U.S. Citizenship and Immigration Services

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

In Re: 20010464

Date: FEB. 09, 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 U.S. Citizenship and Immigration Services (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.

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 derivative U nonimmigrant status in October 2015. He filed the instant U adjustment application in January 2019. In our prior decision, incorporated here by reference, we determined that the Applicant had not established that his 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 his criminal history outweighed his positive equities and he had not demonstrated that he merited a favorable exercise of discretion.

On motion, the Applicant submits a brief, a new affidavit, an affidavit from his spouse, evidence regarding his child's anxiety and schooling, and evidence of payment of child support to his ex-spouse. He asserts that this new evidence adds further positive mitigating factors to our discretionary analysis. The Applicant also makes numerous arguments alleging error in our decision dismissing his appeal.

The Applicant argues that we erred in considering his arrests that did not result in convictions as a significant negative factor in our discretionary determination and claims that because there is no corroborating evidence of a crime, and he was not convicted of a crime, it is inappropriate for USCIS to request his arrest records from his arrest in [redacted] 2000, for two counts of assault in the third degree, endangering the welfare of a child, and two counts of harassment in the second degree, to make our own analysis of his arrests. He states that the police reports should be afforded weight only when the underlying arrest led to a conviction or they are otherwise corroborated, citing *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995). He also refers to *Padmore v. Holder*, 609 F.3d 62, 69 (2d Cir. 2010), and states that the Second Circuit Court of Appeals confirmed that although the Board of Immigration Appeals (the Board) could admit arrest reports into the record, it, "cautioned against crediting the allegations in the charging documents as true." He argues that this statement is "especially germane" as the facts regarding the incident are in dispute, based on the Applicant's own statements and those provided by his ex-spouse in the charging document; however, this argument is not convincing, as the lack of the arrest records results in continued conflicting information regarding the incident. The Applicant additionally cites several unpublished and non-precedent decisions in attempted support of his arguments; however, non-precedent decisions are not binding. *See* 8 C.F.R. § 103.3(c).

The Applicant argues that, "the AAO has all the reasonably available information it needs to determine, as it has done in other cases with similar facts, that [his] three arrests without any convictions are entitled to little, if any weight."[1] However, as there is conflicting evidence, which arises from the Applicant's own statements, and those of his ex-spouse which were discussed in our prior decisions, we still cannot fully assess the Applicant's [redacted] 2000 arrest.

The Applicant further argues that previous decisions on his case did not acknowledge, and weigh as a positive factor, the fact that his arrests were waived with the approval of his Form I-192, Application for Advanced Permission to Enter as a Nonimmigrant. While this was not considered as a positive discretionary factor, the adjudication of Form I-192 is separate from a U adjustment application.

We acknowledge the evidence provided on motion which indicates additional positive mitigating factors on the Applicant's behalf; however, the Applicant has not established legal error in our prior decision and has not sufficiently addressed our above-mentioned concerns.

Regarding our consideration of the Applicant's arrest and criminal charges as a negative discretionary factor, the fact that the Applicant was not convicted of the charges, did not enter a guilty plea, and did not admit any wrongdoing, does not equate with a finding that the underlying conduct or behavior leading to that charge did not occur or that the charge was unsubstantiated. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all factors in making its discretionary determination). In addition, reliance on an arrest report in adjudicating discretionary relief—even in the absence of a criminal conviction—is permissible provided that the report is inherently reliable and its use is not fundamentally unfair. *See e.g., Matter of Grijalva*, 19 I&N Dec. at 722 ("[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.").

In this case, the record indicates that the Applicant was arrested three times since 1994. As explained in our previous decision, although the charges for all his arrests were subsequently dismissed, the nature of the [redacted] 2000 arrest as well as the unresolved questions regarding the circumstances leading to this arrest are serious adverse factors in our discretionary determination.

An applicant must establish that he meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. at 375. To determine whether an applicant has met his burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). The Director properly determined that the Applicant did not provide probative evidence of the events that led to his [redacted] 2000 arrest, and we previously determined that the new evidence submitted with his appeal did not overcome that determination. Finally, the Applicant has not resolved this deficiency on motion.

[1] On motion, as noted in our appeal dismissal, the Applicant references a [redacted] 2019, letter from the Criminal Court which he claims indicates that the arrest record no longer exists; however, upon review of the full record, this letter is not included with the combined motion package and is not mentioned in the Applicant's index of evidence submitted with his motions. The Applicant has not submitted any evidence indicating that the arrest records from his 2000 arrest no longer exist.

Accordingly, the Applicant has not met his burden to establish that the positive and mitigating equities in his case outweigh the adverse factors such that he merits a favorable exercise of discretion. Consequently, the Applicant has not established that his adjustment of status to that of an LPR under section 245(m)(3) of the Act is warranted.

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

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