U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19731856

Date: FEB. 4, 2022

Motion on 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) 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 denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application). We dismissed the Applicant's appeal and the matter is now before us on a combined motion to reopen and reconsider. 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 state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). The motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought.

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 an 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 discretionary adjustment of status determinations). However, where adverse factors are present, the applicant may submit evidence establishing mitigating equities. *See* 8 C.F.R. § 245.24(d)(11) (providing 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").

II. ANALYSIS

The Applicant, a native and citizen of Mexico, was granted U nonimmigrant status in May 2013. She filed the instant U adjustment application in April 2017. In our prior decision, incorporated here by reference, we determined that the Applicant had not established that her continued presence in the United States was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest, as required by section 245(m)(1)(B) of the Act, because her failure to disclose her past immigration violations, which had not been waived at the time of the approval of her U nonimmigrant petition, outweighed her positive equities and she had not demonstrated that she merited a favorable exercise of discretion.

On motion, the Applicant submits a brief in support of her motion to reopen and motion to reconsider and submits copies of evidence which were provided with her appeal. She asserts that our prior decision ignored this evidence and her request for consideration of ineffective assistance of counsel in the filing of her U adjustment application and U nonimmigrant petition. On motion, the Applicant has not overcome our prior determination for the following reasons.

The Applicant initially states in her brief that her understanding of the regulation at 8 C.F.R. § 103.5(a)(8) implied that the, "appeal would first be considered a motion which we believed to be the more appropriate route in the context of a humanitarian based application as U adjustments are. It does not appear that the appeal that was previously filed on [F]orm I-290B was treated as a motion. Rather it was treated directly as an appeal." However, both 8 C.F.R. § 103.5(a)(8) and 103.3(a)(2)(iv) specifically state that an appeal could be treated as a motion for the purpose of granting the motion or taking favorable action. However, the Applicant marked box 1.b in Part 2 of her Form I-290B, Notice of Appeal or Motion, filed in November 2018, which indicated, "I am filing an **appeal** to the AAO. My brief and/or additional evidence will be submitted to the AAO within 30 calendar days of filing the appeal." Further review of the November 2018 appeal indicates that the Applicant's brief and evidence were received at the AAO in December 2018, approximately 30 days after the filing of the Form I-290B. As such, the Director of the Vermont Service Center would not have had the Applicant's brief and evidence to review in order to take favorable action on her U adjustment application, and the Form I-290B was accordingly forwarded to the AAO for consideration of her appeal.

The Applicant further claims that she received ineffective assistance of counsel in the filing of her U nonimmigrant petition, Form I-192, Application for Advanced Permission to Enter as a Nonimmigrant, and U adjustment application. However, regardless of the Applicant's statements and evidence in support of this claim, we cannot grant the relief she seeks because she is not eligible. As noted in previous decisions, the Applicant was granted U nonimmigrant status while she was

inadmissible, as her order of exclusion under section 212(a)(7)(A)(i)(I) of the Act was not disclosed by the Applicant on her U nonimmigrant petition or the Form I-192 and was subsequently not waived with the approval of that application.

The Applicant's arguments do not indicate any specific precedent decision, law, or policy error, that USCIS made in our previous decisions. Additionally, the Applicant does not state new facts supported by affidavits or other evidence. The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 245.24(b); *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). The Applicant has not shown that she was "admitted into the United States… under section 101(a)(15)(U)" of the Act or that she was "lawfully admitted to the United States as a [U nonimmigrant] as required by 8 C.F.R. § 245.24(b)(2)(i) and she is therefore ineligible for adjustment of status in this case. As such, she has not met the requirements of a motion to reopen or a motion to reconsider.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.