U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6500172

Date: JUNE 1, 2020

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 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 motion to reconsider, and we dismissed the Applicant's subsequent appeal. The matter is now before us on a motion to reconsider. Upon review, we will dismiss the motion.

I. LAW

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). Although the Applicant presents new legal arguments on motion, they are ultimately insufficient to establish his eligibility.

The burden of proof is on the applicant to demonstrate eligibility by a preponderance of the evidence. 8 C.F.R. § 214.11(d)(5); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The Applicant, a native and citizen of Mexico, was granted U-4 status as the parent of a victim of qualifying criminal activity from October 2013 to September 2017, and timely filed his U adjustment application in February 2017. In our prior decision, incorporated here by reference, we determined that the Applicant 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 history and lack of rehabilitation outweighed his positive equities and he had not demonstrated that he merited a favorable exercise of discretion. The Applicant has not established legal error in our prior decision and has not overcome these determinations on motion.

On motion, the Applicant first claims that we placed too much negative weight on his [redacted] 2015 criminal conviction for misdemeanor battery against his spouse, as the low severity of the crime is reflected in the ten-day sentence that was imposed. However, the record reflects that the Applicant's sentence also included three years of probation, a $500 domestic violence fine, compliance with a criminal order of protection, and 52 weeks of attendance in a domestic violence program. In addition, although we acknowledged the Applicant's completion of domestic violence and anger management courses, we noted that he had not provided evidence that he completed his probation. We further emphasized that the Applicant had not addressed certain inconsistencies in the record, including factual discrepancies regarding the manner in which he struck his spouse and the extent to which his conduct impacted his stepson, the U-1 principal, as battery and child cruelty charges against the Applicant for the same incident indicated that his stepson was the victim. We particularly noted that the Applicant had not provided a police report for the [redacted] 2013 incident that led to the [redacted] 2015 conviction, even though the Director specifically requested this evidence, and that he had not provided evidence to support his claim that the arresting agency refused to release the report to him. On motion, the Applicant has not submitted evidence regarding his completion of probation, addressed the inconsistencies regarding the circumstances of his arrest, or provided the police report. As such, we find no error in our prior determination.

The Applicant next asserts that his situation directly parallels the factual circumstances of the respondent in *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970), because he is eligible for adjustment of status, his criminal convictions do not make him inadmissible, he does not need to obtain a waiver of inadmissibility, and he has outstanding positive equities. However, this claim is unpersuasive, as the Board of Immigration Appeals (Board) determined that the respondent in *Matter of Arai,* unlike the Applicant, had no adverse factors, signifying that he merited a favorable exercise of discretion without needing to reach whether he had outstanding equities. *Id.* at 495-96. Moreover, as U adjustment applicants are not required to establish their inadmissibility to the United States, we may consider the Applicant's criminal history regardless of whether it makes him inadmissible. *See* 8 C.F.R. § 245.24(d)(11) (explaining that we may take into account "all factors," including acts that would otherwise make an applicant inadmissible, in making our discretionary determination).

We additionally determined on appeal, as relevant here, that the Applicant had not established his rehabilitation because he had not adequately addressed a 2014 arrest in [redacted] California that appears in his record. We explained that although the Applicant maintained that he had not had further problems with the police since his 2013 arrest, he did not submit a supplemental statement in response to the Director's request for evidence (RFE) and did not provide evidence that he contacted the relevant law enforcement agencies to confirm the nonexistence of arrest records. On motion, Applicant's counsel states that our discussion of the "phantom 2014 arrest has no basis in fact" as he could not obtain such record and the "Court provided [him] (and prior counsel) with the only file that they had on the Applicant." However, we afford limited weight to this statement, as the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988). As the Applicant has not provided evidence from law enforcement confirming the nonexistence of the 2014 arrest, he has not overcome our prior determination that he had not established his rehabilitation.

The Applicant further claims that we abused our discretion in denying his U adjustment application because we did not reference his family ties and hardship, especially to his stepson, if he were to be removed from the United States, and did not address the "voluminous" letter that attested to his deep

devotion to family, exemplary character, and work ethic. Upon review, however, the record reflects that we did consider this evidence, as our prior decision summarizes the Applicant's description of his close relationship with his family and belief that his children would be negatively impacted by his removal. In addition, we acknowledged supporting letters that described the Applicant's dedication to his children and "good character." On motion, the Applicant provides additional evidence of his mitigating equities. He submits two supporting letters from friends who describe him as hardworking, professional, and dedicated to family, as well as his Form 1040, U.S. Individual Income Tax Return for 2018 and evidence of payment of child support. He also submits a statement from his spouse, who states that she was the victim of the [redacted] 2013 battery and that the incident was not part of a pattern of domestic violence. This statement appears to be in response to our concern on appeal that his spouse's prior statement did not address this issue.

Although we acknowledge this evidence, the Applicant has not established legal error in our prior decision and has not sufficiently addressed our above-mentioned concerns regarding his criminal history and lack of rehabilitation. As such, the Applicant has not demonstrated on motion that he merits a favorable exercise of discretion. Consequently, the Applicant has not established that his adjustment of status to that of an LPR under section 245(m) of the Act is warranted on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

ORDER: The motion to reconsider is dismissed.