U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21799096

Date: MAY 9, 2022

Motion on Administrative Appeals Office Decision

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

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 as the qualifying family member of a victim of qualifying criminal activity. The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), and we dismissed the Applicant's subsequent appeal. The matter is now before us on a motion to reopen and reconsider. On motion, the Applicant submits a brief and additional evidence.[1] Upon review, we will dismiss the motions.

I. LAW

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 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 benefit sought. The burden of proof is on the applicant to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The Applicant, a 46-year-old native and citizen of Mexico, entered the United States without inspection in July 1995, when he was 20 years old. His spouse filed a Form I-918 Supplement A, Petition for Qualifying Member of U-1 Nonimmigrant (U derivative petition), on his behalf, which

[1] On motion, the Applicant contends that reopening is warranted based on additional evidence of positive and mitigating factors. He also contends that reconsideration is warranted as we gave too much weight to the allegations leading to the 2017 and 2019 orders of protection and should have issued a request for evidence (RFE) or notice of intent to deny (NOID) requesting additional information regarding his [redacted] 2019 arrest before denying his U adjustment application. In support of his contentions, the Applicant submits court records regarding his 2017 and 2019 orders of protection, a copy of his divorce decree, police reports regarding domestic incidents in 2011, 2015, and 2017, letters of support from family and friends, evidence of completion of parenting classes and payment of court fines, a Minnesota Court of Appeals decision, and various non-precedent decisions from our office.

USCIS approved, according him derivative U-2 nonimmigrant status from May 2014 to June 2017.[2] The Applicant timely filed the instant U adjustment application in May 2017. In October 2019, the Director denied the application, concluding that the Applicant had not established that a favorable exercise of discretion was warranted on humanitarian grounds, to ensure family unity, or was otherwise in the public interest as required under section 245(m) of the Act.

In our prior decision on appeal, incorporated here by reference, we acknowledged the Applicant's positive and mitigating equities including his spouse of 10 years and three U.S. citizen children, lengthy residence in the United States, history of stable employment and payment of taxes, and letters of support stating that he is a hard worker and a good father. Nevertheless, we concluded that the adverse factors in his case including his criminal conduct which occurred while he held U nonimmigrant status continued to outweigh the positive and mitigating equities in his case. The record reflects that the Applicant was involved in several domestic disturbances with his spouse at their home in 2015 and 2017. As a result, the Applicant's spouse obtained an order of protection against the Applicant in [redacted] 2017. She further obtained an order of protection on behalf of their son in [redacted] 2019 after the Applicant was arrested for malicious punishment of a child and domestic assault.

Regarding the Applicant's criminal history, we noted the circumstances surrounding the issuance of an order of protection in [redacted] 2017, during the time he held derivative U nonimmigrant status. We acknowledged that the Applicant was not criminally charged. However, we determined that it was appropriate for us to consider the factual information in the police reports associated with the domestic disturbance. Additionally, we highlighted that the order was issued in part based on allegations that the Applicant forced himself sexually on his spouse, which we considered serious misconduct. In terms of the Applicant's 2019 arrest for malicious punishment of a child and resultant order of protection, we noted that the Applicant did not provide any explanation or documents regarding the arrest or order of protection despite being provided an opportunity to do so. Additionally, we stressed that we considered misconduct against a child a serious adverse factor, and that the absence of conviction did not mean that the underlying conduct did not occur. We noted that, absent additional documentation, there was insufficient evidence to establish that his arrest and orders of protection should not be considered adverse factors in his case or that lesser weight should be accorded to said evidence.

