U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 20964912

Date: APR. 05, 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. The Director of the Vermont Center (Director) denied the Form I-485, Application to Adjust Status or Register Permanent Residence (U adjustment application), and we dismissed the Applicant's subsequent appeal. The matter is now before us on a motion to reopen and reconsider. On motion, the Applicant submits additional evidence and a brief reasserting her eligibility. Upon review, we will dismiss the motions.

## I. LAW

A motion to reopen must state new facts to be proved and be supported by affidavits or other 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). 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).

## II. ANALYSIS

The Applicant, a 33-year-old transgender native and citizen of Mexico, was granted U-1 nonimmigrant status from October 2015 to September 2019, and timely filed her U adjustment application in March 2019. The Director denied the application, concluding that the Applicant did not establish that she merited a favorable exercise of discretion.

In our prior decision on appeal, incorporated here by reference, we acknowledged the Applicant's positive and mitigating equities, including: evidence of her victimization, related trauma, and her assistance to law enforcement in the investigation of the domestic violence committed against her; her family ties in the United States, which include her mother and an LPR sister; the duration of her residence in the United States; her fear of facing violence in Mexico because she is transgender; her maintenance of employment in the United States; affidavits and letters of support submitted by friends

and family on her behalf; and her involvement in her community as demonstrated by her church attendance. Additionally, we acknowledged her attendance at Alcoholics Anonymous (AA), additional support letters, and various background articles and publications in support of her assertion that she merits a favorable exercise of discretion. We stated that these positive equities were weighed in the Applicant's favor in the discretionary determination.

Nevertheless, we concluded that the positive and mitigating equities present in the Applicant's case were outweighed by the negative factors also present in her case. We underscored the Applicant's immigration and criminal history as negative factors. Specifically, we noted the Applicant's immigration violations and her criminal history that included convictions for Public Fighting in 2007, False Information in 2007, Prostitution in 2007, Prostitution in 2012, and Operating While Intoxicated (OWI) in 2018. We emphasized the nature, recency, and seriousness of her OWI conviction in 2018, which involved hitting the property of another while under the influence and with high blood alcohol content. We noted that the OWI conviction held additional weight because it occurred after she had been granted U nonimmigrant status. While we acknowledged the Applicant's claim of rehabilitation, we found it insufficient because of the recency and seriousness of the OWI conviction in 2018.

On motion, the Applicant argues that we erred in evaluating whether she warranted a favorable exercise of discretion. She argues that we erred in finding that she was not remorseful for her criminal history.[1] She claims that the criminal convictions that were waived during the adjudication of her U petition should not be reconsidered when adjudicating her U adjustment petition. The Applicant contends that we ignored her positive equities and evidence of rehabilitation.[2] She argues that we made a legal error in placing significant weight on a single OWI conviction when the case law that we cited to involved applicants with multiple drinking and driving convictions. Finally, the Applicant claims that we weighed the underlying police report of her 2018 OWI conviction too heavily. In support of her motions, the Applicant submits a new affidavit, an affidavit from the person she was with when she was arrested in 2018 for OWI, a copy of a certificate of completion for the court mandated 48-hour OWI program, a copy of a letter from a psychologist indicating she did not need substance abuse treatment, a copy of a certificate for a motor vehicle breathalyzer device, a copy of the receipt for an OWI continuing education course, and other documentation.

The Applicant purports that USCIS violated her constitutional rights in reconsidering her criminal conduct that was previously waived during the adjudication of her U petition. However, a U adjustment application is a separate adjudication from a U petition, and USCIS is not bound by its prior determination on a waiver application. Thus, the fact that USCIS granted the Applicant U nonimmigrant status and a waiver of inadmissibility as a matter of discretion despite her immigration violations and criminal record at the time, does not mean that USCIS can no longer consider those acts

[1] We agree with the Petitioner that she has shown that she is remorseful for her criminal actions. Her affidavits, submitted on motion and appeal, indicate that she has apologized for her criminal behavior and has made positive changes in her life.
[2] Our previous decision delineated the positive equities found in the Applicant's case and stated that they are afforded weight in the discretionary analysis. Therefore, we will not further address the Applicant's argument that we ignored the positive equities in her case. Our previous decision also noted the evidence of the Applicant's rehabilitation, including her completion of her probationary requirements, completion of an OWI program for first time offenders, and involvement with AA, however, held that she did not establish rehabilitation because of the recent nature and seriousness of the OWI offense. Therefore, we will not further address the Applicant's argument that we ignored the evidence of rehabilitation in her case.

