U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-A-M-F-

DATE: JULY 25, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

The Applicant seeks to become a lawful permanent resident based on his "U" nonimmigrant status. *See* Immigration and Nationality Act (the Act) section 245(m), 8 U.S.C. § 1255(m). The U classification affords nonimmigrant status to crime victims, who assist authorities investigating or prosecuting the criminal activity, and their qualifying family members. The U nonimmigrant may later apply for lawful permanent residency.

The Director, Vermont Service Center, granted U-1 nonimmigrant status to the Applicant based upon an approved Form I-918, Petition for U Nonimmigrant Status. The Applicant subsequently filed a Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application). The Director denied the application as a matter of discretion. The Director reviewed the Applicant's close family ties in the United States, payment of income taxes, stable employment, and the support of family members, friends, teachers, and professional references, and concluded that these positive factors did not outweigh the negative factors, including a juvenile delinquency adjudication for sexual abuse of a minor, and convictions as an adult for theft, sexual abuse of a minor, and driving under the influence of intoxicants (DUII).

The Applicant filed an appeal, claiming that the positive equities outweighed the negative factors, and that we should exercise our discretion to approve the application. In our appeal decision, incorporated here by reference, we reviewed as positive factors the evidence from church members, teachers, and state officials, his high school education, payment of taxes, and efforts to rehabilitate. The Applicant described a supportive family life with his father, step-mother and three brothers, and stated that he provides financial support for them and for his U.S. citizen child. The negative factors were the Applicant's juvenile delinquency adjudication for third degree sexual abuse, and adult convictions for theft, second degree sexual abuse, DUII, and multiple probation violations. We concluded that the Applicant had not established that the positive equities outweighed the negative factors, and that his adjustment of status was warranted for humanitarian reasons, for family unity, or was otherwise in the public interest.

The matter is now before us on a motion to reconsider. On motion, the Applicant submits a brief and additional evidence. The Applicant claims that we erred in concluding that he was convicted of sexual abuse of a minor, as defined by federal law, that he has successfully completed many of the

conditions of probation, and that he has matured through his experiences. He requests a favorable exercise of discretion.

Upon review, we will deny the motion.

I. APPLICABLE LAW

A motion to reconsider must: (1) 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 United States Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. *See Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010). A petitioner may submit any evidence for us to consider; however, we determine, in our sole discretion, the credibility of and the weight to give that evidence. *See* section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

II. ANALYSIS

In our prior decision, we determined that the Applicant did not demonstrate that the positive equities in his case outweighed the Applicant's juvenile offense and adult convictions. The Applicant's criminal history includes the following: a judgment of delinquency pursuant to the Applicant's admission, of violating Or. Rev. Stat. section 163.415, a Class A misdemeanor (sexual abuse in the third degree); a conviction, pursuant to the Applicant's guilty plea, of violating Or. Rev. Stat. section 164.045 (theft in the second degree), a Class A misdemeanor; a conviction, pursuant to the Applicant's guilty plea of violating Or. Rev. Stat. section 163.425 (sexual abuse in the second degree), a Class C felony; and a conviction, pursuant to the Applicant's guilty plea, of violating Or. Rev. Stat. section 813.010, DUII, a misdemeanor.

Under Section 245(m) of the Act, adjustment of status is a discretionary benefit. The Applicant bears the burden of showing that discretion should be exercised in his favor. 8 C.F.R. § 245.24(d)(11). Although U adjustment applicants are not required to demonstrate their admissibility, USCIS may consider all factors when making its discretionary decision on the application. *Id.* Generally, favorable factors such as family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion. However, where adverse factors are present, it will be necessary for the applicant to offset these factors by showing sufficient mitigating factors. *Id.* This rule permits applicants to submit information regarding any mitigating factors they would like USCIS to consider when determining whether a favorable exercise of discretion is appropriate. *Id.* Depending on the nature of the adverse factors, the applicant may be required to demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. *Id.* Moreover, depending on the gravity of the factors, such a showing might still be insufficient. *Id.*; *Matter of Jean*, 23 I&N Dec. 373, 383-384 (A.G. 2002), *aff'd*, *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006); *see also Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Mejia v. Gonzales*, 499 F.3d 991 (9th Cir. 2007). For

example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. 8 C.F.R. § 245.24(d)(11).

A. Adverse Factors

The Applicant's disregard for the law, as shown in his juvenile delinquency adjudication and adult convictions of two misdemeanors, two felony sex offenses, and three probation violations, along with the fact that the Applicant is still serving a sentence of formal probation, are serious adverse factors weighing against approval of the U adjustment application. The record shows that the incidents underlying Applicant's conviction of second-degree sex abuse and the DUII incident occurred during the period when the Applicant was in U nonimmigrant status.[1] These recent convictions weigh more heavily as negative factors because the Applicant was in U nonimmigrant status, and he has not fully rehabilitated from these crimes.

