U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22935601

Date: NOV. 16, 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 become 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, Application for Adjustment of Status of a U Nonimmigrant (U adjustment application) concluding that the Applicant did not establish he merited a favorable exercise 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 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 Mexico was granted U-1 nonimmigrant status as the victim of qualifying criminal activity from October 2014 through September 2018, and timely filed the instant U adjustment application in July 2018. The Director denied the application, concluding that the

Applicant's repeated arrests for driving under the influence (DUI) demonstrated a pattern of behavior that presents a risk to the well-being, safety, and property of others and, because the Applicant did not provide evidence that he discussed his history of drinking and driving with a civil surgeon who completed his medical exam for immigration purposes USCIS was unable to determine whether he no longer posed a risk to the public. The Director further found that the Applicant's 1997 arrest for carrying a concealed firearm in a vehicle in violation of federal law was a significant adverse factor, and his statement about the circumstances that led to the arrest had only limited evidentiary weight because it lacked corroboration. The Director further noted that, while not factored into the denial, the Applicant failed to disclose a 2003 arrest on battery charges on his Form I-918 and Form I-485 and he did not submit a statement or any of the required documents regarding this arrest.

On appeal, the Applicant submitted an updated Form I-693, Report of Medical Examination and Vaccination, addressing the history of his driving while impaired, as well as a statement from the civil surgeon indicating that although the Applicant had problems with alcohol in the past, he had been abstinent since 2010 and was neither a public risk nor burden to society. In dismissing the appeal, we acknowledged the positive factors in the Applicant's case, including his rehabilitative efforts, longtime residence in the United States, consistent employment, lack of criminal history since 2010, and his family ties in the country. We also recognized that the arrest and disposition records related to the Applicant's 2003 arrest (for battery or disturbing the peace) were destroyed; nevertheless, as the Applicant did not address the circumstances of that arrest, we explained that we were unable to assess his underlying conduct. Thus, we concluded that the overall positive equities were still insufficient to mitigate the serious nature of the Applicant's criminal history, such that a favorable exercise of discretion would be warranted.

A. Motion to Reconsider

The Applicant asserts that we failed to take into account the supplemental documentation he submitted in support of his appeal in December 2020 and September 2021, and that we improperly focused on his criminal history which involved a drinking problem he no longer has. He states that we therefore did not fully consider all of the evidence in dismissing his appeal, and that our adverse decision warrants reconsideration. Contrary to the Applicant's assertions, however, we did consider the information in the Form I-693 and the civil surgeon's statement (both dated in December 2020) and recognized the Applicant's efforts at rehabilitation. Nevertheless, we determined that they were not sufficient to overcome the negative impact of the Applicant's alcohol-related offenses and other criminal interactions, the circumstances of which he either did not address or did not adequately explain. The Applicant further states that although he mailed additional documentation to our office in September 2021, while the appeal was pending, we erroneously noted in the decision that we received no additional evidence. In support, he submits a FedEx tracking receipt with copies of the documents he claims were submitted to our office. As a preliminary matter, the Form I-290B instructions[1] provide that any brief and/or evidence submitted after filing of Form I-290B must be sent directly to our office, and refer appellants to our website for mailing address information. While the FedEx receipt indicates that in September 2021 the Applicant's counsel sent correspondence to a

[1] *See Instructions for Form I-290B*, https://www.uscis.gov/i-290b

Washington, D.C. address, we note that our mailing address had changed in April 2021.[2] Regardless, the record before us does not include any correspondence from the Applicant dated in September 2021, nor does it indicate that we received any evidence from the Applicant aside from the medical documentation before we issued the decision on his appeal. The Applicant therefore has not shown 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).

The Applicant also has not identified any specific legal or USCIS policy errors in our prior decision. Although he indicates that we should not have considered his criminal history because it is beyond the scope of the 10-year good moral character period required for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), and "other immigration statutes," he does not point to any legal provisions or USCIS policy indicating that the same rule applies in the discretionary determinations in adjustment of status proceedings under section 245(m) of the Act.

The Applicant therefore has not established a basis for reconsideration of our appellate decision.

B. Motion to Reopen

The Applicant requests us to reopen his U adjustment application and issue a new decision taking into account all evidence, including the supplemental documentation he claims he mailed to our office in September 2021 which, as stated was not previously included in the record. We have reviewed and considered this additional evidence, but conclude that it does not establish new facts sufficient to overcome our prior adverse determination. The new evidence includes the Applicant's updated statement, his psychological evaluation, a paralegal's statement, documents confirming that certain court records have been destroyed, support letters, and federal income tax returns. In his statement, the Applicant again acknowledges that he had four DUI incidents, and explains that he has tried very hard not to repeat the mistakes of the past and to put drinking behind him. He also states that he did not previously mention the 2003 incident because he did not believe it was the type of issue he would need to mention. He explains that he was not charged and released from jail. The Applicant states that although "the document says [he] was charged with battery," he recalls that "at most the police were thinking of [charging him] with disturbing the peace and decided not to . . . ." The psychological evaluation indicates that the Applicant discussed the 2003 arrest during a consultation with a clinical psychologist. According to the evaluation, the Applicant reported that when his male neighbor, with whom he associated socially was in his home, and while they were both drinking alcohol in excess they engaged in a dispute. The Applicant further reported that in his own and his family's defense he strong-armed the neighbor to leave his home, which resulted in the neighbor's bloody nose; the neighbor then called the police and the incident was investigated. The Applicant related that he attended a court hearing, but the neighbor did not follow through with his accusations of battery. The Applicant's own statements about the circumstances of his 2003 arrest indicate that he engaged in a physical altercation with his neighbor who was injured as a result. This in turn points to the violent nature of the Applicant's conduct, which is an additional adverse discretionary factor.

[2] *See* Administrative Appeals, *Contacting the AAO*, Last Reviewed/Updated: 04/30/2021 (explaining that the AAO's address for briefs and other correspondence related to existing matters is Camp Springs, Maryland) https://www.uscis.gov/administrative-appeals/appeals-resources/contacting-the-aao.

We acknowledge the statement from a paralegal, who explains that the 2003 arrest report and court disposition, as well as other records were destroyed and could not be obtained. However, as we previously recognized that the court records related to the Applicant's 2003 arrest were destroyed the paralegal's statement does not constitute new facts concerning that particular arrest. The letters from the Applicant's family, friends, and a pastor attest to his good character traits and his commitment not to drink alcohol; however, we previously explained that although the evidence pointing to the Applicant's rehabilitation was a positive factor, it was not sufficient to mitigate the seriousness of his criminal history.

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 his past criminal history.

III. CONCLUSION

The new evidence the Applicant submits on motion does not establish that the positive factors in his case outweigh the negative ones, such that adjustment of status under section 245(m) of the Act should be granted as a matter of discretion. The Applicant also has not demonstrated that our decision to dismiss his appeal was based on an incorrect application of the law or USCIS policy and that the decision was incorrect based on the evidence in the record at the time of the initial decision. The Applicant therefore has not shown that we erred as a matter of law or USCIS policy in dismissing his appeal, or that there are new facts or evidence that would warrant reopening of these proceedings.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.