while conducting a subsequent discretionary analysis.[3] *See* 8 C.F.R. § 245.24(d)(11). Rather, it remains the Applicant's burden to demonstrate that she merits adjustment of status to that of an LPR when all positive and negative factors are weighed together.[4] *See id.*

As discussed in our previous decision, drunk driving is a serious adverse factor to be considered in discretionary determinations. *See Matter of Siniaiskas*, 27 I&N Dec. 207, 209 (BIA 2018) (finding DUI a significant adverse consideration in determining respondent's danger to community in bond proceedings); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (A.G. 2019) (discussing "reckless and dangerous nature of the crime of DUI"). The Petitioner argues that *Matter of Siniaiskas* and *Matter of Castillo-Perez* are not analogous to her case because both cases involved an applicant who had multiple drinking and driving convictions. *See id.* However, contrary to the Applicant's arguments, we cited those cases to explain how we assess the seriousness of drinking and driving offenses. *See id.* In addition, we note that there is no single offense exception for drinking and driving offenses, and each conviction for such an offense is a serious adverse factor that is weighed heavily in discretionary determinations. *See id.*

The Applicant also contends that our consideration of the incident report underlying her 2018 OWI arrest was improper, because police reports are extrinsic evidence that should not hold much weight since the Applicant pled guilty to the charges. Contrary to these assertions, however, 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. 713 and *Thomas*, 21 I&N Dec. 20, in finding that consideration of police records and arrests in making a determination as to whether discretion should be favorably exercised is "helpful . . . because it bears on the issue of the [individual's] conduct when he was arrested and this in turn is germane to whether [he] merits discretionary relief"). In this case, there is nothing in the relevant arrest report and other criminal history documentation bringing their reliability into question and the Applicant makes no specific arguments alleging any different. Instead, the contents of the documents—and the fact of the Applicant's arrest itself—are highly probative, as they bear on her character and eligibility for adjustment of status to that of an LPR as a matter of discretion. *See Perez v. Barr*, 927 F.3d 17, 20 (1st Cir. 2019) (stating that, in context of discretionary eligibility for cancellation of removal relief under section 240A(b) of Act, "an immigration court may generally consider a police report containing hearsay when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction, because the report casts probative light on [the individual's] character" (citing *Mele v. Lynch*, 798 F.3d 30, 32 (1st Cir. 2015)). In this

[3] We note that U adjustment applicants are not required to establish that they are admissible. *See* 8 C.F.R. § 245.24(d)(11). Therefore, even if an applicant receives a waiver for certain grounds of inadmissibility in the past, the underlying conduct that led to the grounds of inadmissibility can still be contemplated in a discretionary determination. *See id.* We acknowledge that the Applicant previously received a waiver for grounds of inadmissibility, however, still consider all negative factors in making a discretionary determination.

[4] With respect to the Applicant's contention that our decision violated her constitutional right against double jeopardy under the 5th amendment, constitutional issues are not within our appellate jurisdiction, and we are unable to rule on the Applicant's constitutional arguments. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997). Accordingly, we will not address this issue further.

case, the arrest report further reflects the seriousness of the Applicant's OWI as it indicates, among other things, the Applicant's blood alcohol content registered almost double the legal limit, she failed several field sobriety tests, she caused property damage to another vehicle, she urinated and defecated herself, and that there were open alcohol containers in her car. We acknowledge that in her newly submitted affidavit, the Applicant states that she only drove to help a friend who potentially had alcohol poisoning. However, the intentions of her drunk driving do not mitigate the criminal actions or the serious circumstances surrounding the incident.

## III. CONCLUSION

We acknowledge the Applicant's arguments and her submission of additional evidence. However, she has not provided documentary evidence of new facts sufficient to establish her eligibility or established that our prior decision was based on an incorrect application of law or policy based on the evidence in the record of proceedings at the time of the decision. Consequently, on motion, the Applicant has not demonstrated that she is eligible to adjust her status to that of an LPR under section 245(m) of the Act.

**ORDER:** The motion to reopen is dismissed.

**FURTHER ORDER:** The motion to reconsider is dismissed.