U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24887921

Date: MAR. 9, 2023

Motion on Administrative Appeals Office Decision

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

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 derivative "U" nonimmigrant status. The Director of the Vermont Service Center denied the Form I-485, Application to Adjust Status or Register Permanent Residence (U adjustment application), concluding that a favorable exercise of discretion was not warranted. We dismissed the Applicant's subsequent appeal and combined motion to reopen and reconsider, again as a matter of discretion. The matter is now before us on a motion to reconsider. On motion, the Applicant submits a brief and copies of previously submitted evidence reasserting his eligibility for adjustment of status. Upon review, we will dismiss the motion.

I. LAW

A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that our decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We must dismiss a motion that does not satisfy the applicable requirements. 8 C.F.R. § 103.5(a)(4).

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 proof to establish eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). This burden includes establishing that discretion should be exercised in an applicant's favor; USCIS may consider 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, an 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").

II. ANALYSIS

The Applicant, a native and citizen of Mexico, was granted U-2 nonimmigrant status from March 2014 to October 2017, and timely filed his U adjustment application in October 2017. The Director denied the application, concluding that the Applicant had not submitted sufficient evidence to establish that he merited a favorable exercise of discretion.

In our March 2021 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 offenses, the recency of his convictions, his lack of rehabilitation, the serious nature of driving under the influence, and his immigration violations outweighed his positive and mitigating equities and he had not demonstrated that he merited a favorable exercise of discretion. We noted that the Applicant was convicted of disorderly conduct with public intoxication in [redacted] 2005. He was convicted of driving under the influence of alcohol in 2016 and 2018, which involved hitting the property of another while under the influence and resulted in criminal enhancements for high blood alcohol content. We noted that the most recent convictions occurred while the Applicant held U nonimmigrant status and one after he submitted his U adjustment application to reside permanently in the United States as an LPR. He was also arrested in [redacted] 2013 for disorderly conduct and having an open container in his hand, but no criminal charges were filed. Additionally, we mentioned the Applicant's immigration violations as unfavorable factors, including his misrepresentation upon seeking admission to the United States, removal order, multiple entries without inspection, and unauthorized periods of stay and employment. Finally, we discussed that the record contained insufficient evidence of his rehabilitation.

In our February 2022 decision dismissing his combined motion to reopen and reconsider, which is the prior adverse decision now at issue, we determined that the Applicant had not provided documentary evidence of new facts sufficient to establish his eligibility or established legal error to overcome the determinations in our decision on appeal. We addressed his allegation that the majority of the cases we cited for the basis of our discretionary analysis involved forms of relief that are irrelevant to an adjustment of status application after having U nonimmigrant status. We explained that we cited to these cases to explain the law applicable to, and how we assess, genuine rehabilitation in cases where an applicant has a criminal record. We acknowledged the Applicant's positive equities including recent sobriety, the childhood and adult trauma that led to his alcoholism, his family ties, efforts at rehabilitation, stable employment, church attendance and volunteerism, and the emotional and financial support he provides to his family. Additionally, we conceded that the Applicant's 2016 and 2018 guilty pleas were withdrawn and the cases dismissed after he completed his probation pursuant to sections 1203.3 and 1203.4 of the California Penal Code, but noted such dismissals do not eliminate

the immigration consequences of those convictions. The Applicant reasserted that denying his U adjustment application based on negative factors which were previously disclosed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" under the Administrative Procedures Act (APA). We noted that the Applicant received a waiver for the purpose of obtaining derivative U nonimmigrant status and afford positive weight to that decision; however, we may still consider his immigration violations in exercising our discretion for his U adjustment application. A U adjustment application is a separate adjudication and USCIS is not bound by its prior determination on a waiver application. We acknowledged the Applicant's arguments regarding discretionary denials and his submission of additional evidence of positive and mitigating equities. But we noted that his 2016 and 2018 convictions for DUI of alcohol .08 percent or above—offenses which occurred during the time he held U nonimmigrant status and constituted serious adverse factors in our discretionary determination—outweigh the positive and mitigating equities present in his case.

In support of his current motion to reconsider, the Applicant submits a brief, which repeats arguments from his prior brief that we erred in giving weight to conduct that was considered during the U nonimmigrant visa application process and this violates congressional intent of providing extensive relief to U victims. The Applicant asserts that we are collaterally estopped from denying his U adjustment application by giving weight to conduct previously waived because, per *Khan v. Johnson*, 160 F. Supp. 3d 1199 (C.D. Cal. 2016), issue preclusion applies, as an identical issue was already presented and considered, which was necessary to the ultimate decision. Specifically, the Applicant observes that his immigration violations and 2005 arrest and conviction have been subject to review on several occasions, including the adjudication his approved Form I-918, Supplement A, Petition for Qualifying Family Member of U-1 Recipient, and his approved Form I-192, Application for Advance Permission to Enter as Nonimmigrant. However, as we have previously stated, a U adjustment application is a separate proceeding and we are not bound by prior determinations, as section 212(d)(l4) of the Act and 8 C.F.R. § 212.17 (regarding waivers of inadmissibility for U nonimmigrants) articulates and implement a legal standard for a nonimmigrant status that is distinct from section 245(m) of the Act and 8 C.F.R. § 245.24(d)(11) (regarding the exercise of discretion for U adjustment applicants), which affords lawful permanent residency. Moreover, regarding collateral estoppel, *Khan* is inapplicable to the instant matter, as the facts and legal standard in the instant case are not identical, the Applicant's waiver application was not litigated, and USCIS' decision to approve the waiver application was not a final decision by an immigration judge. *See Khan*, 160 F. Supp. 3d at 1209-1214 (explaining the circumstances in which collateral estoppel applies).

III. CONCLUSION

The Applicant has not established that our prior 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. As we noted in our prior decisions, his 2016 and 2018 convictions for driving under the influence of alcohol with criminal enhancements for high blood alcohol content, which occurred during the time he held U nonimmigrant status and constituted serious adverse factors in our discretionary determination, outweigh the positive and mitigating equities present in his case. Consequently, the Applicant has not demonstrated that he is eligible on motion to adjust his status to that of an LPR under section 245(m) of the Act.

ORDER: The motion to reconsider is dismissed.