U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19993559

Date: FEB. 22, 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 Center denied the Form I-485, Application to Adjust Status or Register Permanent Residence (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 additional evidence and two briefs reasserting his eligibility. 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 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 Mexico, was granted U-2 nonimmigrant status from March 2014 to October 2017, and timely filed his U adjustment application in October 2017. The Director denied the application, concluding that the Applicant had not submitted sufficient evidence to establish that he merited a favorable exercise of discretion.

In our prior decision on appeal, incorporated here by reference, we acknowledged the Applicant's positive and mitigating equities including his lawful residence in the United States in U-2 nonimmigrant status, his LPR spouse and three daughters, his stable employment as a baker, his volunteerism in the community, expression of remorse, active participation in Alcoholics Anonymous (AA), and the emotional and financial hardship that his family would suffer if he is unable to remain in the United States. Additionally, we acknowledged letters from the Applicant's spouse, daughters,

other family members and friends attesting to his good character and current sobriety. Nevertheless, we concluded that the positive and mitigating equities present in the Applicant's case were outweighed by his immigration and criminal history, the recency of his criminal convictions, his lack of rehabilitation, and the serious nature of driving under the influence (DUI).

We highlighted the Applicant's adverse factors, namely his immigration and criminal history. Specifically, we noted the Applicant's use of a fraudulent LPR card to enter the United States, removal order, multiple entries without inspection, and periods of unlawful presence and employment. We acknowledged the Applicant's assertions that his immigration violations were previously waived and that giving weight to them violated the congressional intent of providing extensive relief for U victims. However, we stressed that we may still consider immigration violations in exercising favorable discretion for his U adjustment application. We also noted that the U adjustment application is a separate adjudication and we were not bound by USCIS's prior determination on a waiver application.

Regarding the Applicant's criminal history, we emphasized the nature, recency, and seriousness of his DUI convictions in 2016 and 2018, which involved hitting the property of another while under the influence and resulted in criminal enhancements for high blood alcohol content. We noted that both convictions occurred while the Applicant held U nonimmigrant status and one after he submitted his U adjustment application to reside permanently in the United States as an LPR. We acknowledged the Applicant's claim of rehabilitation, but found it insufficient because it was conditioned on the completion of recommended outpatient services which he had not yet completed. We also noted that the Applicant was placed on supervised probation for his [redacted] 2018 arrest until 2022, nearly five years after filing his U adjustment application and three years after filing his appeal.

On motion, the Applicant contends that we erred in evaluating whether he warranted a favorable exercise of discretion. He argues that "what USCIS fails to address is the fact that the majority of cases [we and related agency guidance] cites for the basis of our discretionary analysis involve[] forms of relief that are irrelevant to an adjustment of status application after having U nonimmigrant status."[1] The Applicant maintains that "[h]e is not inadmissible or deportable, and none of his convictions involve serious violent crimes, sexual abuse, or drugs," unlike the respondents cited to the above-referenced decisions. However, in citing to those decisions, we did not state that the conduct of the respondents in those cases was analogous to the Applicant's conduct. Rather, we cited those cases to explain the law applicable to, and how we assess, genuine rehabilitation in cases where an applicant has a criminal record.

The Applicant next argues that we failed to discuss his plethora of positive equities including his three plus years of sobriety, the childhood and adult trauma that led to his alcoholism, his family ties, efforts at rehabilitation, stable employment, church attendance and volunteerism, the emotional and financial support he provides to his family. The Applicant further argues that our conclusion that he has not been rehabilitated "place[d] no value on the hard work, determination, and perseverance that [he] ha[d] put towards his 9-month and 18 month alcohol education classes, therapy, random alcohol testing, his

[1] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Castillo-Perez*, 27 I&N Dec. 664 (BIA 2019); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970); *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996); *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988); and *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018).

outpatient treatment program and AA support meetings, all [of] which he has completed with excellence and not a single complaint." He notes that he never had to report to a probation officer and he completed court-ordered programs and AA on his own volition. He further notes that he successfully completed the terms of his sentences including jail time, payment of fines, 18 months of alcohol education classes, and has maintained his sobriety since [redacted] 2018. Finally, he highlights that he has been invited by his local AA chapter to speak at events and has filed for early termination of probation with the [redacted] Superior Court. He maintains that "if this is not considered the definition of a rehabilitated man, [agency guidance] will ever [*sic*] allow for such a status." Upon review, we stress that we did consider the Applicant's positive and mitigating equities in our prior decision. Specifically, we highlighted his lawful residence in the United States in U-2 nonimmigrant status, his family ties, his recent sobriety, his expression of remorse and efforts at rehabilitation, his authorized period of employment, and his employment and volunteerism as a baker. Regarding his claim of hardship, we noted the Applicant's assertion that he helped his family overcome the trauma associated with his daughter's kidnapping and rape, and that he provides them with emotional and financial support. We additionally acknowledged the Applicant's assertions that his 2015 disorderly conduct offense was the result of meeting the man who attacked his daughter and that his alcoholism was his way of coping with the emotional pain of his daughter's attack in 2005 and his sister's death in Mexico in 2013.

We concede that the Applicant's 2016 and 2018 guilty pleas were withdrawn and the cases dismissed after he completed his probation pursuant to sections 1203.3 and 1203.4 of the California Penal Code. However, such dismissals do not eliminate the immigration consequences of those convictions. *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).

Finally, we again acknowledge the Applicant's assertion that denying his U adjustment application based on negative factors which arose and were previously disclosed would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" under the Administrative Procedures Act (APA). However, as we noted in our prior decision, a U adjustment application is a separate adjudication, USCIS is not bound by its prior determination on a waiver application. Thus, the fact that USCIS granted the Applicant U nonimmigrant status and a waiver of inadmissibility as a matter of discretion despite his immigration violations and criminal record, does not mean that USCIS must exercise its discretion favorably in adjustment of status proceedings notwithstanding those adverse factors. Rather, it is the Applicant's burden to demonstrate that he merits adjustment of status to that of an LPR when all positive and negative factors are weighed together.

We acknowledge the Applicant's arguments regarding discretionary denials and his submission of additional evidence of positive and mitigating equities.[2] 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, his 2016 and 2018 convictions for DUI of alcohol .08 percent or above—offenses which occurred during the time he held U nonimmigrant status and constituted serious adverse factors in our discretionary determination—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.

[2] The Applicant submits two updated personal statements, copies of Forms I-797A, Notice of Action, approving his U nonimmigrant status, employment authorization document and waiver application, copies of his Order from the Immigration Judge, Stay of Removal Order and Order of Supervision, evidence of rehabilitation, criminal complaints from the Superior Court of California, [redacted] a letter from the Chief Deputy District Attorney in [redacted] and numerous letters of support from family, friends, and coworkers.