The Applicant claims on motion that he is not guilty of "sexual abuse of a minor," as his conviction involved his old girlfriend, and a four-year age difference between them. He asserts that because the Oregon statute is broader than the generic federal crime for sexual abuse of a minor as defined at 18 U.S.C. § 2243(a), *Estrada-Espinosa v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), we may not hold him to the greater standard of proving only the most compelling mitigating circumstances under 8 C.F.R. § 245.24(d)(11).[2] In *Estrada-Espinosa v. Mukasey*, the court determined that the criminal defendant's conviction under a California statute for sexual abuse of a minor was not a crime of violence or aggravated felony for the purposes of determining the defendant's removability from the United States. However, we do not reach the question of whether *Estrada-Espinosa v. Mukasey* prohibits us from holding the Applicant to a standard of proving "only the most the compelling positive factors" because the Applicant has nonetheless not shown that the denial of adjustment would result in exceptional and extremely unusual hardship. The regulation at 8 C.F.R. § 245.24(d)(11) provides, in part, where the adverse factors are particularly serious, an Applicant may demonstrate that adjustment may be granted if the denial of adjustment of status would result in exceptional and extremely unusual hardship. Here, the adverse factors include two felony convictions for sexual crimes in Oregon, which are "particularly serious" within the meaning of the regulation. The Applicant does not claim on motion that he would suffer exceptional and extremely unusual hardship if he were removed.

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[1] We acknowledge the Applicant's claim that we erroneously stated that his felony sexual abuse convictions and his DUII conviction were based on incidents occurring within the past two years. That statement is incorrect and is withdrawn.

[2] The regulation provides, in part, that only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted a crime involving sexual abuse committed upon a child.

The Applicant will continue to serve on probation for the felony sex abuse convictions, including conditions and restrictions ordered by the court, until 2018. While we recognize that the Applicant's father states that the Applicant has improved significantly, the fact that the Applicant is still on probation for the felony sex crimes evidences that he is not fully rehabilitated from his criminal behavior.

The Applicant served on probation for the DUII conviction until 2016. The Applicant does not submit a statement or other evidence on motion that he has completed probation, or describe his continuing efforts at drug and alcohol rehabilitation since he completed treatment. The record does not contain documents describing current recovery efforts, whether or not the Applicant continues to attend AA or other support group meetings, and/or whether he has obtained a new driver's license from the state of Oregon. The Applicant incorrectly claims that we erroneously determined that his continued presence in the United States was a threat to the community. We did not make this observation in our decision.

B. Favorable Factors

On motion, the Applicant submits documentation of additional mitigating factors, including his participation in court ordered treatment programs, letters from his parents, a copy of his brother's naturalization certificate, and his 2014 tax return. He submits a new letter from PPO, and a letter from indicating that he completed alcohol and drug treatment on 2015, fully paid the fines and fees as ordered by the court for both the DUII and sex abuse convictions, and completed all the special conditions of his DUII case. indicates that probation for the DUII case would expire on 2016.[3] states that the Applicant is currently attending sex offender counseling, is doing well, and that probation for the sex offender conviction is scheduled to expire on 2018. The Applicant's parents state that they have a close-knit family, and request that we keep the family together. His father states that he has seen significant improvement in his son, and describes his good deeds.

The favorable factors in this case are the Applicant's close family ties in the United States, his payment of income taxes, his consistent employment, improved behavior, completion of the conditions of the DUII probation, continuing participation in court-ordered treatment for sexual abuse, and the support of family members, friends, teachers, and professional references.

C. Weighing the Factors as an Exercise of Discretion

The Applicant claims that we did not credit him for expressing remorse for his actions. We acknowledge the Applicant's letter submitted in response to the Director's request for evidence where the Applicant stated "I am truly remorseful for what I have done wrong." The Applicant's single admission of regret, however, is belied by his attempts throughout the record to refute his

[3] letter is dated in January 2016.

culpability.[4] On motion, the Applicant contends that his completion of and participation in court ordered treatment programs is an expression of remorse. While we acknowledge statements that the Applicant is complying with probation and is doing well, the Applicant's participation in court ordered treatment programs is not an expression of remorse. Further, though his statement that he is truly remorseful is accepted as an expression of remorse, its effect is lessened by his assertions that he is innocent. The criminal court found that there was a factual basis for the sexual abuse convictions and we cannot look behind the convictions to reassess the Applicant's guilt or innocence. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999) (unless a judgment is void on its face, an administrative agency cannot go behind the judicial record to determine an alien's guilt or innocence); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996)(same).

The favorable and mitigating factors in the present case are the Applicant's close family ties in the United States, his employment, financial responsibility, high school education, the support of his extended family in the United States, professional, and social networks, commendable efforts to rehabilitate, and the expression of remorse.

After considering the evidence in its totality, based upon our discretion, we find that the Applicant's serious criminal history, probationary status, and lack of complete rehabilitation from his criminal past, outweighs the favorable factors in his case. Accordingly, the Applicant has not demonstrated that his adjustment of status is warranted for humanitarian reasons, for family unity, or is otherwise in the public interest.

III. CONCLUSION

In these proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reconsider is denied.

Cite as *Matter of M-A-M-F-*, ID# 17355 (AAO July 25, 2016)

[4] The Applicant claimed that he was coerced into smoking marijuana that caused him to commit the offense that led to the 2008 conviction, denied knowing that his girlfriend in the 2013 conviction was a minor, contested the charges of violence against both females contained in the arrest reports, and argued that his blood alcohol content was just above the legal limit that resulted in the 2014 conviction.