U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21581366

Date: JUN. 14, 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 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 her "U" nonimmigrant status. The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application). We dismissed the Applicant's appeal, and the matter is now before us on a combined motion to reopen and reconsider. Upon review, we will dismiss the motions.

I. LAW

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 state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). The motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought.

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 establishing their eligibility, section 291 of the Act, 8 U.S.C. § 1361, and must do so 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 their 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).

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, the 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 nonimmigrant status in September 2014. She filed the instant U adjustment application in December 2018. In our prior decision, incorporated 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 outweighed her positive equities and she had not demonstrated that she merited a favorable exercise of discretion. On motion, the Applicant submits a brief and new evidence.

Relevant to the Applicant's criminal history, she adjusted her status to that of an LPR spouse of a U.S. citizen in 2003. Four years later the Applicant was arrested for transporting nine undocumented migrants in her truck; in 2008 she was convicted of felony transportation of unlawful aliens in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii)[1] and 1324(a)(1)(B)(ii) and sentenced to 18 months of imprisonment and 2 years of supervised release. The Applicant was subsequently removed from the United States as an aggravated felon in [redacted] 2009 pursuant to an Immigration Judge's order, and prohibited from entering, attempting to enter, or being in the United States for a period of 10 years. The Applicant nevertheless returned to the United States without inspection two weeks later, and the prior removal order against her was reinstated. In 2010 the Applicant pled guilty to reentering the United States after removal in violation of 8 U.S.C. § 1326(a), with sentencing enhanced pursuant to 8 U.S.C. § 1326(b)(2), a Class C felony offense, and was sentenced to 37 months in prison and 3 years of supervised release. The record shows that following her release from prison in 2012 the Applicant was again removed from the United States in [redacted] 2013.

A. Motion to Reconsider

In support of her motion to reconsider, the Applicant argues that our dismissal of her appeal was "unclear whether the [d]ecision . . . has not met the statutory eligibility requirements of INA Section 245(m) – humanitarian grounds, family unity, or the public interest – or if it is solely based on a negative exercise of discretion, as these separate analyses are conflated throughout the decision." The Applicant states that she is statutorily eligible and has demonstrated that she merits a positive exercise of discretion. We note that the statute the Applicant states we are conflating is the same, and states that USCIS "*may* adjust the status" of a U nonimmigrant "if...in the opinion of the [agency]," her continued presence is justified on humanitarian grounds, to ensure family unity, or is otherwise in the

[1] This section provides for punishment of "[a]ny person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law."

public interest." 8 U.S.C. § 1255(m)(1)(B) (emphasis added). Our discretionary analysis is based around the Applicant's positive mitigating factors, which includes humanitarian grounds, family unity, or the public interest. Our dismissal of the Applicant's appeal relied on that framework to determine that her negative factors outweighed the positive, and therefore resulted in a negative discretionary determination. The Applicant further claims that "only one" of these factors (humanitarian grounds, family ties, or public interest) "must be present in a case in order for an applicant to meet the statutory eligibility requirements." However, this claim is meritless. There is nothing in our previous decision that establishes application of an incorrect analysis. Under the Applicant's reasoning, regardless of the amount or seriousness of the adverse factors, an applicant who asserts a humanitarian or family basis to stay in the country should be allowed to adjust status. Moreover, the regulations implementing section 1255(m) specifically state that USCIS, in determining whether to exercise its discretion to adjust status, "may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making the discretionary decision on the application." *See* 8 C.F.R. § 245.24(d)(11). Here, our previous decision establishes that we considered all factors and evidence and properly exercised our statutory discretion in dismissing the Applicant's appeal.

The Applicant further argues that our dismissal of her appeal was "inconsistent, arbitrary, and capricious in violation of stated USCIS policies and the APA." Here, the Applicant revisits some arguments made on appeal, and states that, as her Form I-192, Application for Advance Permission to Enter as a Nonimmigrant (waiver application), was approved with her U nonimmigrant petition, USCIS "already exercised its discretion to grant [her] U nonimmigrant status and associated waiver under a higher legal standard than that to which the current adjustment of status is subject." The Applicant argues that "to deny the present application for negative factors which arose and were disclosed before the previous grant would be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' and therefore a violation of the Administrative Procedures Act, USCIS Policy Manual, and a recently issued USCIS Policy Alert." In our previous decision, we explained that USCIS is not bound by its prior determination on a waiver application. Thus, the fact that USCIS granted the Applicant U nonimmigrant status and a waiver of inadmissibility as a matter of discretion despite her immigration violations and criminal record, does not mean that USCIS must exercise its discretion favorably in adjustment of status proceedings notwithstanding those adverse factors. Rather, it is the Applicant's burden to demonstrate that she merits adjustment of status to that of an LPR when all positive and negative factors are weighed together. *See* 8 C.F.R. §§ 245.24(b)(6), (d)(11).

