U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22271473

Date: JULY 11, 2022

Service Motion on Administrative Appeals Office Decision

Form I-485, Application for Adjustment of Status of 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. The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), as a matter of discretion, concluding that the positive equities did not outweigh the negative factors in the case. The Applicant appealed. We dismissed the Applicant's appeal, concurring with the Director's adverse determination. Thereafter, the Applicant filed a combined motion to reopen and reconsider, which we dismissed as untimely.

We subsequently reopened the Petitioner's combined motion to reopen and reconsider, and provided the Petitioner the opportunity to submit a brief. *See* 8 C.F.R. § 103.5(a)(5)(ii) ("When a Service officer, on his or her own motion, reopens a . . . proceeding . . . and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief.") Upon review of the record in its entirety, we withdraw our prior decision and remand the matter to the Director for the issuance of a new decision.

I. LAW

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of the law or U.S. Citizenship and Immigration Services (USCIS) policy and that the decision was incorrect based on the evidence in the record as the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

In addition, 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. Implementing regulations require a U adjustment applicant to establish that he was "lawfully admitted to the United States" as a U nonimmigrant, that he "continues to hold such status at the time of application," and that his "presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest." 8 C.F.R. § 245.24(b)(2)(i), (b)(2)(ii), (b)(6). A U adjustment applicant continues to hold U nonimmigrant status during the

pendency of a U adjustment application under section 245(m) of the Act. Section 214(p)(6) 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 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 adjustment of status discretionary determinations). However, where adverse factors are present, the applicant may submit evidence establishing mitigating equities. *See* 8 C.F.R. § 245.24(d)(11) (stating 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").

II. ANALYSIS

The Applicant, a native and citizen of Mexico, was granted U nonimmigrant status from October 2015 to September 2018, and timely filed his U adjustment application in February 2018. The Director denied the application, finding that the Applicant did not submit sufficient evidence to establish that a favorable exercise of discretion was warranted. The Applicant filed an appeal, which was dismissed on January 12, 2021. Thereafter, the Applicant filed a combined motion to reopen and reconsider on March 15, 2021, and it was rejected on April 2, 2021, for indicating more than one receipt number on the Form I-290B, Notice of Appeal of Motion (Form I-290B). He then refiled his combined motion to reopen and reconsider on April 16, 2021, which was dismissed as untimely on September 27, 2021. *See* 8 C.F.R. §§ 103.5(a)(1)(i) and 103.8(b) (providing that motions must generally be filed within 33 days of the adverse decision).[1]

A. Untimely Filing of Motion to Reopen and Reconsider

Upon review, we note that the regulations do not mandate motion rejection based upon the erroneous listing of two receipt numbers on the Form I-290B. *See* 8 C.F.R. § 103.2(a)(7)(ii) (providing reasons

[1] In response to the coronavirus (COVID-19) pandemic, USCIS extended filing deadlines associated with the Form I-290B. If USCIS issued the decision between March 1, 2020, and October 31, 2021—as here—an applicant may file a Form I-290B within 60 calendar days from the date of the adverse decision, with three days added for service by mail pursuant to 8 C.F.R. § 103.8(b). *See* "USCIS Extends Flexibility for Responding to Agency Requests," (Dec. 30, 2021), https://www.uscis.gov/newsroom/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-0. The Applicants initial Form I-290B was received 62 days after the issuance of our decision on appeal and rejected. The Applicant's subsequent Form I-290B was accepted for filing 94 days after the issuance of our decision.

for rejecting a benefit request). Furthermore, the Form I-290B instructions do not indicate that the Form I-290B will be rejected for listing multiple receipt numbers. *See generally* Form I-290B, Instructions for Notice of Appeal or Motion (Dec. 2019 ed.). Accordingly, the Applicant's initial motion was timely filed and erroneously rejected. Thus, we consider the Applicant's motion to reopen and reconsider on the merits.

