arrests in making a determination as to whether discretion should be favorably exercised was permissible).

Considering the foregoing, evidence in the record suggests that while he maintained U nonimmigrant status, the Applicant was involved in a domestic dispute with his girlfriend, during which he assaulted and strangled her. The Applicant's conduct concerns the very type of behavior that U nonimmigrant status seeks to protect against. *See* section 101(a)(15)(U)(iii) of the Act and 8 C.F.R. § 214.14(a)(9) (including, as qualifying criminal activity, "domestic violence"); *see also* Interim Rule, *New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53015 (Sept. 17, 2007) ("In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence... while offering protection to victims of such crimes."). As such, even though the Applicant was not convicted for this criminal behavior, and evidence in the record reflects that he and his girlfriend have reconciled, the Applicant's 2019 arrest for domestic violence is a serious adverse factor weighing against a favorable exercise of discretion and the Applicant's arguments on motion do not establish any error of law or policy in that determination.

The Applicant also notes on motion that he sends regular wire transfers to his daughter in Ecuador and that this should be considered as an additional positive equity in our exercise of discretion. He argues generally that the positive and mitigating equities in his case outweigh the adverse factors, and that his continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest such that he warrants a favorable exercise of our discretion to adjust his status to that of an LPR.

We again acknowledge and consider the Applicant's positive and mitigating equities, including his lengthy residence, history of work and paying taxes, family ties, and his efforts to resolve his alcohol-related issues. However, our prior decision fully considered the Applicant's positive and mitigating equities in determining that a favorable exercise of discretion was not warranted considering the recency and serious nature of his criminal history. The Applicant's arguments on motion do not demonstrate any error in that decision. Moreover, the Applicant's new evidence on motion does not alter that determination or otherwise establish his eligibility for adjustment of status.

Based on the foregoing, the Applicant has not submitted additional evidence with his motion that is sufficient to establish by a preponderance of the evidence eligibility for the benefit sought. Further, the Applicant has not established that our prior decision was based on an error of law or policy, or was otherwise incorrect based on the record at the time of the decision. As such, the Applicant has not met the requirements for either a motion to reopen or motion to reconsider.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.