On motion, the Applicant asserts that we "should reopen [his] adjustment of status case because he is offering new facts and previously unavailable evidence showing that he merits favorable discretion." He first argues that the allegations his former spouse made against him in order to obtain the 2017 and 2019 orders of protection were fabricated during a contentious separation and custody battle and that she requested dismissal of both the 2017 and 2019 orders of protection before they expired. He submits a statement from his former spouse in support of his assertions. We acknowledge that the record indicates that his former spouse requested dismissal of the protection orders issued against him. However, in her statement, the Applicant's former spouse does not deny her allegations of sexual assault or otherwise address the allegedly fabricated charges; instead, she states that the Applicant has made "mistakes" in the past but is a good father to their children. Furthermore, the Applicant has still not provided additional court documents regarding the 2017 order of protection as specifically

[2] The Applicant and his spouse divorced in 2020.

requested by the Director in her request for evidence (RFE) or an explanation as to why he was unable to obtain those documents. Lastly, the record indicates that the Applicant's former spouse requested dismissal of the 2019 order of protection because she reached final divorce and custody agreements with the Applicant, and not because the underlying allegations in the order of protection were untrue.

The Applicant next argues that the state of Minnesota subsequently dropped the criminal charges for malicious punishment of a child and domestic assault.[3] We acknowledge that the Applicant was not convicted of these charges. However, as we noted in our prior decision, even if the Applicant was not ultimately convicted of the charges, that does not equate with a finding that the underlying conduct or behavior leading to the charges did not occur or that the charges were unsubstantiated. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all factors in making the discretionary determination and that it "will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of" certain classes of crimes). We additionally note, on motion, discrepancies regarding the circumstances leading to the Applicant's 2019 arrest. For instance, the Applicant explains in his updated affidavit that he told his son to do his homework and then left him alone to complete it. He states that he was in another room when he heard a crash and discovered that his son had fallen off his hoverboard. According to him, he "ran up and scolded" his son for playing on his hoverboard instead of doing his homework. He claims that he "looked [his son] over and gave [him] a hug." Two days later, his former spouse called to tell him that their son had bruises on his body. He claims that he tried to explain what happened, but she abruptly ended the conversation. He maintains that he never hit his son and that he was "heartbroken" when he received the court notice for an order of protection for his son. We note, however, that the Applicant's version of the events differs from those found in the *Statement of Probable Cause* indicating that the Applicant's son's mother noticed bruising on his buttocks after he spent a weekend with the Applicant. The Applicant's son initially told his mother that he had fallen at the Applicant's home. However, he later began to cry and stated that the Applicant "had spanked him due to [his] poor performance on his homework." He further stated that the Applicant put ice on his buttocks and told him not to tell his mother. During a physical examination, the Applicant's son told doctors that the Applicant spanked him with a "stick of white wood that was approximately 2-2.5 feet long." The *Statement of Probable Cause* indicates that "pieces of wood matching the description provided by [the Applicant's] son were located in [his] residence." The Applicant has not addressed or otherwise explained why his version of what happened differs from his son's version of events or why pieces of wood consistent with his son's version of the events were later found in his home.

We acknowledge the Applicant's arguments and his submission of additional evidence of positive and mitigating equities.[4] However, he has not provided documentary evidence of new facts sufficient to

[3] The Applicant submits a copy of a document entitled *Petitioner's Request for Dismissal of Order of Protection* from Ramsey County, Minnesota District Court, a sentencing document, and a copy of document entitled *Petitioner to Enter Plea of Guilty in Misdemeanor or Gross Misdemeanor Case Pursuant to Rule 15*, indicating that the charges for malicious punishment of a child and domestic assault were dismissed and that he pled guilty to an amended charge of contributing to the need for protection or services.

[4] The Applicant submits an updated personal affidavit stating that he and his former spouse experienced marital problems regarding money and coparenting, an affidavit from his former spouse stating that the Applicant has always been a good father, a copy of police reports for domestic disturbances between him and his former spouse from 2011 to 2019, a record of child support payments, a copy of a parenting class certificate, a letter from his son, a letter confirming that he completed a diagnostic assessment and individual therapy, and a letter from his employer confirming his current employment as a construction worker.

establish his eligibility or 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 decision, the nature, recency, and seriousness of the 2017 and 2019 orders of protection issued against the Applicant, the absence of additional information or documentation regarding the 2017 order of protection, his 2019 conviction for contributing to the need for protection or services, and inconsistencies in the record regarding the circumstances that led to said conviction—all of which occurred during the time he held U nonimmigrant status—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 reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.