U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22816161

Date: NOV. 1, 2022

Motion on Administrative Appeals Office Decision

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

The Applicant, who was granted "U" nonimmigrant status as a victim of qualifying criminal activity, seeks to adjust her status to that of a lawful permanent resident (LPR) 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 (U adjustment application), concluding that the Applicant did not establish as required that adjustment of status was warranted as a matter of discretion and we dismissed a subsequent appeal on the same ground.

The matter is now before us on a combined motion to reopen and reconsider. Upon review, we will dismiss the motions.

I. LAW

As previously discussed, U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if, among other requirements 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. Applicants bear the burden of establishing that discretion should be exercised in their favor, and USCIS may consider all relevant factors in making its discretionary determination. 8 C.F.R. § 245.24(d)(11).

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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the immigration benefit sought.

II. ANALYSIS

The Applicant, a native and citizen of El Salvador, was granted U-1 nonimmigrant status as the victim of qualifying criminal activity from October 2015 until September 2019, and timely filed the instant U adjustment application in June 2019. In our prior decision, which we incorporate here by reference,

we determined that the Applicant had not established that her 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 her criminal history and lack of rehabilitation outweighed the mitigating factors, which included past abuse and related trauma, family ties in the United States, and hardships she would face upon returning to El Salvador. The Applicant has not established new facts or legal error in our prior decision sufficient to overcome these determinations.

A. Motion to Reopen

In support of her motion to reopen the Applicant submits new evidence, which consists of a personal statement, copies of 2019-2020 federal income tax returns, a psychological evaluation, a copy of her driver's license, letters attesting to her good character, and the birth certificate of her youngest child born in the United States in 2021 along with the child's medical records.

Regarding her criminal history, the Applicant states that her last conviction for reckless driving was in [redacted] 2015. She explains that although she was initially charged with Driving While Intoxicated (DWI), she told her attorney that she believed the weight loss pills she was taking at the time "caused the couple of drinks [she] had at [her] friend's house to have a greater effect on [her] than [she] realized," and those circumstances likely convinced the judge to reduce the charge to reckless driving. She further states that she made a lot of life changes since then to have no more issues with the law—she paid all court-ordered fines, attended counseling and, as she now has a valid driver's license she will no longer be driving without proper documents; she also studied traffic laws and passed the test because she "wanted to live in a way that better respected the laws and traffic rules of this country." The Applicant further states that she has not had any convictions since 2015 "as all other incidents [she] has had were misunderstandings and those charges were dismissed." The Applicant claims that she also changed her relationship with alcohol, which she previously used to cope with the past traumas and depression, and that she regrets the behavior that led to the charges against her. She states that she has not had alcohol for the past two or three years. The Applicant also reiterates that if she were to return to El Salvador, she would be very worried about her and her children's safety because of gangs, poverty, and lack of access to good medical care and education.

We acknowledge the Applicant's statements on motion as well as the additional evidence. However, she has not established new facts that would warrant reopening of the adjustment proceedings and reevaluating positive and negative factors in her case. We previously acknowledged that the Applicant suffered trauma and abuse, but determined that her past experiences did not absolve her of responsibility for her criminal behavior, most notably her pattern of drinking and driving. We also noted that the Applicant's testimony did not indicate she recognized the seriousness of her offenses, or expressed remorse for her actions. The Applicant's updated statement concerning her 2015 arrest for DWI and the psychological evaluation are not sufficient to overcome those determinations. Although the psychological evaluation indicates that the Applicant "has begun to make progress through her involvement in AA" and "is starting to see the importance of her feelings and their connection to her decision and behavior," the Applicant's testimony continues to indicate lack of genuine rehabilitation. Specifically, while the Applicant states generally that she is remorseful for her past actions, she continues to minimize her responsibility by blaming her 2015 DWI arrest on an unexpected effect of combining alcohol with diet pills, and characterizing her other arrests (including for felony robbery and misdemeanor assault in 2008, and for an assault on a family member in 2019)

as "misunderstandings." Similarly, she indicates that her convictions for driving without a license occurred because "[i]t was not until 2020 that Virginia passed legislation allowing the undocumented, that is, non-citizens without legal presence to apply for a driver privilege card, which allows them to avoid charges for driving without a license." She further states through her counsel that there is no indication harm befell any person or property in connection with her convictions and they were relatively minor charges for which she was not sentenced to any jail time and paid minimal fines. These statements do not show that the Applicant has accepted responsibility for her actions and violations of the law or recognized potential harm to the public as a consequence of her drinking and driving; nor do they establish that she is genuinely remorseful for her past behavior. Although we recognize the Applicant's claim that she studied traffic laws and intends to obey the rules of the road, public court records indicate that in [redacted] 2021 she was found guilty of exceeding posted speed limit by more than 20 miles per hour, in violation of section 46.2-878.2 of the Virginia Code. Thus, while we acknowledge the Applicant's statements on motion, we conclude that the evidence remains insufficient to show rehabilitation.

Moreover, we previously considered the Applicant's family ties in the United States and acknowledged that the hardship the Applicant and her children were likely to experience upon return to El Salvador was a significant mitigating factor. Nevertheless, we concluded that it did not outweigh the adverse factors. Evidence that the Applicant had another child since then is not sufficient to change this determination. Specifically, the child's medical documentation does not indicate any developmental or health issues that might substantially impact our discretionary analysis.

