U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20010454

Date: FEB. 1, 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 (VSC) denied the Form I-485, Application to Register Permanent Residence or Adjust Status (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 a brief and additional evidence.[1] Upon review, we will dismiss the motions.

I. LAW

A motion to reopen must state new facts and be supported by 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). 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 44-year-old native and citizen of Mexico, entered the United States without inspection in March 2000, when he was 22 years old. His spouse filed a Form 1-918 Supplement A, Petition for Qualifying Member of U-1 Nonimmigrant (U derivative petition), on his behalf, which USCIS approved, according him derivative U-2 nonimmigrant status from October 2014 to September 2018. The Applicant timely filed the instant U adjustment application in September 2018. In April 2020, the Director denied the application, concluding that the Applicant had not established that a

[1] On motion, the Applicant submits additional evidence of positive and mitigating factors including an updated letter from the Sheriff's Office of [redacted] stating that they will not release the arrest report directly to him; court documents indicating that his protective order and probation were terminated in [redacted] 2021, and that his charges for battery and corporal injury were dismissed pursuant to section 1203.4 of the California Penal Code (Cal. Penal Code); and a copy of the Child Custody and Visitation (Parenting Time) Order Attachment.

favorable exercise of discretion was warranted on humanitarian grounds, to ensure family unity, or was otherwise in the public interest as required under section 245(m) of the Act.

In our prior decision on appeal, incorporated here by reference, we acknowledged the Applicant's positive and mitigating equities including his lengthy residence in the United States, his family ties including his three U.S. citizen children, his history of stable employment, his payments of taxes, and the hardship that his family would face if he is not allowed to remain in the United States. Nevertheless, we concluded that the positive and mitigating equities present in the Applicant's case were outweighed by the nature, recency, and seriousness of the conduct leading to his 2016 arrest and subsequent conviction, and his failure to establish that the criminal proceedings pertaining to his conviction had been completed.

Regarding the Applicant's criminal history, we summarized the events leading to his arrest in [redacted] 2016, during the time he held derivative U nonimmigrant status. We noted that the Applicant stated that he received a text message with photographs of his spouse[2] dancing and kissing another man. We further noted that, the Applicant admitted that he lost his temper resulting in him slapping his spouse across her face and grabbing her by the shoulders. We acknowledged the Applicant's expression of remorse and his contention that he completed his probation, a domestic violence counseling program, parenting classes, and paid all court costs and fines. We noted that, although the Applicant provided evidence that he completed parenting classes and domestic violence counseling, he did not submit evidence that he successfully completed probation or that the protective order issued against him was terminated early. We also noted that we were unable to determine the extent to which the Applicant had been forthcoming and accepted responsibility for his actions due to the absence of an arrest report or charging document regarding his [redacted] 2006 arrest.

We acknowledged the Applicant's arguments reasserting his eligibility for adjustment of status. We further acknowledged the Applicant's additional evidence submitted on appeal including letters of support from coworkers, friends and family, employment documents, and updated federal tax returns. We highlighted a letter from the Applicant's former spouse in which she stated that the Applicant was a loving spouse and excellent father throughout their 15-year marriage. She admitted that the Applicant slapped her in [redacted] 2016 due to her infidelity, but stated that he was otherwise not a violent person.

On motion, the Applicant asserts that his U adjustment application "should be approved because the newly submitted evidence, in conjunction with the previously submitted evidence in the record[,] supports a favorable exercise of discretion in [his] case." He highlights the fact that we dismissed his case based, in part, on his pending probation and current protective order against him. He now submits a *Notice of Termination of Protective Order in Criminal Proceedings*, an *Order of the Court*, and *an Order of Dismissal* from the Superior Court of [redacted] California, indicating that his protective order and probation were terminated in [redacted] 2021, and that the charges for and his *nolo contendere* plea to battery and corporal injury to spouse, cohabitant, or parent were also dismissed pursuant to section 1203.4 of the California Penal Code (Cal. Penal Code) (providing that a court, in "any case in which a defendant has fulfilled the conditions of probation . . . ," may "in its discretion and the interests of justice" permit a defendant to "withdraw their plea . . . [and] thereupon dismiss the

[2] The Applicant and his spouse divorced in 2018.

accusations . . . and . . . the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which they have been convicted . . . .") (West 2022). He argues that this additional evidence should be sufficient to grant his U adjustment application.

