U.S. Citizenship and Immigration Services

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

In Re: 19330189

Date: FEB. 07, 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 to Register Permanent Residence or Adjust Status (U adjustment application), and we dismissed the Applicant's appeal. The matter is now before us on a motion to reconsider. In support of this motion, the Applicant offers a new brief.

Upon review, we will dismiss the motion to reconsider.

## I. LAW

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. 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). 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").

Depending on the nature of any adverse factors, the applicant may be required to demonstrate clearly that the denial of adjustment of status would result in exceptional and extremely unusual hardship, but such a showing might still be insufficient if the adverse factors are particularly grave. *Id.* For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. *Id.*

In these proceedings, the applicant bears the burden of establishing their eligibility for the benefit sought, 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 motion to reconsider must establish that our decision was based on an incorrect application of the law or 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).

## II. ANALYSIS

The Applicant was granted U-1 status in October 2014 through September 2018. In September 2018, she filed the instant U adjustment application. The Director subsequently denied this U adjustment application, concluding that the Applicant's positive and mitigating equities were outweighed by the adverse factor of her criminal history such that a favorable exercise of discretion was not warranted. The Director identified several positive equities in the Applicant's case, including her lengthy residence in the United States, her advocacy work in the LGBTQ community, and her work to increase HIV prevention awareness. The Director acknowledged the Applicant's concerns over the difficulties she would face as a transgender woman should she have to return to Mexico and acknowledged that the medical care she receives in the United States would be difficult to obtain there. However, the Director concluded that the Applicant's lengthy criminal history, including multiple arrests or citations for prostitution and a 2017 citation for lewd or dissolute conduct in public while she held U-1 status, showed a pattern of behavior raising concerns for the Applicant's risk to public safety, the well-being of others, the risk to the property of others, and her disregard for the laws of the United States. The Director acknowledged the Applicant's explanation that she had engaged in prostitution due to difficulty in finding employment and her statement that it had been years since she had engaged in prostitution. Ultimately, the Director determined that as the record lacked the police officer's report for the 2017 arrest, and the Applicant's own statement regarding the arrest was discrepant with a court affidavit in the record, she was unable to determine if the Applicant continued to engage in prostitution and therefore continued to disregard the laws of the United States.[1] Accordingly, the Director determined that the Applicant had not established that a favorable exercise of discretion was warranted to adjust her status to that of a lawful permanent resident.

The Applicant then appealed the matter to us, contending that the Director assigned too much weight to her criminal history in denying her U adjustment application. In our previous decision, incorporated here by reference, we acknowledged the positive equities identified by the Director in the record below. However, we concluded that the Applicant's 2017 citation for lewd or dissolute contact in public, the inconsistency in the record regarding the circumstances underlying the citation, and the failure of the Applicant to take responsibility for her actions, prevented us from determining the risk that the Applicant posed to public safety. We therefore found no error with the Director's assignation of significant negative weight to the Applicant's 2017 conviction.

[1] The record reflects that the Director issued a request for evidence (RFE) regarding the Applicant's [redacted] 2017 citation on the charge of lewd or dissolute conduct in public, including a copy of the police report. The Applicant did not provide a copy of the police report with her request, but did provide documents with her response.

On motion, the Applicant submits a brief and contends that we abused our discretion by improperly evaluating the totality of the evidence before us, that we failed to assign proper weight to the positive equities in her case, and by assigning too heavy a negative weight to her misdemeanor arrest for lewd or dissolute conduct in public and subsequent conviction for trespassing.

As it relates to the positive equities, the Applicant argues that we did not evaluate the totality of the record and failed to consider the letters of recommendation in the record, resulting in our failure to assign a proper weight to all of the positive equities in the case. Upon review, we did not explicitly identify these letters in our decision when weighing the positive factors in her case against the negative equities. We acknowledge as an additional positive factor the Applicant's work ethic and her reputation as a valued friend and hardworking and reliable employee, as demonstrated by these letters.

