U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26349315

Date: MAY 3, 2023

Motion on Administrative Appeals Office Decision

Form I-485, Application to Register Permanent Residence or Adjust 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 for Adjustment of Status of a U Nonimmigrant (U adjustment application), concluding that a favorable exercise of discretion was not warranted because the Applicant's positive and mitigating equities did not outweigh the adverse factors in his case. We dismissed the Applicant's appeal and a subsequent combined motion to reopen and reconsider. The matter is now before us on a combined motion to reopen and reconsider. Upon review, we will dismiss the motion.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary 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 law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

The Applicant is a citizen of Guatemala who first entered the United States in 2014 with a valid U-3 visa. The Applicant filed his U adjustment application in March 2018. In September 2019, the Director denied the Applicant's U adjustment application. The Director acknowledged the positive and mitigating equities present in the Applicant's case: his family ties in the United States, including his mother, stepfather, and siblings; his community ties; the financial support he provides to his family; the hardships he and his family would experience were he to reside abroad; church membership and active involvement; letters from community members, church leaders, and employers in support of the Applcinat's request to adjust status; gainful employment in the United States; the Applicant's academic pursuits; volunteer work; and the Applicant's apparent lack of a criminal record since 2016.

However, the Director determined that the positive and mitigating equities were outweighed by the adverse factor of the Applicant's criminal history which "posed a risk to the safety and personal property of others." As detailed by the Director, the Applicant was charged with battery in 2015; the court docket submitted by the Applicant indicates he was diverted from prosecution for 24 months, was required to complete 40 hours of volunteer work and an anger management program, pay fees and

fines, and "stay away from" M-R-[1]. The charges were ultimately dismissed in 2017. In 2016, the Applicant was charged with theft. The court docket establishes that the Applicant pled guilty, was placed on probation for three years, had to serve 5 days in jail, was ordered to pay fees and fines and complete a theft awareness program, and was required to "stay 100 yards away from M-A-". The conditional sentence was not set to expire until [redacted] 2020.

In addition to the nature and seriousness of the above-referenced charges, the Director noted that while the Applicant had submitted court documents, he had failed to provide the arrest reports or criminal complaint, as requested by the Director in the March 2019 request for evidence. The Director concluded that the record did not suffice to establish that the Applicant's continued presence in the United States was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest such that she warranted a positive exercise of discretion to adjust her status to that of an LPR.

On motion, the Applicant maintains that he has established that he merits a favorable exercise of discretion. He contends that he has not had any problems with the law since 2016 and avoids people who could be a bad influence on hm. He also details the hardships he and his family will experience if he is unable to remain in the United States. Further, the Applicant states that he has done court-ordered volunteer work, is actively involved in his church, sends money to his grandparents in Guatemala, and is trying to become a better person. In addition to his declaration, the Applicant submits a 2019 psychological evaluation; 2019 court documentation from his probation officer; letters in support from his mother, sibling, stepfather, and employer; documentation establishing money transfers to his family in Guatemala since 2015; an excerpt from the *USCIS Policy Manual*; and two Board of Immigration Appeals decisions. We find that the Applicant has not submitted new facts supported by documentary evidence sufficient to warrant reopening the matter or established that our previous decision was based on an incorrect application of law or USCIS policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision.

In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, recency, and seriousness" of the relevant offense(s). *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). As noted by the Director, the record indicates that the Applicant was arrested on two separate occasions for the offenses of battery and theft, serious and troubling conduct while in U-3 status. We also note that the most recent charge against the Applicant, for theft, was in [redacted] 2016, less than six years ago.

Further, 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 (BIA 1988) ("[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."). In the absence of additional information or documentation which allows us to properly and fully consider the basis for and specific facts surrounding the Applicant's arrests, such as the underlying arrest report, records, or transcripts documenting his subsequent criminal proceedings, there is insufficient evidence to

[1] Initials are used throughout this decision to protect the identities of the individuals.

establish that his arrests and the serious charges levied against him should not be considered as adverse factors in his case or, alternatively, that lesser weight should be accorded to such evidence.

Moreover, 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 established rehabilitation, we examine not only the applicant's actions during the period of time for which he was required to comply with court-ordered mandates, but also after his successful completion of them. *See U.S. v. Knights*, 534 U.S. 112, 121 (2001) (recognizing that the state has a justified concern that an individual under probationary supervision is "more likely to engage in criminal conduct than an ordinary member of the community"). Further, when an individual is on probation, he enjoys reduced liberty. *See, e.g., Doe v. Harris*, 772 F.3d 563, 571 (9th Cir. 2014) (noting that, although a less restrictive sanction than incarceration, probation allows the government to "impose reasonable conditions that deprive the offender of some freedoms enjoyed by law abiding citizens") (internal quotations omitted); *U.S. v. King*, 736 F.3d 805, 808-09 (9th Cir. 2013) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.") (internal quotations omitted). In this case, the Applicant's conditional sentence for theft was set to expire on [redacted] 2020, more than two years after the filing of his U adjustment application, and although the Applicant has submitted documentation to establish that his supervised probation ended on [redacted] 2019, the record does not include evidence indicating his successful discharge from his conditional sentence.

While we acknowledge the positive and mitigating factors in this case, including the new evidence submitted on motion, they are insufficient to outweigh the nature, recency, and seriousness of the Applicant's criminal history such that he has met his burden to establish that he warrants adjustment of status as a matter of discretion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.