U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20946514

Date: JUL. 11, 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 as a victim of qualifying criminal activity. The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application). We dismissed the Applicant's subsequent appeal. The matter is now before us as a combined motion to reopen and to reconsider. Upon review, we will dismiss the motion.

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. 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").

A motion to reopen must state new facts to be proved 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; be supported by any pertinent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

A. Facts and Procedural History

The Applicant, a native and citizen of Mexico, was granted U nonimmigrant status from February 2010 until February 2014. The qualifying crimes forming the basis of his Form I-918, Petition for U Nonimmigrant Status (U petition), were felonious assault and abduction, occurring in [redacted] 1998. According to the U petition, the Applicant was taken from his home at gunpoint and suffered injuries, including having his neck cut, his head hit with a bat, and his face shot. In his U petition, the Applicant acknowledged that he had been arrested, charged with committing an offense, convicted of crimes, placed on probation, and been in jail. He stated he was charged "approximately" in 1991 and 2000[1] for driving under the influence (DUI), in 2003 for damaging property, and in 2007 for driving without a license. The Applicant submitted a Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), seeking to waive his inadmissibility. The Director approved the waiver application under sections 212(a)(6)(A)(i) (noncitizen present without admission or parole) and 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport) of the Act in conjunction with the U petition.

The Applicant filed his U adjustment application in May 2013. In response to the question whether he has ever "been arrested, cited, charged, indited, convicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations," he checked the box indicating "No." In October 2013, the Director issued a request for evidence (RFE) notifying the Applicant, among other things, that his background check revealed adverse factors, i.e., arrests for burglary and DUI, and asked for additional information pertaining to his criminal history. In response to the RFE, the Applicant provided documents evidencing, with respect to his burglary charge, that he pled guilty to the lesser included offense of theft by taking and was sentenced in 2013 to probation, community service and a fine. The Applicant also submitted documents for a 2012 DUI charge, evidencing he was convicted after a bench trial for DUI and having an open container of alcohol and sentenced to time in prison, probation, community service, fines, and alcohol treatment measures. The Director subsequently issued a notice of intent to deny (NOID), explaining that in addition to the aforementioned charges, of which he did not provide evidence of compliance with sentencing, the Applicant's background check revealed he was charged in 1988 for possession of marijuana, in 2001 for the misdemeanor charges of sexual battery and battery, as well as, felony charges of false imprisonment and criminal damage to property, in 2003 for failing to appear for the 2001 charges, in 2004 and 2007 for driving with a revoked license, in 2009 for giving a false name to law enforcement and driving with a revoked license, and in 2011 for felony burglary and DUI. Of note, the Director

[1] The Applicant did not provide documents regarding his 1991 and 2000 arrest for DUI. However, we note that the record contains documents indicating that he was arrested for DUI in 2001, which may be the arrest he referred to in his U petition. The court documents also indicated the Applicant was also cited for driving with an expired license in 2001.

also notified the Applicant that his failure to admit to and submit documentation regarding all of his arrests or citations was a negative factor in his case. In response to the NOID, the Applicant provided, among other evidence, some additional court documents and documents evidencing that he complied with class instruction, probation, and community service for some of his sentences. He also explained the 2011 felony burglary arrest. He stated he was working as a landscaper and was told by a customer to go clean up the yard at a specific address. While he was working, the police arrived. The Applicant explained that he was cleaning the property but he was arrested and later pled to theft by taking, the lesser charge to burglary. He said the other guy with him was not charged. In the denial, the Director weighed the adverse factors against the positive and mitigating equities in the Applicant's case and noted specifically that the Applicant's recent convictions of theft by taking and DUIs after he obtained U-1 nonimmigrant status, and the unknown circumstances surrounding his 2001 sexual battery, false imprisonment, and criminal damage to property charges, weighed heavily against him. The Director therefore found that the Applicant had not met his burden of demonstrating a favorable exercise of discretion was appropriate in his application for adjustment of status.

In our decision on appeal, incorporated herein by reference, we weighed the adverse factors and positive equities and addressed the Applicant's arguments. In sum, we acknowledged that the Applicant last arrived in the United States in 1998 and established his lengthy residency and employment here. We recognized his strong family ties, his ownership of property, and that he is a business owner. We noted the letters by friends and family attesting to Applicant's work ethic and his financial and emotional support to his family. The Applicant described, and we considered, the challenges he would face if he returned to Mexico, including the hardship his family would face, his possible difficulty finding a job, the general violence and the possibility that one of his assailants from 1998 may be in Mexico. We also gave positive weight to the Applicant's evidence of completing probation and the terms of his sentences, and his statements of rehabilitation, including that he has not consumed alcohol since 2013. We considered that the Applicant was the victim of a serious violent crime and assisted law enforcement in the investigation and prosecution of that crime. Against these positive factors, we considered the Applicant's recent criminal history and the lack of explanation around his 2001 arrest for sexual battery, false imprisonment, and criminal damage to property. We also weighed the Applicant's long history of DUI. In our de novo review, we dismissed the Applicant's appeal concluding that the adverse factors outweighed the positive equities and the Applicant had not established by a preponderance of the evidence that his continued presence in the United States was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest. On motion, the Applicant submits new evidence and asserts our decision on appeal was incorrect for a number of reasons.

