U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19752116

Date: MAR. 25, 2022

Motion on Administrative Appeals Office Decision

Form I-485, Application for Adjustment of Status of Alien in U Nonimmigrant Status

The Applicant seeks to adjust status to that of a lawful permanent resident (LPR) based on her "U" nonimmigrant status. *See* Immigration and Nationality Act (the Act) section 245(m), 8 U.S.C. § 1255(m). The Director of the Vermont Service Center denied her Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), concluding that the Applicant did not establish that adjustment of her status was warranted as a matter of discretion. We sustained the Applicant's appeal and subsequently issued a service motion to reopen withdrawing our previous decision. Upon *de novo* review, we will dismiss the appeal.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if she meets all other eligibility requirements and, "in the opinion" of USCIS, 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 her eligibility pursuant to section 291 of the Act, 8 U.S.C. § 1361, and must establish her eligibility 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 her 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). 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, an applicant should submit evidence establishing mitigating equities. See 8 C.F.R. § 245.24(d)(11) (stating 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").

II. ANALYSIS

A. Procedural History

The Applicant filed her U adjustment application in October 2015. The Director denied the application in May 2017, concluding the Applicant's criminal history demonstrated an ongoing pattern of criminal behavior and that the mitigating factors in this matter did not outweigh the negative equities in the record. As such, the Director determined the Applicant had not established that she warranted an exercise of discretion on humanitarian grounds, to ensure family unity, or in the public interest. The Applicant filed an appeal of the Director's denial decision. We sustained the Applicant's appeal in March 2018, concluding the Applicant's positive equities outweighed her negative factors. In sustaining her appeal, we accepted the Applicant's claim that she had been rehabilitated from her criminal history, ranging from 2003 until 2014. As such, in assessing the Applicant's favorable equities, we noted she lacked any law enforcement encounters since 2014. In January 2022, we reopened this matter on Service motion, as governmental records demonstrated the Applicant's criminal history extended beyond 2014 and included undisclosed arrests under an alias in [redacted] 2017. We withdrew our previous decision and allowed the Applicant to submit a brief and evidence, including final dispositions and associated police reports for her 2017 arrests. The Applicant responded to our Service motion with a brief and additional evidence.

In our previous decision, incorporated herein, we recognized the favorable and mitigating factors for the Applicant including her longstanding residence in the United States, her U.S. citizen spouse she is currently in the process of divorcing, and her four U.S. citizen children. We also acknowledged the Applicant's steady employment in the United States, income tax documentation, evidence that she financially supported family members in Mexico, her grant of U-1 nonimmmigrant status based on her subjection to domestic violence by a former boyfriend, the Applicant's financial contribution to the household, her involvement with her children's school and activities, the Applicant's involvement in her community, the Applicant's counseling needs, the Applicant's assistance with the health issues of her children, and over 50 letters of support attesting to the Applicant's positive attributes.

In response to our service motion to reopen, the Applicant asserts her 2017 arrests only involved a misdemeanor conviction and that she has had no further issues with law enforcement since 2017. The Applicant also asserts the 2017 criminal incident should not be considered a severe violation due to mitigating factors including a misunderstanding, a preexisting "on-again, off-again relationship" with the victim, and an underlying mutual order of protection. The Applicant claims that she and her family members would suffer extremely unusual or extreme hardship upon denial of her adjustment application. Specifically, the Applicant asserts a mass was discovered in her breast that is being monitored for growth; she experienced extreme abdominal pain that caused her stress and has since resolved; her sister was shot and killed in Mexico leaving behind three children; the Applicant is currently separated from her spouse with a divorce pending; she was forcibly kissed by her spouse, resulting in a sexual contact charge against him; she is availing herself of the protections and resources for crime victims in the United States; her son continues to suffer from asthma and is being treated by doctors familiar with his condition in the United States where less air pollution exists; the Applicant's daughter's car was hit by a drunk driver resulting in anxiety and headaches for her; the Applicant's daughter will soon graduate from high school and needs her mother during this transition; the Applicant is the primary financial support for her children as her spouse's child support is less than he

previously contributed; the Applicant is involved in her children's education and three of her children are limited in their English and/or reading proficiency; and the Applicant speculates her two oldest children would remain in the United States with her abusive ex-boyfriend if she returned to Mexico and her spouse, whom she also labels as abusive, would be granted custody of their youngest son. The Applicant also submits multiple letters of support from individuals identifying the Applicant as caring, responsible, and responsible. We note that the letters of support attesting to the Applicant's good character do not address the Applicant's record of arrests and convictions; there is no indication that the authors are aware of her criminal history.

