U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18726096

Date: FEB. 10, 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 as the qualifying family member of a victim of qualifying criminal activity. 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 subsequent appeal. The matter is now before us on a motion to reopen and reconsider. Upon review, we will dismiss the motions.

I. LAW

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other 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 native and citizen of Honduras, was granted U-3 nonimmigrant status as the child of a victim of qualifying criminal activity from November 2013 to November 2017, and timely filed his U adjustment application in November 2017. The Director determined that the Applicant's criminal history, which occurred while he held U nonimmigrant status, showed a pattern of problematic behavior, disregard for the laws of the United States, and disregard for the safety and property of others. Accordingly, the Director denied the application, concluding that the Applicant's positive and mitigating equities did not outweigh the adverse factors in his case.

In our prior decision on appeal, incorporated here by reference, we acknowledged the Applicant's positive and mitigating equities including his family in the United States, his lengthy residence in the country since childhood, his graduation from high school, his participation in a mentoring program,

his expressions of remorse, dangerous conditions in Honduras, and letters of support describing his good moral character. Nevertheless, we concluded that the positive and mitigating equities present in the Applicant's case were outweighed by his numerous arrests and citations from law enforcement, including two convictions and the fact that he was still on probation at the time of the decision. The record reflects that the Applicant was arrested in [redacted] 2015 for robbery in the first degree, armed with a deadly weapon. He was adjudicated a juvenile delinquent and sentenced to three years of supervised probation. He was arrested in [redacted] 2016 for criminal possession of stolen property and unlawful possession of marijuana. The charges were dismissed pursuant to New York's speedy trial provisions in [redacted] 2016. The Applicant was arrested in [redacted] 2016 for criminal possession of marijuana in the fifth degree and unlawful possession of marijuana. He pled guilty to an amended charge of disorderly conduct. He was given a one-year conditional discharge and five days of community service. The Applicant was arrested again in [redacted] 2016 for robbery in the third degree. The charge was dismissed "by motion of the DA" in [redacted] 2017. The Applicant was arrested in [redacted] 2017 for theft of services and criminal trespass. He pled guilty and was given a one-year conditional discharge and ordered to perform five days of community service. The Applicant was arrested in [redacted] 2017 for criminal mischief in the third degree. The charges were dismissed pursuant to New York's speedy trial provisions in [redacted] 2018. Finally, the Applicant was arrested for criminal trespass in the third degree in [redacted] 2019. The charge was again dismissed pursuant to New York's speedy trial provisions in [redacted] 2019.

Regarding the Applicant's criminal history, we acknowledged that the Applicant submitted a copy of the certificate of disposition regarding his [redacted] 2015 charge for robbery in the first degree and his statement explaining that the charges against him were dismissed. However, we noted that the Applicant had not submitted an arrest report or additional evidence regarding the arrest despite being requested to do so. We also noted that the Applicant was still on probation at the time of our decision. As a result, we concluded that the Applicant had not shown that he was successfully rehabilitated because there was no updated letter from his probation officer or other evidence that he had successfully completed probation. We further acknowledged that the Applicant was arrested in [redacted] 2016, [redacted] 2016 and [redacted] 2017, which resulted in two guilty pleas for disorderly conduct and criminal trespass. We highlighted the conduct underlying the Applicant's [redacted] 2016 arrest, which purportedly involved physical violence and the threatened use of a gun and a knife. We noted that, although the Applicant claimed that he was falsely arrested, the certificate of disposition regarding the arrest only stated that the charge was dismissed by "motion of the DA," without indicating the basis for the motion. Finally, as to the Applicant's [redacted] 2017 arrest for criminal mischief and criminal menacing and [redacted] 2019 arrest for criminal trespass, we noted that the Applicant did not dispute the description of the [redacted] 2017 incident and that, while the charges were later dismissed, the certificates of disposition for both arrests indicated that the charges were dismissed pursuant to New York's speedy trial provisions, without vindicating him of any wrongdoing.

The Applicant previously asserted we erred in considering the criminal charges against him as negative factors in his case because when a criminal proceeding is terminated, the arrest and charges are considered a nullity and no adverse repercussions should attach. On motion, the Applicant argues that charges in five of his eight arrests were dismissed and considered legal nullities and that, "[b]ecause the charges associated with these arrests were dismissed by a Court post-arrest, the police reports and charging documents in these cases amount to little more than unsupported and uncorroborated allegations." He references various decisions by the Board of Immigration Appeals (the Board) and

U.S. Circuit Courts of Appeals[1] for the assertion that we "broadly mischaracterized the law with regard to the relevance of arrest reports in the discretionary context, specifically with regard to [his] dismissed charges" and as a result "the police reports and charging documents cannot be deemed relevant to determining whether [his] conduct, or whether he warrants a favorable exercise of discretion."