B. Motion to Reopen and Reconsider

1. A Favorable Exercise of Discretion is Warranted on Humanitarian Grounds, to Ensure Family Unity, or Otherwise in the Public Interest

As noted, the Director denied the Applicant's U adjustment application, finding that he did not submit sufficient evidence to establish that he warranted adjustment of status to that of an LPR as a matter of discretion. The Director acknowledged the positive and mitigating equities present in the Applicant's case: his lengthy residence; his family ties in the country, including his two U.S. citizen children and LPR spouse and stepchild; his past victimization; and his assistance to law enforcement and need for ongoing treatment as a result of the victimization. However, the Director noted that the Applicant was arrested and charged with assault in [redacted] 2007 and leaving the scene of a collision/criminal mischief in [redacted] 2012. In addition, the Director highlighted that the Applicant had an unresolved 2011 pending charge for criminal mischief. The Director acknowledged the submission of motions to dismiss associated with the Applicant's [redacted] 2007 and [redacted] 2012 charges, as well as the Applicant's statement, but highlighted that the record did not contain police reports or other evidence sufficiently explaining the specific circumstances that gave rise to each arrest. In the absence of evidence such as police reports, the Director concluded that she did not have all of the evidence necessary to determine the Applicant's eligibility for a discretionary benefit.

On appeal, the Applicant argued that the Director gave disproportionate weight to his three arrests. In addition, the Applicant contended that police reports are inherently unreliable and untrustworthy and therefore again did not provide them. We dismissed the Applicant's appeal, concurring with the Director's adverse determination. We acknowledged the Applicant's positive and mitigating equities, but highlighted that, due to the Applicant's criminal history, the lack of information regarding the underlying circumstances of his arrests prevented us from fully understanding the risk he poses to public safety and the extent to which he has rehabilitated.

On motion, the Applicant submits the requested police reports for his arrests in 2007 for assault, 2011 for criminal mischief, and 2012 for leaving the scene of a collision/criminal mischief. As the Applicant has submitted new evidence directly related to the grounds for our dismissal of his appeal, we will grant the motion to reopen. We further will remand the matter to the Director for the issuance of a new decision and reconsideration of whether the Applicant has met his burden of establishing that a favorable exercise of discretion is warranted.

2. The Applicant was Lawfully Admitted

In the decision, the Director also found that at the time the Applicant filed his Form I-918, Petition for U Nonimmigrant Status, he was inadmissible to the United States under sections 212(a)(9)(C)(i)(I) (unlawful presence for more than one year and subsequent attempt to enter or actual entry without

inspection) and 212(a)(9)(B)(i)(II) (unlawful presence for more than one year and again seeks admission within 10 years) of the Act, and that he failed to request a waiver of these grounds of inadmissibility when he filed his Form I-192, Application for Advance Permission to Enter as Nonimmigrant, which, as a result, appeared to have been approved in error. The Director concluded the Applicant was statutorily ineligible to adjust his status to that of an LPR and denied the application accordingly. On appeal and on motion, the Applicant argues that sections 212(a)(9)(C)(i)(I) and 212(a)(9)(B)(i)(II) of the Act do not apply and the Director erred in this determination.

The record shows that the Applicant entered the United States without inspection in 2000, stayed for an undefined period of time, then returned to Mexico. In 2002, he was admitted to the United States in H-2B status and overstayed. Upon review of the record, we observe that the Applicant did not attempt or actually enter the United States without inspection as he last entered the United States in H-2B status and, therefore, section 212(a)(9)(C)(i)(I) of the Act does not apply in this matter. Moreover, we find that the Applicant fully disclosed his immigration history, including his unlawful presence and overstay, in his Forms I-918 and I-192, and the record does not support a finding that he failed to request a waiver for his unlawful presence or that the Form I-192 was approved in error. Based on the foregoing, we will withdraw the Director's decision and remand the matter to the Director.

ORDER: The motion to reopen is granted, and the matter is remanded for the entry of a new decision consistent with the foregoing analysis.