Lastly, we recognize that the letters from family and friends the Applicant submits on motion describe her as a caring wife and mother, church member, and person of good moral character. However, the letters do not address the Applicant's criminal history, nor do they provide details of any actions she took towards rehabilitation. We acknowledge the letter from a group of people who gather every other fifteen days stating that they have seen a change in the Applicant. But, the letter does not indicate that its author or authors are aware of all aspects of the Applicant's criminal history. We cannot therefore give this and other letters significant weight as evidence of the Applicant's rehabilitation and her good moral character.

Thus, while we acknowledge the submission of new supporting evidence we conclude that the record as a whole remains insufficient to establish that the positive equities in the Applicant's case outweigh the negative impact of her criminal history, especially that the Applicant still has not provided adequate evidence of rehabilitation. *See Matter of Marin*, 16 I&N Dec. 581, 588 (BIA 1978) (stating that an applicant for discretionary relief with a criminal record must ordinarily present evidence of genuine rehabilitation).

B. Motion to Reconsider

The Applicant also has not established that our prior decision was based on an incorrect application of USCIS law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time we dismissed her appeal.

The Applicant argues that we incorrectly analyzed her criminal record and evidence of rehabilitation in light of precedent on discretion in the immigration context. She asserts, citing several precedent

decisions of the Board of Immigration Appeals[1] that although arrests absent convictions or other corroborating evidence of the allegations can be considered in the exercise of discretion, they should not be given substantial weight. The Applicant further states that we erred by equating her 2015 DWI arrest with a DWI conviction based solely on her admission that she drank alcohol prior to driving. While our decision does in fact reference a "2015 DWI conviction," it is a typographical error, as we had specifically acknowledged that the Applicant "was not convicted of the DWI offenses" despite being charged with such offenses twice—in 2010 and 2015. Regardless, the Applicant has not shown that we improperly considered her statements about drinking and driving prior to both incidents as negative discretionary factors, even though she was ultimately convicted of lesser offenses. Rather, reliance on an arrest report in adjudicating discretionary relief—even in the absence of a criminal conviction—is permissible provided that the report is inherently reliable and its use is not fundamentally unfair. *See e.g., Matter of Grijalva*, 19 I&N Dec. 713, 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."); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996) (holding that a police report concerning circumstances of arrest that is not part of a record of conviction is appropriately admitted into evidence for the purpose of considering an application for discretionary relief). The Applicant therefore has not shown that given her own testimony admitting history of drinking and driving we erred as a matter of law in weighing the 2015 arrest and the resulting DWI charge against her in the discretionary analysis.

The Applicant further states that she disclosed her criminal history on her U nonimmigrant petition and USCIS concluded in approving her Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), that she did merit a favorable exercise of discretion, and that we improperly ignored that discretionary decision in concluding otherwise. As an initial matter, the record reflects that USCIS granted the Applicant's waiver request before she was arrested and charged with DWI in 2015, and did not therefore consider this additional arrest in its decision. Furthermore, a U adjustment application is a separate adjudication and USCIS is not bound by its prior determination on a waiver application. Consequently, the Applicant has not demonstrated that we erred by not affording the waiver grant significant weight in evaluating the positive and negative factors in her case.

The Applicant also asserts that we incorrectly analyzed the discretionary factors in her case based on law and policy relating to exercise of discretion and our own decisions on U adjustment applications. Specifically, she states that we improperly focused on her criminal history without discussing the positive equities in her case, and references several decisions we issued in unrelated U adjustment proceedings. We note, however, that those decisions are not binding in the instant proceedings, because they were not published as precedents. *See* 8 C.F.R. § 103.3(c). Furthermore, we did previously consider the positive factors in the Applicant's case, including the length of her residence in the United States, her family ties, her daughter's medical issues, assistance to law enforcement, employment and tax history, the completion of court-ordered sentences, letters attesting to her character traits, and her fear of returning to El Salvador. Nevertheless, we determined that they were not sufficient to overcome the Applicant's criminal history and lack of evidence pointing to

[1] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996); *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986); *Matter of Arreguin de Rodriguez*, 21 I&N Dec. 38 (BIA 1995).

rehabilitation. The Applicant's statement to the contrary does not establish a basis for reexamination and reconsideration of our prior decision.

Lastly, the Applicant claims that we erred by not considering the exceptional and extremely unusual hardship to her family, as required by the regulations at 8 C.F.R. § 245.24(d)(11). She states that she previously provided country reports to show the extreme violence in El Salvador, and reiterates that she and her children would be in danger if they returned there. The Applicant avers that her personal circumstances coupled with the evidence of country conditions show that exceptional and extremely unusual hardship would befall her and her family such that it sufficient to overcome her single adverse factor of criminal convictions. However, in making our discretionary determination on appeal, we considered all relevant factors, including adverse conditions in the Applicant's native El Salvador. While we acknowledged that the hardship the Applicant and her children would experience upon returning there was a mitigating factor, we concluded that she has not demonstrated that positive equities in her case outweighed the negative ones. The Applicant's assertion that we failed to consider whether her hardship, which we recognized as a mitigating factor would be exceptional and extremely unusual, does not establish a legal or policy error in our decision.

The Applicant therefore has not shown that our prior decision was incorrect as a matter of law or USCIS policy based on the evidence in the record at the time we dismissed her appeal, or that there are new facts or evidence that would warrant reopening of these proceedings and reevaluating positive and negative factors in her case.

Based on the above, we again conclude that the positive considerations in the Applicant's case, including her prior trauma and difficult circumstances, family ties in the United States, employment, payment of taxes, and hardship upon returning to El Salvador do not outweigh the negative impact of her criminal history and insufficient evidence of genuine rehabilitation. Consequently, the Applicant has not established 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 a favorable exercise of discretion is warranted. Her U adjustment application will therefore remain denied and her appeal dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.