B. Motion to Reopen

We first consider the Applicant's motion to reopen and conclude he has not submitted new facts establishing his eligibility for the benefit sought or that we erred in dismissing his appeal, as required under 8 C.F.R. § 103.5(a)(2). Most of the evidence submitted on motion further supports the positive equities that we have already considered, i.e., the injuries he faced as a victim of a qualifying crime, the hardship his family would face if he returned to Mexico such as records of his wife and daughter's

medical issues,[2] the conditions he would face if he returned to Mexico such as documents on the average wage and that his assailant from 1998 is still at large, his efforts at rehabilitation, as described in the additional letters by friends.[3] The remaining newly submitted evidence, however, do not provide sufficient facts to overcome our prior determination that the Applicant warrants a favorable exercise of discretion.

The Applicant includes documents that he asserts establishes that we incorrectly weighed his criminal history. He submits a final custody order for his grandson, claiming that a judge reviewed his criminal history and decided it was in the child's best interest to be supported by the Applicant. However, the order awards custody solely to the Applicant's wife, not the Applicant. The Applicant does not explain if this was due to his criminal record. Further, the Applicant did not explain what records were provided to the judge for consideration or how the weighing of evidence by a judge in a custody determination evidences that we incorrectly weighed his criminal history. He also asserts that his alcoholism was a coping mechanism for his trauma and we should use a "trauma-informed" approach when reviewing his criminal history. However, he generally cites to articles discussing PTSD and alcoholism in support of his assertion and does not provide details linking his criminal history to his being a victim of a qualifying crime. In addition, he refers us generally to his therapist's letter for an explanation. According to the November 2021 letter, however, the Applicant "had recurrent alcohol-related problems from the age of nineteen, intermittently, until the age of thirty-eight." While the therapist acknowledges that the Applicant has turned to alcohol in stressful situations, the therapist does not state that his alcoholism, which began well before he was victimized, stems from his trauma.

The Applicant also submits new documents pertaining to his criminal history, but this new evidence similarly does not support that he warrants a favorable exercise of discretion. He includes the indictment for his 2001 arrest, which indicates that the Applicant was charged with false imprisonment and sexual battery for locking a woman in a room and touching her breasts, battery and criminal damage to property for kicking a man and damaging surrounding items, and obstruction of officer for kicking an officer in the groin. Court records reflect that the Applicant pled not guilty, was released on bond, and the 2003 failure to appear charge in his record refers to him not appearing for the hearing. Court records from 2003 also reflect the charges in the indictment were not prosecuted because the witnesses involved could not be located. In addition, the Applicant submits an unsworn statement by a former coworker who says he was there on the night of the 2001 incident. He recalls seeing a man, who had been drinking, hit the Applicant, the Applicant running, and a woman splitting the men up. He further recalls the police came and only arrested the Applicant. The coworker made no reference to the sexual battery. The Applicant submits a personal statement describing the 2001 incident, explaining that he was working as a supervisor for a cleaning company and was drinking with his

[2] The record indicates that a number of Applicant's family members rely solely on him to provide for them financially, and that his daughter, wife, and young grandson are the most financially dependent. However, the record also evidences that the Applicant co-owns a company with his son. In a letter by the Applicant's therapist, dated November 2021, the author describes the Applicant's role in the company as the one directing the work and giving estimates, while his son and other employees do the work. The author of the letter also states that the Applicant's wife and daughter "have different roles," within the company, along with his other children. The therapist's letter supports the Applicant's continued employment and his employment of his family, which are all positive equities, but also contradicts other parts of the record, such as the letter by his wife's doctor, dated November 2021, stating that his wife relies on her husband as "the sole bread winner."