In our previous decision, we noted the record contained adverse factors for the Applicant, including lengthy and extensive criminal history ranging from 2003 to 2014. The Applicant's discussed criminal history includes a 2003 arrest for third degree assault during which she provided a false name and date of birth; 2005 arrest for assault and disorderly conduct; 2007 arrest for witness retaliation; 2007 arrest for harassment – obscene language; 2012 arrest for harassment; 2012 arrest for domestic violence, harassment, and criminal mischief; 2013 arrest for assault and harassment; and additional traffic violations. Reliance on an arrest report in adjudicating discretionary relief, even in the absence of a conviction, is permissible if the report is inherently reliable and its use is not fundamentally unfair. *See Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988). The Applicant's discussed criminal convictions include a 2003 third degree assault, 2005 assault and disorderly conduct, 2014 harassment, and traffic convictions. For immigration purposes, a conviction exists when a guilty plea has been entered and the judge has ordered some sort of punishment, penalty, or restraint on the person's liberty. *See* section 101(a)(48) of the Act.

In our now-withdrawn decision, we determined the favorable factors for the Applicant outweighed the negative. In addition to noting the favorable factors stated above, we attributed our conclusion to the Applicant's "candor regarding her arrests," her "remorse," "rehabilitation," and "lack of encounters with law enforcement since 2014." In July 2017, the Applicant submitted a declaration asserting that she has learned to stay out of trouble and that she is committed to never repeating her past criminal mistakes. But in [redacted] 2017, the Applicant was arrested for harassment, violation of a protection order, and intimidating a witness or victim based on a [redacted] 2017 victim report. The Applicant used a alias in her dealings with law enforcement officials at time of this arrest. In satisfaction of the charges against her, the Applicant pled guilty to section 18-4-506 of the Colorado Revised Statutes, second degree criminal tampering. In response to our motion to reopen, the Applicant asserts she merely reached out to the victim on Facebook asking why she had been blocked, then wished the victim the best. We cannot look behind her conviction to reassess her guilt or innocence. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999) (unless a judgment is void on its face, an administrative agency cannot go behind the judicial record to determine an alien's guilt or innocence); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1974) (same). At the time of the Applicant's conviction, she pled guilty to tampering with the property of another with intent to cause injury, inconvenience, or annoyance to that person or another. *See* Colo. Rev. Stat. § 18-4-506 (West 2017). The Applicant's submitted explanation of this incident is not in accordance with her guilty plea and the elements of the statute; including intent to cause injury, inconvenience, or annoyance.

The Applicant bears the burden of establishing she merits a favorable exercise of discretion. 8 C.F.R. § 245.24(d)(11). Upon review, the Applicant has not made such a showing. The Applicant's unlawful behavior and criminal history demonstrates a disregard for the law and safety of the public. We

recognize the Applicant has demonstrated favorable and mitigating factors, as stated above and as discussed at length in our previous decision. However, the Applicant has not demonstrated that she has taken responsibility for her unlawful actions. The Applicant previously indicated before us that she was rehabilitated due to her lack of encounters with law enforcement since 2014. But in 2017, less than a month after she claimed before us her commitment to stay out of trouble and never repeat her criminal mistakes, the Applicant was arrested for harassment, violation of a protection order, and intimidating a witness or victim. And the Applicant's arrests were only ascertained pursuant to a USCIS' search of governmental systems. The Applicant did not disclose these arrests or subsequent conviction to us during the pendency of her adjustment application, demonstrating a lack of candor. The Applicant demonstrated a similar lack of candor in again using a false identity with law enforcement officials in her 2017 arrest. In addition, the Applicant's claims regarding her 2017 arrest are inconsistent with her plea of guilty to second degree criminal tampering, evidencing a lack of remorse for her criminal actions. The Applicant's extensive criminal history spanning from 2003 to 2017 including criminal contacts after the approval of her U petition in 2012, her lack of candor regarding her criminal history, her lack of candor before law enforcement officials, and her lack of remorse and demonstrated rehabilitation outweigh her positive and mitigating factors including her extensive familial, financial, health, and educational ties to the United States, her victimization by her ex-boyfriend, and the multiple letters of support submitted on her behalf.

Accordingly, the Applicant has not demonstrated that her continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest such that he warrants a positive exercise of our discretion to adjust her status to that of an LPR under section 245(m) of the Act.

ORDER: The motion to reopen is dismissed.