Regarding the weight accorded to arrest reports and charging documents, we note that in *Matter of Arreguin*, the Board stated it was "hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein." 21 I&N Dec. 38, 42 (BIA 1995). As a result, the Board did consider the arrest report, but gave it "little weight." *Id.* In its discussion of *Arreguin*, the Second Circuit Court of Appeals found that the Board could consider arrest reports and affidavits, but clarified it could not deny relief for cancellation of removal "upon the assumption that the facts contained in such documents [were] true." *Padmore v. Holder*, 609 F.3d 62, 69 (2d Cir. 2010). In *Avila-Ramirez v. Holder*, the Seventh Circuit Court of Appeals found that the Board erred in giving an arrest report "significant weight," but clarified, "this is not to say that we read *Arreguin* to prohibit any consideration of arrest reports in the weighing of discretionary factors." 764 F.3d 717, 725 (7th Cir. 2014) (citing *Arreguin*, 21 I&N Dec. at 42, and *Sorcia v. Holder*, 643 F.3d 117, 126 (4th Cir. 2011) (stating *Arreguin* "did not indicate that it was *per se* improper to consider an arrest report . . . . ")). Therefore, although we do not give substantial weight to arrest reports, criminal complaints, and charging documents that did not lead to a conviction, we may and do consider them in our discretionary determination. Moreover, while we acknowledge that the [redacted] 2016, [redacted] 2016, [redacted] 2017 and [redacted] 2019 charges against the Applicant were ultimately dismissed in his favor, the fact that the Applicant was not convicted of the underlying charges, or that the charges were ultimately not sustained by the Criminal Court, does not equate with a finding that the underlying conduct or behavior leading to those charges did not occur.[2] *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). Accordingly, we find no error in our prior discussion of or weight given to the Applicant's [redacted] 2016, [redacted] 2016, [redacted] 2017 and [redacted] 2019 arrests.

The Applicant next contends that we "unduly emphasized" his juvenile adjudications and violations for disorderly conduct and criminal trespass as adverse factors when they were not considered crimes under New York law. He points to language on the certificate of disposition for his [redacted] 2015 arrest which states that, a "youthful offender adjudication is not a judgment of conviction for a crime or any other offense." While we acknowledge that an adjudication of youthful offender status or juvenile delinquency is not a criminal conviction under the immigration laws. *Matter of Devison-Charles*, 22 I&N Dec. 1362, 1373 (BIA 2000); nonetheless, all relevant factors are considered in assessing an applicant's eligibility for adjustment of status as matter of discretion. 8 C.F.R § 245.24(d)(11); *see generallv Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (including, in adverse factors relevant to discretionary relief: "the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident"). In this case, the record reflects, and the Applicant does not dispute, that he was cited or arrested five times from 2015 to 2020 for

[1] *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995), *Avila-Ramirez v. Holder*, 764 F.3d 717 (7th Cir. 2014), and *Padmore v. Holder*, 609 F.3d 62 (2d Cir. 2010).

[2] As we noted in our prior decision, the charges were dismissed pursuant to New York's speedy trial provisions at section 170.30(1)(e) of the New York State Criminal Procedure Law (CPL), not because the court vindicated the Applicant of any wrongdoing.

robbery in the first degree, disorderly conduct, criminal trespass, criminal menacing in the third degree, criminal mischief in the third degree, criminal possession of stolen property, robbery in the third degree and unlawful possession of marijuana —offenses involving conduct that posed a significant risk to the personal safety of others.

Lastly, the Applicant asserts that "[he] meets the eligibility requirements to adjust status, and additionally, his application should be granted as a matter of discretion." In so doing, he refers to the evidence of positive equities that he submitted with his U adjustment application and in response to the Director's request for evidence (RFE). He reiterates that he is remorseful for his "past mistakes," enrolled in [redacted] with [redacted] Community Service and successfully completed the probationary period associated with his [redacted] 2015 conviction. He states that his mother, two sisters, and various aunts and uncles live in the United States. He maintains that is unfamiliar with Honduras and would suffer severe hardship if he had to return to the country. He states that he has no close family members in Honduras, and fears that his lack of family and community ties would make him a target for gang recruitment or death. He reiterates that he has made a life for himself in the United States, which includes a high school education and a fulltime job as an Uber driver. Upon review, however, the record reflects that we did consider this evidence, as our prior decision acknowledged the Applicant's lengthy residence in the United States, his efforts at rehabilitation including his high school graduation, employment and participation in a mentoring program, and his close and extensive family ties in the United States. In addition, we acknowledged supporting letters attesting to his good moral character, as well as the trauma he experienced from witnessing his mother's physical abuse by her former partner. On motion, the Applicant supplements evidence of his positive and mitigating equities with a copy of previously submitted certificates of disposition for his [redacted] 2015 and [redacted] 2019 arrests, a copy of a certificate of disposition indicating that his [redacted] 2020 charges for petit larceny and criminal possession of stolen property were dismissed in [redacted] 2021 pursuant to New York's speedy trial provisions, a letter from the Criminal Court of the [redacted] dated [redacted] 2020 indicating that the [redacted] Police Department failed to file a legally acceptable accusatory instrument with the court regarding a summons for an unknown charge, and a letter from his probation officer dated [redacted] 2021.[3]

While we acknowledge the Applicant's arguments and aforementioned additional evidence, he has not established legal error in our prior decision and has not submitted evidence sufficient to demonstrate his eligibility for the benefit sought. As stated in our decision on appeal, the Applicant's numerous arrests and citations from law enforcement, resulting in two convictions, and the lack of evidence of his successful completion of probation, outweigh the positive and mitigating equities present in his case. As such, the Applicant has not demonstrated on motion that he merits a favorable exercise of discretion. Consequently, the Applicant has not demonstrated that he is eligible 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.

[3] It is unclear if the Applicant successfully completed his probation. In the letter from the Applicant's probation officer, which is dated [redacted] 2021, he states that, "[t]he probation term is scheduled to end on [redacted] 2021. To date, [the Applicant] is in compliance. [He] has been complying with [his] [c]onditions of [p]robation."