[3] While we may not refer to each exhibit submitted, we have reviewed and considered the evidence presented on motion in its entirety.

coworkers after work. He describes another employee showing up for work drunk, continuing to drink several beers and shots of tequila while working, and accusing the Applicant of "messing around" with his wife. The Applicant says the man began hitting him with a belt and so he ran because the attack brought back memories of when he was shot. He describes damaging the door and window while fighting and the man's wife trying to split them up. He says the police arrived and arrested only him. He states he was frustrated and pushed the police away but did not kick a police officer. He also claims he did not touch his co-worker's wife and thinks the police believed the woman because she had not been drinking. In his personal statement, the Applicant also provides details relating to his 2012 arrest for burglary, stating that he pled guilty to theft because his attorney told him it would make everything go away.

While we acknowledge that the newly submitted court records clarify details surrounding some of the 2001 charges, we note that both the indictment and the Applicant's statement describe him damaging property, disregarding and harming law enforcement, drinking at his worksite where we had a supervisory role, and allowing his employees to drink on the job site. While the Applicant contests sexual battery occurred, he concedes he was drinking alcohol at the time and his co-worker's letter does not address the sexual battery. Furthermore, the Applicant does not explain why he did not previously provide the indictment or these statements and makes no claim as to whether he was able to obtain police reports for the 2001 incident. With respect to the Applicant's burglary charge, even if the Applicant was unaware he was on the wrong property and pled to theft by taking without understanding the legal repercussions, the remainder of his criminal history, including the behavior described in the 2001 indictment, demonstrates a pattern of reckless disregard for the laws of the United States: possession of marijuana in 1998, charges for driving without a license in 2001, 2004, 2007, 2009, giving a false name to law enforcement during one of his arrests, and DUIs from 1991, 2001, 2011, and 2012, where he was also cited for having an open container of alcohol with him. As we explained on appeal, and again emphasize here, driving under the influence of alcohol is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of our discretion. See Matter of Siniauskas, 27 I&N Dec. 207, 207 (BIA 2018) (finding DUI a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); see also Matter of Castillo-Perez, 27 I&N Dec. 664, 671 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI"). As a result, the evidence presented on motion does not present new facts establishing the Applicant warrants a favorable exercise of discretion in his adjustment application, as required under 8 C.F.R. § 103.5(a)(2).

C. Motion to Reconsider

We now turn to the Applicant's motion to reconsider and conclude he has not established that the decision on appeal was based on an incorrect application of law or policy or was incorrect based on the evidence in the record at the time of the decision, as required under. 8 C.F.R. § 103.5(a)(3).

The Applicant asserts that we are precluded from considering his 2001 arrest because we already considered the arrest in adjudicating his waiver application. In support he cites to case law discussing res judicata and collateral estoppel. However, the cases the Applicant cites to are not within the context of a U adjustment application. The Applicant is correct to the extent he alleges that, as a general matter, a waiver of inadmissibility in connection with the underlying U petition under section 212(d)(14) of the Act may be considered as a mitigating factor during the adjudication of the

subsequent U adjustment application. However, his adjustment application is a separate proceeding under section 245(m) of the Act and the question before us is whether the Applicant warrants a favorable exercise of discretion based on the totality of the evidence. See 8 C.F.R. § 245.24(d)(11) (stating that USCIS "may take into account all factors . . . in making its discretionary determination on the application"). As such, we are permitted to consider the Applicant's previous criminal behavior in our analysis of whether his adjustment of status is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.[4]

The Applicant also claims that we, on appeal, and the Director, in the denial, improperly held him to a higher standard of proof by requiring him to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. A review of the record does not indicate that the Director required a higher standard of proof or a showing of exceptional and extremely unusual hardship. Rather, the Director focused on the Applicant's arrests, the seriousness of the Applicant's criminal behavior and found those adverse factors were not outweighed by the Applicant's positive and mitigating equities, which included weighing the hardship his wife and daughter would face. On appeal, we also did not raise or hold the Applicant to this higher standard. Rather we similarly weighed the record and concluded that the Applicant had not established by a preponderance of the evidence that he warranted a favorable exercise of discretion.

In addition, the Applicant asserts that he reasonably relied on USCIS's approval of his U visa petition and waiver after he disclosed his 2001 arrest and as a result, he did not preserve evidence or locate witnesses. He cites to one of our adopted decisions, where we concluded that an adjustment of status application should be approved because the Applicant reasonably relied on "erroneous past practice." The Applicant also cites to a United States Supreme Court case discussing reliance on a deferred action for childhood arrivals memorandum. These cases were not within the U adjustment context and the Applicant's argument is not that he relied on erroneous past practice or a memo, but a prior decision on a separate benefit type. The Applicant's U adjustment application is a separate proceeding and a prior approval made in connection with the Applicant's U nonimmigrant status is not binding in these proceedings nor does it guarantee that an applicant will be granted adjustment of status. Moreover, the Applicant's 2001 arrest was just one factor among many that we weighed in concluding he had not established that he warranted a favorable exercise of discretion.

