U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17929785

Date: MAR. 22, 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 her "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 her subsequent appeal, concurring with the Director's adverse determination. The matter is now before us on a motion to reopen and reconsider. Upon review, we will remand the matter to the Director for the issuance of a new decision.

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 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").

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).

II. ANALYSIS

The Applicant, a native and citizen of Mexico, entered the United States without inspection, admission, or parole in 1989. The Applicant was granted U nonimmigrant status from October 2014 until September 2018, and timely filed the instant U adjustment application in August 2018. The Director denied the U adjustment application, determining that the Applicant had not demonstrated that her adjustment of status to LPR was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest because the adverse factors, particularly the lack of requested evidence surrounding the circumstances of two arrests, outweighed the positive factors in the case. Specifically, in 2004, Applicant was charged with the following violations of the New York Penal Law (N.Y. Penal Law): section 120.05, Assault in the second degree (a class D felony); section 265.01, Criminal possession of a weapon in the fourth degree (a class A misdemeanor); section 120.14, Menacing in the second degree (a class A misdemeanor); section 240.26, Harassment in the second degree (a "violation" meaning an offense, other than a traffic infraction for which a sentence to a term of imprisonment may not exceed 15 days); and a local law violation for possession of knives or instruments. The record shows that the Applicant was incarcerated for 19 days following the arrest. In 2005, the charges were dismissed, and the record was sealed pursuant to section 170.55 of the New York Criminal Procedure Law (N.Y. Crim. Proc. Law). In [redacted] 2014, while the Applicant was on the waiting list for U nonimmigrant status, she was arrested for violating N.Y. Penal Code sections 120.14, Menacing in the second degree (a class A misdemeanor), and 240.26, Harassment in the second degree (a violation). The record shows that in August 2015, the charges were dismissed, and the record was sealed pursuant to N.Y. Crim. Proc. Law section 170.55.

We dismissed the Applicant's subsequent appeal, determining that the Applicant did not provide sufficient information or documentation to allow us to properly and fully consider the basis for and specific facts surrounding her 2004 and 2014 arrests (e.g., the arrest reports). The Applicant then filed a motion to reopen and reconsider. On motion, counsel for the Applicant asserts that the Applicant "described the efforts she took to obtain the full arrest record" but was ultimately not able to obtain the full reports and that we should not hold this fact this against her in our discretionary weighing of the positive and mitigating equities and adverse factors present in her case. She further reiterates that, as articulated in her statements, her 2004 arrest involved an act of self-defense against, and the accusations of, her former abusive partner, her [redacted] 2014 arrest involved false accusations against her, and all charges associated with both arrests were ultimately dismissed. In response to a Notice of Intent to Deny (NOID), the Applicant further provides documentation regarding her 2004 arrest, results of a New York State (NYS) Division of Criminal Justice Services record search, a declaration from the Applicant explaining her efforts to obtain the arrest records, affirmations from her attorneys attesting to her efforts, and an email from the police department responsible for her arrest. The documentation indicates that there is no criminal history information for the Applicant in the NYS Division of Criminal Justice Services record and that the Applicant tried to obtain her arrest records, but the police department told her that they cannot provide documents where the client was the named

defendant. Because this evidence is material to the Director's ground for denial of the Applicant's U adjustment application, we will remand the matter to the Director to redetermine whether she has established that a favorable exercise of discretion is warranted and otherwise established her eligibility to adjust status to that of an LPR under section 245(m) of the Act.

ORDER: The decision of the Director is withdrawn. The matter is remanded to the Director for the issuance of a new decision consistent with the foregoing analysis.