U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19993547

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) based on his derivative "U" nonimmigrant status under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), concluding that a favorable exercise of discretion was not warranted. We dismissed the Applicant's appeal and he now files a motion to reopen and motion to reconsider, arguing that we erred in the decision dismissing his appeal. Upon review, we will dismiss the motions.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) "may adjust the status" of a U nonimmigrant if he or she meets all other eligibility requirements and "in the opinion" of USCIS, his or her 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 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). This burden includes showing that discretion should be exercised in his or her favor. 8 C.F.R. §§ 245.24(b)(6), (d)(11). USCIS may consider all factors when making its discretionary decision on the application. 8 C.F.R. § 245.24(d)(11). Generally, favorable factors such as family unity, length of residence in the United States, employment, community standing, and good moral character may be sufficient to merit a favorable exercise of administrative discretion. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970); *see also* 7 *USCIS Policy Manual* A.10(B)(2), https://www.uscis.gov/policymanual (providing guidance to USCIS adjudicators regarding factors to consider in discretionary adjustment of status determinations). However, where adverse factors are present, the applicant may submit evidence of mitigating equities. 8 C.F.R. § 245.24(d)(11) (stating that, "[w]here adverse factors are present, an applicant may offset these by submitting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate").

A motion to reopen must state new facts and be supported by affidavits or other documentary 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 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 requested immigration benefit.

II. ANALYSIS

In our prior decision dismissing the Applicant's appeal, incorporated here by reference, we determined that he 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 and mitigating equities and he had not demonstrated that he merited a favorable exercise of discretion. Specifically, we concluded that in regard to the serious crimes that he was charged with, including robbery, theft by taking, five counts of aggravated assault, terroristic threats, and fleeing/eluding police, the Applicant had not provided an arrest report, as previously requested by the Director, in order for us to determine the nature of the events resulting in his arrest. The Applicant has not submitted new evidence, nor established legal error in our prior decision, and has not overcome these determinations on motion.

On motion, the Applicant claims that we placed too much negative weight on his [redacted] 1999 arrest for robbery, theft by taking, five counts of aggravated assault, terroristic threats, and fleeing/eluding police, as he was not convicted, it was over 20 years ago, and USCIS was aware of the arrest at the time it approved his Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application). First, the Applicant argues, through counsel, that USCIS approved his waiver application pursuant to section 212(d)(14) of the Act, determining that it was in the public or national interest to do so. *See* section 212(d)(14) of the Act ("The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a [U] nonimmigrant" and "may waive the [applicable grounds] . . . if the Secretary of Homeland Security considers it to be in the public or national interest to do so."). He claims that such a finding also lends itself to a favorable exercise of discretion when adjudicating his U adjustment application. While the adjudication of the waiver application is a discretionary determination, the corresponding regulations at 8 C.F.R. § 212.17(b)(2) state, in part, "[i]n the case of applicants inadmissible on criminal or related grounds, in exercising its discretion USCIS will consider the number and severity of the offenses of which the applicant has been *convicted*" (emphasis added). In contrast, the regulations governing discretion on the U adjustment application at 8 C.F.R. § 245.24(d)(11) state, in part, "[a]n applicant has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application" and generally does not exercise discretion favorably in cases where the Applicant has "committed or been convicted of" certain classes of crimes. Thus, discretion takes into account all acts purportedly committed by the Applicant, regardless of a conviction. Moreover, we acknowledge that USCIS previously considered and waived the Applicant's criminal history in granting him U nonimmigrant status and afford positive weight to this decision. Nonetheless, a U adjustment application is a separate adjudication and USCIS is not bound by its prior determination on a waiver application.

Next, the Applicant contends, through counsel, that we relied on case law[1] "that had no direct application to matters of discretion in the context of an adjustment of status [and that] all of the referenced cases related to an [I]mmigration [J]udge determination of inadmissibility/deportability based on a conviction[,] not an arrest." We acknowledge the Applicant's discussion of this case law but note that 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), providing us with the authority to consider *all relevant factors* in determining whether a favorable exercise of discretion is warranted.[2]

Moreover, in our previous decision, we specifically noted that the [redacted] 1999 arrest report was not submitted and the Applicant did not provide information as to whether he attempted to, but could not obtain, the arresting officer's report. Additionally, we also noted that, other than a brief statement that mentioned finding his then girlfriend with another individual, the Applicant had not provided a probative, detailed, and credible description of the circumstances that gave rise to the arrest. The Applicant has not submitted this documentation on motion. The burden of proof in these proceedings is on the Applicant to properly address the facts which led to his arrest and, despite multiple opportunities, he has not done so.

Here, the Applicant has not established legal error in our prior decision and has not sufficiently addressed our above-mentioned concerns regarding his criminal history. As such, the Applicant has not demonstrated on motion 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.

III. CONCLUSION

The Applicant has not submitted new evidence to establish his eligibility for adjustment of status under section 245(m) of the Act. Moreover, he has not demonstrated any error of law or policy in our decision dismissing his appeal.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

---

[1] The Applicant is referring to our use of *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) (citing to *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988) and *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995)) and *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995).

[2] Relevant factors can include evidence of criminal conduct that has not resulted in a conviction as well as information taken from police reports and similar documents. *See Matter of Thomas*, 21 I&N Dec. at 23 (BIA 1995) (holding that evidence of criminal conduct that has not culminated in a final conviction may nonetheless be considered in discretionary determinations); *see also 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.").