U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19043927

Date: MAY 03, 2022

Motion on an Administrative Appeals Office Decision

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

The Applicant seeks to become a lawful permanent resident (LPR) based on his "U" nonimmigrant status as a victim of qualifying criminal activity under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), finding that the Applicant did not show adjustment of status was warranted on humanitarian grounds, to ensure family unity, or is otherwise in the public interest and thus, did not establish he should be granted a favorable exercise of discretion. We dismissed the Applicant's subsequent appeal. The matter is now before us on a motion to reopen and reconsider. Upon review, we will dismiss the motion.

I. PROCEDURAL HISTORY

In our previous decision on appeal, which we incorporate herein, we affirmed the Director's decision, finding that the positive and negative factors in the Applicant's case were properly assessed. Similar to the Director, we concluded that there was insufficient evidence in the record to allow us to fully consider the negative factors in the Applicant's case, specifically, events surrounding his 2017 arrest and the charges that followed, thus we were unable to ascertain whether the positive factors outweighed the negative.

To summarize further, the 2017 arrest in question resulted from an incident involving the Applicant's mother and 13-year-old daughter. As a result of this interaction, police charged the Applicant with the following: acting in a manner injuring a child, assault with intent to cause physical harm, and harassment with physical contact. The record indicates that these charges were dismissed by the prosecutor at the request of the Applicant's mother and the record was sealed by the court. On appeal, we acknowledged that the disposition for the case showed the charges against the Applicant were dismissed and the record sealed pursuant to section 160.50 of New York Criminal Procedure Law (CPL), however, section 160.50 also authorized the Applicant to access any available records behind his arrest. The Applicant had not submitted these records or evidence demonstrating that he attempted but was unable to procure these records. In addition, we found that statements from the Applicant's mother and daughter provided discrepant information about events leading to his arrest and otherwise offered little detail of what took place prior to police arriving, interactions with police officers, and

subsequent discussions with prosecutors that lead to a dismissal of charges. Notably, our previous decision clearly outlined the legal parameters by which an arrest record, absent a conviction, can be considered in a discretionary analysis. *See* sections 245(m) and 291 of the Act; 8 C.F.R. § 245.24(d)(11); *See Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996); *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995).

On motion to reopen, the Applicant submits a new statement where he details his second unsuccessful attempt to obtain his sealed criminal records and provides additional information regarding the 2017 arrest. He also submits updated statements from his mother and daughter. In regard to the motion to reconsider, the Applicant asserts that our office ignored governing case law that weighs in his favor and wrongfully used on *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) and *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) to justify our reliance on an arrest record when the court dismissed the charges and sealed the criminal record in the furtherance of justice, demonstrating that the information contained in the arrest report had no probative value. The Applicant contends that we should instead rely on *Padmore v. Holder*, 609 F3d 62, 69-70 (2d. Circuit 2010), where the Second Circuit Court of Appeals confirmed that arrest reports could be admitted as part of the record but could not be used as the basis for a discretionary denial on the assumption that the facts contained therein were true. Finally, the Applicant asserts that we erroneously failed to consider two unpublished decisions from the Board of Immigration Appeals; did not consider that section 160.60 of the CPL indicates that when a criminal record is sealed the defendant shall not be required to divulge such information; and did not engage in a full weighing of the positive and negative factors in his case.

II. ANALYSIS

Upon review of the entire record, we will affirm our previous decision. In his prior filings, the Applicant provided evidence demonstrating the positive factors in his case, including, but not limited to, his record of employment, family ties in the United States, and care for his daughter. However, the record also includes evidence of negative factors including two convictions for driving under the influence (in 2000 and 2006) and his 2017 arrest. We recognize that the two convictions occurred 16 and 22 years ago, thus the most significant negative factor in this case is the Applicant's more recent arrest in 2017, which resulted in serious charges being brought - charges that involved possible injury to a child and intent to cause physical harm. More specifically, we must determine on motion whether it is proper to give substantial probative weight to this arrest and the charges rendered, denying adjustment on discretion, when the information surrounding what events occurred to result in the charges being brought is unclear.

Here, and throughout this application, the Applicant's mother describes how the charges against her son were dismissed at her request, after she explained to the prosecutor that the incident that led to the arrest only involved a "loud discussion" concerning payment of rent and "nothing else happened." The Applicant's daughter corroborates this description in her statements. Yet, the charges resulting from the arrest indicate that the incident involved possible injury to a child and intent to cause physical harm. The Applicant must resolve this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). We acknowledge that in their statements, the Applicant's daughter and mother appear to attempt to provide an explanation for this inconsistency indicating that the police were not able to speak Spanish, so could not properly communicate with them. This unsupported information alone does not provide an objective and

detailed explanation as to why the police would request charges that indicated there had been injury to a child and intent to cause physical harm if the Applicant's actions involved only a loud discussion.

Moreover, the arrest report itself has never been submitted. The Applicant claims that his criminal record has been sealed and, despite CPL section 160.50 authorizing him to access any available sealed records his attempts at obtaining the arrest report have been unsuccessful. On motion, the Applicant presents a new statement with a letter from his attorney requesting the sealed records from the criminal court. The Applicant's statements indicates that he presented this letter to the clerk at the court but was told the only available record of these charges was the court disposition. However, the Applicant does not submit a written response from the criminal court. Thus, taking into consideration all of these factors and the evidence provided to support them, we conclude that the record of what occurred to result in the Applicant's arrest for charges involving injury to a child and intent to cause physical harm remains unclear.

As we stated above, the burden of proof is on the applicant to demonstrate eligibility 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 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). Here, the Applicant has not met his burden. He has not resolved the inconsistencies surrounding the events which led to his arrest and thus, the details of this negative factor are unsettled, and we cannot ascertain whether the negative factors are outweighed by the positive.

Furthermore, although we are properly considering the evidence before us (court records of criminal charges and statements from the Applicant, his mother, and daughter), we are not relying on information in the arrest report, assigning probative value to facts in the arrest report, or assuming the information contained therein is true, because the arrest report has not been submitted. Similarly, we are not requiring the Applicant submit the arrest report from the 2017 incident that resulted in his arrest. In this case, the record still contains inconsistent and incomplete information on what led to the Applicant's arrest on serious charges. Without the Applicant submitting sufficient evidence to resolve the discrepancies and to clearly show what occurred, we cannot find the Applicant has met his burden of proof in demonstrating he merits a favorable exercise of discretion.

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Here, the Applicant has not established our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. A motion to reopen is based on documentary evidence of new facts. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

Although the Applicant has submitted new supporting documentation, he has not demonstrated eligibility for the requested benefit. The burden of proof is on the Applicant to demonstrate eligibility 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). As it is the Applicant's burden to resolve inconsistencies and

show he warrants a favorable exercise of discretion, and we find he has not done so, we will dismiss the motion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.