U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 22492334

Date: AUG. 30, 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 based on his "U" nonimmigrant status as a child of a victim of qualifying criminal activity under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of Alien in U Nonimmigrant Status (U adjustment application), and we dismissed his appeal and subsequent combined motion to reopen and reconsider, as it was received untimely. The matter is before us on an additional combined motion to reopen and reconsider. Upon review, we will dismiss the motions.

## I. LAW

Any motion to reconsider an action by U.S. Citizenship and Immigration Services (USCIS) filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i). This 30-day period includes 3 additional days for the mailing of a decision. 8 C.F.R. § 103.8(b). During the coronavirus (COVID-19) pandemic, USCIS issued guidance which stated that the filing of Form I-290B, Notice of Appeal or Motion, would be allowed up to 60 dates from the date of decisions issued between March 1, 2020, and October 31, 2021. The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. 8 C.F.R. § 214.14(c)(4); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

## II. ANALYSIS

The Applicant is a 25-year-old citizen of Mexico who entered the United States without authorization in 1996. In June 2013, the Applicant was granted U-1 status from June 2013 until June 2017 based on his mother's victimization.[1] The Applicant timely filed the instant U adjustment application in June 2017. The Director denied the application, concluding that the Applicant's positive and mitigating equities were outweighed by his arrest for sexual assault to a child while in U status.

[1] The Applicant's mother died in a drunk driving accident caused by her boyfriend in [redacted] 2003. The Applicant was seven years old. The Applicant obtained U nonimmigrant status as a result of this crime pursuant to 8 C.F.R. § 214.14(a)(l4)(i).

Accordingly, the Director concluded 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 such that he warranted a positive exercise of discretion to adjust his status to that of an LPR. The Applicant has not overcome this determination on motion.

We dismissed the Applicant's appeal, and determined that, due to his criminal history, he had not established that his continued presence was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest and that he had not demonstrated that he merited a favorable exercise of discretion to adjust his status under section 245(m) of the Act. The Applicant was arrested and charged in [redacted] Texas for sexual assault to a child under Texas Penal Code (Tex. Penal Code) section 22.011(a)(2), a second-degree felony. According to the indictment document from the Criminal District Court [redacted] of the State of Texas, the Applicant intentionally and knowingly caused the penetration of the anus of a child younger than 17 years of age with his sexual organ. With his appeal, the Applicant provided evidence that the charge was reduced to assault under Tex. Penal Code section 22.01(a)(1), a class A misdemeanor. The Applicant pleaded guilty to assault in [redacted] 2018. The Applicant was sentenced to 24 months of community supervision and required to pay a $500 fine. In [redacted] 2021, the Applicant submitted an order from the County Criminal Court [redacted] of [redacted] Texas stating that he was discharged from the community supervision effective [redacted] 2020. We determined that while the Applicant expressed remorse, he did not provide any explanation as to the specific circumstances giving rise to his arrest on charges of felony sexual assault to a child and subsequent conviction for misdemeanor assault. We determined that the record indicated that the Applicant was arrested for felony sexual assault of child while in U status, and the charging document described very serious conduct, and that 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). Although we acknowledged that the Applicant's charge for felony sexual assault of a child was reduced to a misdemeanor assault, the Applicant did not contest the contents of the documents outlining the conduct underlying his arrest or otherwise described the circumstances that led to it, and the record nonetheless established that he pleaded guilty to and was convicted for intentionally, knowingly, or recklessly causing bodily injury to another person, which is a crime of a recent, serious, and violent nature. *See* Tex. Penal Code § 22.01(a) (stating that a person commits the offense of assault if they "intentionally, knowingly, or recklessly cause[] bodily injury to another").

Further, we determined that the Applicant was placed under probationary supervision as a result of his conviction in [redacted] 2018, over a year after the filing of his U adjustment application requesting to reside in this country permanently as an LPR. The Applicant completed his probation requirements in [redacted] 2020, almost two years after his filing of the instant appeal. We determined that the record lacked evidence of his conduct since his probation was terminated. While his compliance with the terms of his probation may be considered a mitigating factor, it was not, alone, sufficient to demonstrate his successful rehabilitation: 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). Ultimately, we determined that the Applicant presented evidence of

humanitarian, public interest, and family unity considerations. However, due to the nature, recency, and seriousness of the Applicant's criminal history, the Applicant did not establish that his continued presence was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest. Consequently, the Applicant did not demonstrate that he merited a favorable exercise of discretion to adjust his status under section 245(m) of the Act.

The Applicant subsequently filed a combined motion to reopen and reconsider our dismissal of his appeal. The Applicant's appeal decision was mailed from the Administrative Appeals Office on March 26, 2021. The subsequent motion to reopen and reconsider was received at the Vermont Service Center on June 14, 2021, after 80 days. As a result, that motion to reopen and reconsider was dismissed as untimely. *See* 8 C.F.R. § 103.5(a)(1)(i), 8 C.F.R. § 103.8(b).

With his instant combined motion to reopen and reconsider, the Applicant argues that his previous combined motion to reopen and reconsider was untimely due to USCIS error, and therefore should be forgiven. In support of this argument, the Applicant submits a FedEx tracking notice. We note that this tracking information indicates that a package was delivered to Saint Albans, Vermont on May 24, 2021; however, the Applicant has not submitted any corroborating evidence to indicate that this tracking notice relates to the filing of his combined motion to reopen and reconsider. Further, the Applicant states that the combined motion to reopen and reconsider was untimely due to an improper rejection of his filing by the Vermont Service Center. With the instant motion, the Applicant states, "[a]ccording to instructions on the USCIS website, motions to reconsider decisions of the AAO must be sent to the USCIS office that made the unfavorable decision. The Service Center that denied the I-485 based on U-visa is the Vermont service center. The Vermont Service Center received the Applicant's motion to reopen to the AAO on May 24, 2021, within the appeal time provided. Therefore, the AAO has erred in its decision to deny the motion to reconsider as untimely" (emphasis omitted). However, he does not submit a Notice of Action from the Vermont Service Center that would have been received with that rejected filing and could corroborate his stated reasons for the rejection of his May 24, 2021, filing. The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. 8 C.F.R. § 214.14(c)(4); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Further, a rejected filing does not retain a filing date. 8 C.F.R. § 103.2(a)(7)(ii).

As a result, we have determined that the Applicant has not established, by a preponderance of the evidence, that our previous dismissal of his combined motion to reopen and reconsider was in error, and his U adjustment application will remain denied.

**ORDER:** The motion to reopen is dismissed.

**FURTHER ORDER:** The motion to reconsider is dismissed.