The Applicant cites *Wellington v. I.N.S.*, F.3d 631 (5th Cir. 1997), which stated, "[a]lthough decisions on motions to reopen are discretionary, an agency may not depart from its settled policies without offering a reasoned explanation," and further cited *Brackeen v. Holland*, 994 F.3d 249 (5th Cir. 2021), summarizing in her own words, "an agency violates the APA under the arbitrary and capricious standard by changing position without providing adequate reasons for the change." As noted above, in our dismissal of her appeal, we explained that an adjudication of a waiver application and an adjudication of an application for adjustment of status are held to separate standards. Sections 101(a)(15)(U)(i) and 214(p) of the Act, 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p) and 8 C.F.R. § 214.14(a)(14) (regarding U nonimmigrant classification) articulate and implement a legal standard for a temporary, 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. Therefore, we determine that the Applicant was provided with sufficient

reasons for change, specifically the differing nature between a grant of U nonimmigrant status and adjustment of status to that of an LPR.

In further support of this argument, the Applicant cites the USCIS Policy Manual's discussion of discretionary decisions, as well as USCIS Policy Alert, PA-2021-05 (April 27, 2021). The Policy Alert notes that "USCIS gives deference to prior determinations when adjudicating *extension requests* involving the same parties and facts unless there was a material error, material change in circumstances or in eligibility, or new material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility" (emphasis added). This Policy Alert is not informative in the Applicant's case, as she was not applying for an extension request, but for an adjustment of status to that of an LPR. Additionally, as noted, the adjudication of a waiver application and an adjustment of status application are not the same adjudication. The Policy Alert relates to, essentially, a renewal of a status already held. Here, the Applicant was applying to adjust status to a that of an LPR.

The Applicant further argues that USCIS is collaterally estopped, or precluded from reaching a different decision than that issued with the approval of her waiver application, as the circumstances have not changed since the waiver application was approved. In support of this argument, the Applicant cites *Amrollah v. Napolitano*, 710 F.3d (5th Cir. 2013). However, the circumstances of the Applicant's case are not similar to *Amrollah*, which references a *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) decision which provided three requirements for issue preclusion to apply: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." *Amrollah*, 710 F.3d. Notably, whether the Applicant merits discretion for a waiver application or for the more permanent lawful permanent resident status are not identical issues, and the issues in the Applicant's case were not "actually litigated" or ruled upon by a judge. Instead, the decisions on the Applicant's waiver application and U adjustment application were made by USCIS.

The Applicant also argues that our previous decision failed to follow the guidance in the USCIS Policy Manual for issuing a discretionary denial and discusses in detail the evidence previously submitted and how she meets each of the qualifications. Our previous decision discussed the evidence in the record at the time of the decision and provided the weighing of positive and negative factors in the Applicant's case. The decision on her appeal noted her family ties, evidence of employment and payment of taxes, and evidence of abuse experienced by the Applicant at the hands of former partners. The previous decision also noted that letters were provided attesting to the Applicant's character; however, as they did not fully discuss knowledge of the Applicant's past, they were not given significant weight. The appeal dismissal acknowledged the Applicant's fears that her prior partners were living in Mexico and could harm her there, but also noted that the Applicant frequently traveled back to Mexico after she was granted U nonimmigrant status, and that she resided in Mexico while she was awaiting the adjudication of her U nonimmigrant petition.[2] The Applicant notes an error in our previous decision which noted that her children resided with her sister while she was incarcerated and corrects the record that they lived with their father at the time. While we acknowledge the error,

[2] Our previous decision noted that the Applicant had made 21 trips to Mexico during her U nonimmigrant status. In her motion, the Applicant argues that the trips were short in duration to visit her mother and to attend medical appointments related to a workers compensation claim. While trips of short duration do not equate to permanent relocation, the Applicant has not shown an unwillingness to be in Mexico, and therefore we determine that our previous decision made no error in discussing her travel.

we do not find it significant enough to alter our previous decision. The Applicant's significant negative factors, including being convicted of an aggravated felony, having her previous LPR status revoked and subsequently being removed from the United States twice, are not outweighed by her humanitarian concerns or family ties, and her adjustment of status is not otherwise in the public interest. The Applicant argues in her motion that we made a "disingenuous summary conclusion" in our discussion of her 2001 arrest for assault, for which she plead *nolo contendere*, which is considered a conviction for immigration purposes. The Applicant argues on motion that she did not clearly remember, and that as the consequences of her plea resulted in a fine, it should not be considered a significant negative factor as it was her "sincere belief" that the charge was dismissed. The Applicant does not challenge the previous decision which noted that she had not provided a full accounting for the events the led to her 2001 arrest, and only stated that she was the one who was attacked. The Applicant continues to insist that it was a minor incident 20 years ago and should have been given little weight in review of her discretionary factors.