We further acknowledge the Applicant's argument that these letters should be afforded positive weight significant enough to warrant a favorable exercise of discretion. However, we do not find this argument persuasive. In support of this argument, the Applicant cites to *Matter of Hranka*, 16 I&N Dec. 41 (BIA 1978), in which the testimony from the applicant's mother and a letter from a family friend were considered sufficient to warrant a favorable exercise of discretion, in support of this assertion. The decision in *Hranka* relates to the adjudication of a favorable exercise of discretion in an application for advance permission to enter as a nonimmigrant (waiver application). Discretionary determinations in waiver applications are determined in accordance with guidance at section 212(d)(14) of the Act. In contrast discretionary determinations in U adjustment applications are guided by section 245(m)(1)(B) of the Act and 8 C.F.R. 245.24(d)(11). Thus, they are distinct under the law. We are not bound, under the law, to apply the guidance on the exercise of discretion of a waiver to the determination of whether a favorable exercise of discretion is warranted in a U adjustment application. Therefore, the Applicant has not shown on motion that the letters in the record should be afforded a positive weight in a discretionary determination of her U adjustment application significant enough to warrant a favorable exercise of discretion, or that our decision was incorrect based upon law or USCIS policy in effect at the time.

Regarding the negative factors in her case, the Applicant contends that we assigned them too heavy a negative weight. Specifically, she argues that we did not consider the statement submitted on appeal resolving the identified discrepancies in the record, and that we further erred in reaching a conclusion that she posed a risk to public safety in part because we concluded that there was insufficient evidence in the record to determine such a risk. She contends that she submitted ample evidence, including a supplementary statement, the criminal complaint, citation, and criminal disposition, to allow us to reach a determination. We do not find this argument persuasive. As an initial matter, we note that our decision did not reach a conclusion with regard to the risk she poses to public safety; instead we found that the inconsistencies in the record prevented us from determining such a risk. Second, we directly addressed the supplementary statement provided on appeal in our decision. We identified discrepancies between this statement and the initial statement the Applicant provided with her U adjustment application noting, for example that in the statement submitted with her U adjustment application, she indicated that she "had no intent to solicit," but on appeal stated that during the 2017 incident she "was not prostituting." We also discussed the additional documentation that the Applicant references on motion, noting that as part of her the plea agreement, she "was ordered to stay off the sidewalks and roadways of the [redacted] map area, complete an AIDS education class, and take an HIV

antibodies test."[2] As we considered the statement and additional documentation submitted by the Applicant on appeal in our decision, and explained in that decision why it was insufficient to allow us to determine the risk she poses to public safety, we find that the Applicant's arguments on motion do not show that that our decision was incorrect based upon the evidence in the record below.

Finally, the Applicant contends on motion that we erred in concluding that she has not accepted responsibility for her actions. She points to the statement submitted with her appeal in which she stated that she understood "that it is [her] fault" that the 2017 incident happened. We acknowledge that the Applicant has accepted responsibility for the arrests and convictions for prostitution in her past. However, as discussed above, the record does not provide a consistent narrative of the circumstances leading up to her 2017 arrest for lewd or dissolute conduct in public and subsequent conviction for trespassing, therefore calling into question the extent to which the Applicant has accepted responsibility for this incident. The Applicant further asserts on motion that she has accepted responsibility for the 2017 conviction because she has completed the terms of the conviction. Upon review, we note that at the time we issued our decision the record lacked evidence demonstrating that she had been discharged from the 24-month probationary period she was placed under pursuant to her plea agreement, and that as of the date of this decision, the record still does not contain evidence of her discharge from probation. Accordingly she has not demonstrated that our decision was incorrect based upon the evidence before us at the time of our decision.

## III. CONCLUSION

The Applicant has not established legal error in our prior decision and has not shown that our decision was incorrect based upon the record before us. As such, the Applicant has not demonstrated on motion that she merits a favorable exercise of discretion. Consequently, the Applicant has not established that her adjustment of status to that of an LPR under section 245(m)(3) of the Act is warranted.

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

[2] Our decision further included a footnote stating that section 1202.6 of the California Penal Code mandates AIDS testing for persons convicted of soliciting an act of prostitution.