As a preliminary matter, we consider the Applicant's conviction, which occurred while he held U nonimmigrant status and involved conduct the U visa program was designed to protect against, as a serious negative factor. As we noted in our prior decision, the fact that the charges levied against the Applicant were ultimately dismissed in his favor does not equate with a finding that the underlying conduct or behavior leading to those charges did not occur. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all factors in making its discretionary determination and that it "will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of" certain classes of crimes). Moreover, although the Applicant's guilty plea was withdrawn and his case was dismissed after he completed his probation pursuant to section 1203.4 of the Cal. Penal Code, such dismissal does not eliminate the immigration consequences of that conviction. *See* section 101(a)(48)(A) of the Act (stating that an offense remains a "conviction" for immigration purposes when "adjudication of guilt has been withheld, where . . . the [individual] has entered a plea of guilty or nolo contendere . . . and . . . the judge has ordered some form of punishment, penalty, or restraint on the [individual]'s liberty to be imposed."); *see also Ramirez-Castro v. INS*, 287 F.3d 1172, 1173 (9th Cir. 2002) (concluding that an order of the court in California expunging an individual's conviction after successful completion of probation does not eliminate the immigration consequences of that conviction).

The Applicant further asserts that he has submitted "voluminous" evidence of his reform and good moral character, including 14 letters of support from coworkers, family and friends, and evidence that he remains gainfully employed and is the primary parent to his three U.S. citizen children. He argues that "beyond a mere generic reference to 'hardships,' neither [our] decision nor the USCIS decision sufficiently analyzed the facts unique to the Applicant's case; specifically, the hardship to his three U.S. citizen children and the fact that the Applicant's U visa was based on one of the worst imaginable crimes—his son's sexual abuse by an elementary school teacher. Upon review, however, the record reflects that we did consider the positive and mitigating equities in the Applicant's case. Specifically, we noted his family ties including his three U.S. citizen children and the hardship they would suffer if the Applicant is unable to remain in the United States, his previous marriage to a U spouse, numerous letters of support, evidence of stable employment and payment of taxes, as well as his acquisition of U nonimmigrant status as factors weighed in his favor.

Finally, the Applicant asserts that we erred in dismissing his appeal based on a "lack of objective documentation" regarding his arrest. He highlights two letters from the Sheriff's Office of [redacted] prohibiting the release of his arrest report directly to him pursuant to section 6254(f) of the California Government Code (Cal. Gov't Code). He argues that "given the fact that [he] is prohibited by law from obtaining the report, and that USCIS has to merely submit a written request to obtain the report, it was clearly erroneous to penalize [him] for not submitting the report." We acknowledge that law enforcement agencies are permitted to withhold arrest reports pursuant to section 6254(f) of the Cal. Gov't Code. However, law enforcement agencies are required to provide large portions of the information contained within the report such as the factual circumstances regarding the arrest; a description of any injuries or weapons involved in the incident, the full name and physical description of the arrestee; the time, date, and location of the arrest; and all charges for

which the arrestee was booked. Cal. Gov't. Code § 6254(f)(1)-(2) (West 2022). Furthermore, we stated that "due to the lack of objective documentation, *such as* arrest reports and charging documents, we [we]re unable to determine the extent to which the Applicant ha[d] been forthcoming with USCIS and accepted responsibility for his actions . . . ." (emphasis added). As we noted above, section 6254(f) of the Cal. Gov't Code permitted the release of some objective documentation regarding the Applicant's arrest. Furthermore, we reiterate that it is the Applicant's burden to establish, by a preponderance of the evidence, his eligibility for the benefit sought, including that a favorable exercise of discretion is warranted. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. §§ 245.24(b)(6), (d)(11); *Matter of Chawathe*, 25 I&N Dec. at 376.

We acknowledge the Applicant's arguments and his submission of additional evidence of positive and mitigating equities. However, he has not provided documentary evidence of new facts sufficient to establish his 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. As we noted in our prior decision, the nature, recency, and seriousness of his [redacted] 2017 conviction for domestic-violence related offenses outweigh the positive and mitigating equities present in his case. Consequently, the Applicant has not demonstrated that he is eligible on motion to adjust his 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.