The Applicant also claims that he did not try to hide his criminal charges and we erred by "infer[ring]" that he misrepresented a material fact. He states he sufficiently responded to the question in the U petition asking whether he was ever arrested, cited, detained, or charged by listing one of the charges brought against him in 2001, choosing to list the charge for damaging property and not to disclose the simultaneously filed charges for sexual battery, battery, and false imprisonment. He also included a

[4] Similarly, the Applicant asserts that we should give deference to the approval of the waiver application and U petition, citing to USCIS policy guidance instructing officers to give deference to prior determinations when adjudicating nonimmigrant extension requests. Volume 2, Part A, Chapter 4 of the USCIS Policy Manual, "Extension of Stay, Change of Status, and Extension of Petition Validity, https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4. However, the motion involves an adjustment application and is not a subsequent application seeking an extension in the non-immigrant context. We acknowledge that USCIS favorably exercised discretion in regard to the Applicant's petition for U nonimmigrant status. Nonetheless, as discussed above, the Applicant's U adjustment application is a separate proceeding under the Act and any prior determination made in connection with the Applicant's U nonimmigrant status is not binding in these proceedings.

letter from his prior counsel who stated it was an oversight to not mention all the charges. The Applicant further asserts that background checks in his record indicate that USCIS was aware of these charges when it approved the waiver application. Neither the denial or our dismissal discussed misrepresentation but highlighted that the Applicant did not disclose a number of charges, including those of sexual battery, battery, and false imprisonment in his U petition, waiver application, or on his adjustment application. While we acknowledge former counsel's statements, we also recognize that the Applicant attested to the contents of both the U petition and the adjustment application. He also certified that he was not withholding any information that would affect the outcome. Of more consequence, the Applicant had opportunities to reveal his criminal history and give details regarding his 2001 arrest when he filed his U petition, filed his adjustment application, responded to the subsequent RFE and NOID, and when he filed the appeal. The Applicant did not provide details or circumstances surrounding the 2001 charges, other than to provide a disposition that the charges were not prosecuted, until the instant motion. As a result, we concluded in the appeal decision that there was insufficient evidence to establish that the Applicant's arrest and the serious charges levied against him should not be considered. The Applicant has not established that we erred in our decision based on the record at the time of the appeal.

In addition, the Applicant claims that Congress intended for USCIS to grant adjustments generously, stating "U status holders are able to adjust even if they have committed a myriad of immigration violations or are inadmissible under criminal grounds . . . as long as they have not participated in Nazi persecution, genocide, or torture or extrajudicial killings."[5] We agree that section 245(m) of the Act clearly carves out from adjustment "[p]articipants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing." However, adjustment pursuant to section 245(m) of the Act requires the Applicant to meet all eligibility requirements and demonstrate "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 does not cite to legal authority for his assertion that adjustments are granted to noncitizens who committed a myriad of immigration and criminal violations. Furthermore, the Act does not provide that noncitizens should automatically have their criminal records waived and their adjustment applications approved simply for being U nonimmigrant status holders. We recognize that each applicant presents different factors to weigh in establishing that their continued presence is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest and no one factor is determinative, and that some noncitizens with criminal records may successfully establish that a favorable exercise of discretion is warranted. See 8 C.F.R. § 245.24(d)(11) (providing that USCIS "may take into account all factors . . . in making its discretionary determination on the application" and where adverse factors are present, an applicant may offset them by establishing mitigating equities and that a favorable exercise of discretion is appropriate). However, the Applicant here has not made this showing or that our prior decision incorrectly applied pertinent law or agency policy. 8 C.F.R. § 103.5(a)(3). He also has not established that our prior decision was incorrect based on the evidence of record at the time of

[5] Along these lines, the Applicant claims that the statute does not mandate admissibility or good moral character. Our decision on appeal did not require the Applicant to establish good moral character or his admissibility, but we did consider the positive character evidence in the record. See Matter of Arai, 13 I&N Dec. at 496 (favorable factors include, but are not limited to . . . good moral character); see also 7 USCIS Policy Manual A.10(B)(2), https://www.uscis.gov/policy-manual (listing good moral character as an adjudicative factor to consider in discretionary adjustment of status determinations).

the initial decision and did not cite to binding precedent decisions or other legal authority establishing error in our prior decision. Id.

III. CONCLUSION

The evidence and arguments submitted on motion are not sufficient to overcome the determination that the Applicant's continued presence in the United States is not justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest such that he warrants a favorable exercise of our discretion to adjust his status to that of an LPR. The Applicant's motion to reopen and reconsider is dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.