U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21982937

Date: JUL. 28, 2022

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 derivative "U" nonimmigrant status. The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application). We dismissed the Applicant's subsequent appeal. The matter is now before us as a combined motion to reopen and 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"). If an applicant has a criminal record, we consider multiple factors in our exercise of discretion, including the "nature, recency, and seriousness" of the crimes. Matter of Marin, 16 I&N Dec. 581, 584-85 (BIA 1978).

A motion to reopen must state new facts to be proved 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; be supported by any pertinent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

A. Facts and Procedural History

The Applicant, a native and citizen of Mexico, was granted derivative U nonimmigrant status and filed his U adjustment application in January 2017. On his adjustment application the Applicant indicated that he had been arrested in 2015. The Director issued a request for evidence (RFE) for additional information pertaining to his 2015 arrest and supporting a favorable exercise of discretion. In response to the RFE, the Applicant provided the 2015 incident report, indicating he was arrested pursuant to section 273d(a) of the California Penal Code (Cal. Penal Code) for the felony offense of corporal punishment or injury of child. Cal. Penal Code § 273d (West 2015). The incident report identified the victim, K-E-,[1] as an 11-year-old child. The Applicant's daughter, age 8, and son, age 9, and two other children, both age 9, were identified as witnesses. According to the narrative portion of the incident report, K-E- told the officer that the Applicant punched him in the face with a closed fist. The officer noted that K-E- had "blood running down his chin and his lip was swollen." According to the report, the Applicant told the officer that he repeatedly requested that K-E- return a ball they were playing with and when K-E- refused, he made a gesture with his hands but K-E- "was standing to his right, and he accidentally hit him in the face with the back of his right, open hand." The officer described the Applicant's right hand, stating he "saw redness and a cut on his upper knuckles, extending onto the top of his hand."[2] The Applicant's son and daughter described similarly how the injury happened: the Applicant hit K-E- accidentally with the back of his open right hand. One other witness described the Applicant as "very mad" and said he "hit [K-E-] in the face . . . not on accident" and the fourth witness stated the Applicant punched K-E- with a closed fist. The officer stated that based on the evidence before him, he arrested the Applicant. In the incident report, the officer also summarized the "9-1-1 call" placed by Applicant's wife, who stated, "these kids they drove my husband so crazy so my husband slapped him," "my husband slapped the kid because the kid was fooling with us," and "he don't like that the kid sticking out the middle finger." According to the court records submitted in response to the RFE, the prosecutor filed charges and the Applicant pled not guilty. The criminal complaint was amended to include section 242 of the Cal. Penal Code, the misdemeanor charge of battery, and the Applicant pled guilty to the battery charge. Cal. Penal Code § 242 (West 2015). In his 2017 declaration, submitted in support of his U adjustment application, the Applicant explained that although he hit K-E- unintentionally, he pled guilty after his attorney explained to him it was his actions that mattered, not his intent. The Applicant also included a letter by his criminal attorney stating that the charges were "blown out of proportion" and while the prosecutor and judge agreed with him, the case proceeded because the charges involved a child.

[1] Initials are used to protect the identities of the individuals.

[2] According to the incident report, the evidence included photographs of the Applicant's and K-E-'s injuries. A photograph of the injury to K-E-'s mouth, evidencing a swollen and cut lip, was included in motions to the Director.

In June 2018, the Director denied the adjustment application. The Director acknowledged positive and mitigating equities, including the Applicant's remorse at the harm he inflicted, the trauma the Applicant suffered as a result of the harm to his child,[3] the country conditions in Mexico, his residence in the United States since 2005, his employment and support of his four U.S. citizen children, and letters from his community attesting to his good moral character. However, the Director found these equities did not overcome the serious nature of a crime involving harm to a child, and that the Applicant was sentenced to community service, anger management classes and 36 months of probation, ending in [redacted] 2019. The Director also considered that the Applicant entered the United States with fraudulent documents after being previously removed.[4] As a result, the Director determined that the Applicant had not met his burden to establish that he warranted adjustment of status to that of an LPR as a matter of discretion.

In our de novo review, we dismissed the Applicant's appeal concluding that the adverse factors outweighed the positive and mitigating equities such that the Applicant had not established by a preponderance of the evidence that his continued presence in the United States was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest. We acknowledged additional positive and mitigating equities, such as the Applicant's payment of taxes, his family ties, and concerns regarding his children's health and his ability to support his family in Mexico. However, we explained that the Applicant's offense occurred within the last five years, during the time he held derivative U nonimmigrant status, and that his statements that the offense was an accident were inconsistent with the record. On motion, the Applicant includes a supplemental report by the [redacted] Sheriff's Department which he asserts corroborates his account of what occurred on the day of his arrest. He also asserts that we erred by placing too much weight on the incident report.

B. Motion to Reopen

We first consider the Applicant's motion to reopen and conclude he has not submitted new facts establishing his eligibility for the benefit sought, as required under 8 C.F.R. § 103.5(a)(2).

