U.S. Citizenship and Immigration Services

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

In Re: 23554401

Date: DEC. 20, 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 "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), concluding that the Applicant had not demonstrated that a favorable waiver of discretion was warranted, as required. We dismissed a subsequent appeal on the same ground and the matter is now before us on motion to reopen and motion to reconsider. On combined motion to reopen and to reconsider, the Applicant submits a brief and additional evidence. Upon review, we will dismiss this combined motion.

A motion to reopen is based on documentary evidence of new facts, and 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 at the time of the initial decision. 8 C.F.R. § 103.5(a)(2)-(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought.

USCIS may in its discretion adjust the status of an individual lawfully admitted to the United States as a U nonimmigrant to that of an LPR if, among other eligibility requirements, they establish that 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. When exercising its discretion, USCIS may consider all relevant factors, both favorable and adverse, but the applicant ultimately bears the burden of establishing eligibility and demonstrating that discretion should be exercised in their favor. 8 C.F.R. § 245.24(d)(10)-(11).[1] However, where adverse factors are present, the applicant should submit evidence establishing mitigating equities. 8 C.F.R. § 245.24(d)(11).

The applicant bears the burden of establishing their eligibility and must do so by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). This burden includes

[1] Favorable factors such as family unity, length of residence in the United States, employment, community involvement, and good moral character are generally sufficient to merit a favorable exercise of discretion. *See generally* 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).

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).

In our prior decision, incorporated here by reference, we dismissed the Applicant's appeal, concluding that a favorable exercise of discretion was not warranted because the positive and mitigating factors in his case were not sufficient to overcome the significant negative factor of his criminal history, including two arrests and convictions for driving while intoxicated (DWI) which occurred while he was in U status, and for which he remained on probation. On combined motion the Applicant submits proof of attendance at a [redacted] (NY) [redacted] DWI Victim Impact Panel, a copy of which was in the record below, a *New York State Department of Motor Vehicles Alcohol and Drug Rehabilitation Program (Impaired Driving Program) Notice of Completion*, and his Alcoholics Anonymous (AA) meeting attendance records from August 2020 to February 2022. He contends that we erred when, in determining that he had not overcome the Director's ground for denial, we did not weigh the positive equities in his case and considered only a single negative factor.

Contrary to the Applicant's assertion, in our decision we noted the positive and mitigating equities in his case, including his employment history, payment of taxes, and letters from his DWI counselor, partner, partner's child, friends, employer, and pastor describing him as professional, kind, hardworking, and dedicated to his family. We further identified evidence in the record below showing the Applicant's attendance at a victim impact panel, completion of a year of counseling, and compliance with the terms of his probation, and considered these positive and mitigating factors. We appropriately assigned these factors positive weight in our discretionary analysis, but concluded that they did not overcome the significant negative weight afforded his criminal record.

On motion, the Applicant submits new evidence of his continued attendance at AA meetings through February 2022 and of his completion of a New York State impaired driving program. He again acknowledges that he made a mistake, has taken responsibility for the DWI convictions, and has remained vigilant against further impaired driving incidents. We afford the Applicant's continued compliance with the terms of his probation, completion of the impaired driving program, continued attendance at AA meetings, and acknowledgement of his DWI convictions some positive weight. However, when considered with the record below, these additional positive factors are insufficient to overcome the adverse factor of his criminal record.

In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, recency, and seriousness" of the relevant offense(s). *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). As we noted in our prior decision, the record below indicates that the Applicant was arrested for, charged with, and convicted of felony aggravated unlicensed operation of motor vehicle in the first degree and misdemeanor aggravated DWI based on two incidents that occurred in 2018. DWI is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of our discretion. *See Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018) (finding DUI a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI"). In addition, the record below shows that these incidents occurred while the Applicant was in U status, reflecting their recency.

Further, as we also explained in our decision, an applicant for discretionary relief "who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion." *Matter of Roberts*, 20 I&N Dec. 294, 299 (BIA 1991); *see also Matter of Marin*, 16 I&N Dec. at 588 (emphasizing that the recency of a criminal conviction is relevant to the question of whether rehabilitation has been established and that "those who have recently committed criminal acts will have a more difficult task in showing that discretionary relief should be exercised on their behalf"). To determine whether an applicant has established rehabilitation, we examine not only the applicant's actions during the period of time for which he was required to comply with court-ordered mandates, but also after his successful completion of them. *See U.S. v. Knights*, 534 U.S. 112, 121 (2001) (recognizing that the state has a justified concern that an individual under probationary supervision is "more likely to engage in criminal conduct than an ordinary member of the community"). Here, the Applicant has shown on motion that he remains compliant with the terms of his probation and has continued to attend AA meetings. However, he has not offered evidence to show that he has been discharged from probation on which, per the record below, he is to remain until [redacted]2024. We are therefore unable to examine the Applicant's actions following his release from probation and, as we discussed above, the positive weight we afford his actions while on probation is insufficient to overcome the significant negative weight we assign his criminal record.

For the foregoing reasons, the Applicant has not offered new evidence on motion to reopen sufficient to establish his eligibility for the classification sought, nor has he shown on motion to reconsider that our prior decision was based on an incorrect application of law or policy, or was erroneous based upon the record before us.

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

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