U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20450160

Date: MAR. 24, 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 "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. The Director subsequently dismissed the Applicant's motion to reopen and reconsider, concluding that he did not provide new facts supported by documentary evidence or establish that the 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. We dismissed the Applicant's appeal, again as a matter of discretion, 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 to that of an LPR 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 the Applicant was convicted of driving while ability impaired (DWAI) in 2015, an alcohol-related offense and one which posed a risk to others, and also convicted of driving under restraint, failure to display proof of insurance, and driving under revocation—offenses which showed a disregard for the laws of the United States and occurred while the Applicant held U nonimmigrant status. We further concluded that the record contained scant evidence of the Applicant's rehabilitation. 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, through counsel, claims that we mischaracterized his traffic citations as arrests. He states that he "has only ever been arrested two times in his life"—once for harassment in 2014 and once for DWAI in 2015—and "all other encounters with law enforcement resulted in citations, not arrests." The Applicant further states, through counsel, that the harassment offense was ultimately dismissed on constitutional grounds, which is not a conviction for immigration purposes, and the DWAI offense occurred while he was outside of his vehicle, not involving an accident or injury, for which he successfully completed his probation sentence. The Applicant again specifically states that "[a]ll other encounters with law enforcement were for traffic infractions and all resulted in citations, not arrests."

As a preliminary matter, our decision on appeal expressly acknowledged that the Applicant's guilty plea to and conviction for harassment was vacated in part on constitutional grounds and, thus, we did not consider it a conviction for immigration purposes. Nonetheless, the implementing regulations provide that USCIS may consider all factors in making its discretionary determination and the fact that the Applicant was not ultimately convicted of the charges does not equate with a finding that the underlying conduct or behavior leading to the charges did not in fact *occur*. *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) (emphasis added). Further, regardless of whether the traffic infractions were arrests or citations, the Applicant has been charged

with seven traffic and driving violations subsequent to his DWAI arrest and conviction in [redacted] 2015, and all while he held U nonimmigrant status. While the Applicant has not presented any other criminal history, this repetitive unsafe behavior remains a concern as it poses risk to the public and demonstrates a disregard for U.S. laws.

Next, the Applicant contends, through counsel, that *Matter of Siniauskas*, 27 I&N Dec. 207, 208-09 (BIA 2018) is inapplicable in this case. Counsel argues that *Matter of Siniauskas* involved a respondent that committed four driving under the influence (DUI) offenses, three of which resulted in automobile accidents, and one of which was committed weeks before the court hearing. In contrast, counsel asserts that the Applicant committed a single DUI offense that was withdrawn and he pled guilty to an added DWAI charge. However, in citing to that decision, we did not state that the conduct of the respondent in that case was analogous to the Applicant's conduct. Rather, we cited that case, as well as to *Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (BIA 2019) (discussing the "reckless and dangerous nature of the crime of DUI"), to explain the law addressing, and how we assess, alcohol-related driving offenses in our exercise of discretion. As stated on appeal, in *Matter of Siniauskas*, the Board of Immigration Appeals affirmed DUI to be a significant adverse consideration in determining a respondent's danger to the community in bond proceedings. 27 I&N Dec. at 208-09. 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.

Finally, the Applicant contends, through counsel, that the DWAI incident occurred in [redacted] 2015, over six years ago, and he has fully complied with all the terms of his probation and has never had an issue with driving under the influence again. Counsel further states that the Applicant is "extremely remorseful and apologetic for" his past violations. However, as discussed in our previous decision, following the Applicant's conviction for DWAI in [redacted] 2015, he subsequently committed seven traffic and driving violations, all in quick succession, and all while he held U nonimmigrant status. An applicant for discretionary relief "who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion." *Matter of Roberts*, 20 I&N Dec. 294, 299 (BIA 1991); *see also Matter of Marin*, 16 I&N Dec. at 588 (emphasizing that the recency of a criminal conviction is relevant to the question of whether rehabilitation has been established and that "those who have recently committed criminal acts will have a more difficult task in showing that discretionary relief should be exercised on their behalf"). To determine whether an applicant has been rehabilitated, we examine not only an applicant's actions during the period of time for which they were required to comply with court-ordered mandates, but also after they have satisfied all court-ordered and monitoring requirements. In this case, the Applicant was given multiple opportunities in the past to alter his behavior but, despite these opportunities, he again engaged in similar conduct, showing a lack of rehabilitation.

Here, the Applicant has not submitted new evidence or established legal error in our prior decision, and has not overcome our previous determinations on motion. 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.