The Applicant additionally discusses an incident that occurred when she was in an immigration detention center. She argues that she was not made previously aware of the derogatory information in the record prior to our decision; however, we note that the Director's request for evidence (RFE) asked for information regarding this incident which noted "USCIS also notes that while incarcerated, you were placed in separation on one known occasion in 2013 for assaulting another inmate," and it was additionally discussed in the Director's denial. While our decision provided more details of the incident, we determine that the Applicant was notified of the derogatory information. Moreover, regarding derogatory information of which the Applicant was unaware, USCIS must provide her with an opportunity to rebut the information before a decision is issued. *See* 8 C.F.R. § 103.2(b)(16)(i) (stating that, if a decision will be adverse to the applicant and based on derogatory information of which she is unaware, USCIS is required to advise her of the derogatory information and provide her with an opportunity to rebut the information before a decision is rendered). USCIS is not, however, required to provide the Applicant with an exhaustive list or documentation of the derogatory information as long as it advises the applicant of that information and provides them an opportunity to respond. *See, e.g.*, *Ogbolumani v. Napolitano*, 557 F.3d 729, 735 (7th Cir. 2009) (explaining that 8 C.F.R. § 103.2(b)(16)(i) "does not require USCIS to provide, in painstaking detail, the evidence of fraud it finds" and that a notice of intent to deny (NOID) provided sufficient notice and opportunity to respond to the derogatory information); *Hassan v. Chertoff*, 593 F.3d 785, 787 (9th Cir. 2010) (concluding that 8 C.F.R. § 103.2(b)(16)(i) requires only that the government make a petitioner "aware" of the derogatory information used against her and provide her with the opportunity to explain—"[t]he regulation . . . requires no more of the government."); *Zizi v. Field Office Director*, 753 Fed. Appx. 116, 117 (3rd Cir. 2019) (stating that 8 C.F.R. § 103.2(b)(16)(i) "does not require the Government to provide 'actual documents[;]'" instead, it "requires only that [the] petitioner 'be advised' of derogatory information and 'offered an opportunity to rebut the information and present information [o]n his . . . own behalf").

Regarding this incident, the Applicant provided the response that, "she was involved in an altercation with another detainee." The Applicant argues in her motion that using this incident report amounts to the use of police reports or arrest records, and states that it is "an unproven accusation that should be given little to no weight," and argues that arrest reports are not considered part of the record of conviction. However, 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."). Here, the Applicant corroborates that an altercation took place, and does not dispute the information provided in our dismissal of her appeal. Therefore, we determine that there was no error in attributing negative weight to this incident, and further that the Applicant has not established that our previous decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3).

B. Motion to Reopen

The Applicant submits additional evidence in support of her positive mitigating factors, including documentation that she has completed food service exams, is in the process of obtaining her General Education Development (GED), evidence of property purchases, and documentation of country conditions in Mexico. We acknowledge that the record contains positive and mitigating equities relevant to both humanitarian and family unity concerns. In summary, the Applicant has lived in the United States consistently since she was 19 years of age and has been gainfully employed since her return to the United States after being granted U nonimmigrant status in 2015. She was the victim of severe abuse at the hands of her former spouse and received U nonimmigrant status as a result of her assistance to law enforcement in the investigation of her former spouse's abuse. The Applicant expressed remorse for the incidents that led to her arrests and immigration violations. She also has two minor children, and one adult child, all who are U.S. citizens. However, these positive and mitigating factors remain outweighed by the Applicant's serious criminal history and immigration violations.

An applicant must establish that she meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. at 375. To determine whether an applicant has met her burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). The Director properly determined that the Applicant's criminal history outweighed her positive factors. The Applicant has not overcome this determination on appeal or on motion. Accordingly, the Applicant has not met her burden to establish that the positive and mitigating equities in his case outweigh the adverse factors such that she merits a favorable exercise of discretion. Consequently, the Applicant has not established that her adjustment of status to that of an LPR under section 245(m)(3) of the Act is warranted.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.