The supplemental report submitted is authored by a different officer and describes testimony obtained by the officer from other witnesses. The report adds, in relevant part, that the two witnesses who stated the Applicant hit K-E- intentionally were K-E-'s friend and cousin, that the Applicant and K-E- had previous confrontational interactions, allegedly resorting to name calling and use of racial slurs, and that on the day of the incident K-E- had made inappropriate gestures toward the Applicant and his children. The report also contains statements by two neighbors who did not witness the incident but had positive things to say about the Applicant. While we acknowledge the additional information and opinions of the Applicant's neighbors, their statements do not support that the Applicant accidentally hit K-E-. Nor do the new facts address discrepancies with the Applicant's testimony, i.e., the Applicant's knuckle was red and cut, K-E-was bleeding from the force of the blow. Moreover, the new facts do not overcome that the officer weighed the evidence and decided to arrest

[3] The Applicant's derivative U nonimmigrant status was based on the sexual assault of his minor child.

[4] The Applicant filed two combined motions to reopen and reconsider. One motion was rejected, then dismissed as untimely filed and the subsequent motion was also dismissed but the Director addressed the motion to reopen on substantive grounds, concluding the documents submitted did not present new facts overcoming the reasons for the denial.

the Applicant, the district attorney decided to prosecute the Applicant for corporal punishment or injury of a child, and the Applicant's wife acknowledged in her statements to the police that the Applicant slapped K-E-. While the Applicant's wife was not a witness to the incident, she was aware of some facts prior to calling the police, including that the children's behavior was affecting the Applicant and that K-E- had inappropriately gestured at the Applicant's family, and she did not claim the offense was an accident. The remaining evidence submitted on motion further supports the positive equities that we have already considered, i.e., the hardship his family would face if he returned to Mexico and his good moral character.[5] The remaining newly submitted evidence, therefore, does not provide sufficient facts to overcome our prior determination that the Applicant does not warrant a favorable exercise of discretion.

C. Motion to Reconsider

We now turn to the Applicant's motion to reconsider and conclude he has not established that the decision dismissing his appeal was based on an incorrect application of law or policy or was incorrect based on the evidence in the record at the time of the decision, as required under 8 C.F.R. § 103.5(a)(3).

The Applicant asserts that we erred by placing too much weight on the incident report and cites to legal decisions in which police reports were found to be unreliable. The Applicant does not dispute the incident report, other than the statements by the witnesses and victim that he intentionally hit K-E-. We considered these discrepancies but also gave weight to parts of the report that were corroborated by the record.[6] We noted that the officer saw blood running down K-E-'s chin, which was supported by the photograph in the record evidencing K-E-'s swollen and injured lip. While the Applicant asserts that the photograph does not show blood, we are aware that photographs capture moments in time and may not have been taken upon the officer's arrival on scene. Of note is that the Applicant does not contest that K-E-'s mouth was bleeding, just that the photograph does not show it. In addition, evidence in the record reflects that the Applicant's hand was red and there was a cut to his upper knuckles. Further, the Applicant's wife's recorded statements to the police do not speak to the incident being an accident. For this reason, the Applicant has not established that we gave substantial weight to the police report and that our decision was incorrect based on the evidence in the record at the time of the decision. We further note that the Applicant has provided on motion a supplemental police report that he believes we should give significant weight and overturn our decision on appeal. However, for the reasons described above, we do not conclude that the supplemental report provides sufficient facts to overcome our prior determination.

The Applicant also asserts that the offense was not severe and we erred by not looking at the overall injury to K-E-, the length of his sentence and that this is the Applicant's only criminal transgression. However, the Applicant does not assert error in our analysis of the nature and recency of the offense and has not established that the offense was not serious. The Applicant states that K-E- refused

[5] While we may not refer to each exhibit submitted, we have reviewed and considered the evidence presented on motion in its entirety.

[6] For police reports to be given substantial weight they should be corroborated by the record, and we are not precluded from considering otherwise reliable police records and arrests in our exercise of discretion. See Matter of Teixeira, 21 I&N Dec. 316, 321 (BIA 1996) (citing to Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988) and Matter of Thomas, 21 I&N Dec. 20 (BIA 1995)) (finding that we may look to police records and arrests in making a determination as to whether discretion should be favorably exercised).

medical treatment and that his injuries did not appear severe in the photograph. However, the record indicates that the Applicant struck an 11-year-old child in the mouth, an offense to which the court imposed a sentence of community service, 36 months of probation, and anger management classes. The Applicant further asserts that he was not sentenced to jail time, which courts have considered in balancing whether a noncitizen is eligible for waiver. However, the cases cited by the Applicant do not state that sentence length is a mandatory positive factor to consider in the U adjustment context. With this said, the Director considered the Applicant's sentencing and we found no error in the Director's decision on appeal. The Applicant also asserts that we erred by concluding one crime outweighed the positive factors in his case. However, as discussed above, our analysis also considered the nature and recency of the offense, which involved a crime against a child, occurring during the period of time the Applicant held U nonimmigrant status, and two years prior to the filing of his adjustment application. Criminal counsel for the Applicant, while opining that the charges were overblown, acknowledged that the judge and prosecutor were concerned that the offense involved a child. Further, as both the Director and our appeal decision highlights, violent behavior against a child, given the vulnerability of children, is serious and severe in nature. The Applicant therefore has not established that our prior decision incorrectly applied pertinent law or agency policy. 8 C.F.R. § 103.5(a)(3). He also has not established that our prior decision was incorrect based on the evidence of record at the time of the initial decision and did not cite to binding precedent decisions or other legal authority establishing error in our prior decision. Id.

III. CONCLUSION

The evidence and arguments submitted on motion do not overcome our determination that the Applicant's continued presence in the United States is not 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.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.