U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-A-C-R-

DATE: JAN. 31, 2019

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 derivative U nonimmigrant status under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The Director denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), concluding that the record did not establish that an exercise of discretion is warranted, as the mitigating factors and positive equities in the Applicant's case did not outweigh the negative factors. We dismissed the Applicant's subsequent appeal. The matter is now before us on a combined motion to reopen and motion to reconsider. The Applicant submits a brief and additional evidence and reasserts his eligibility. Upon review, we will deny the combined motion.

I. LAW

A motion to reopen must state new facts 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 law or U.S. Citizenship and Immigration Services (USCIS) policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

In our decision on appeal, incorporated here by reference, we concluded that the favorable factors in the Applicant's case did not outweigh the significant negative factors, including the Applicant's verified membership in the [redacted] gang, which represents a threat to national security and public safety, and his failure to disclose that membership on his U adjustment application. Therefore, we found that a favorable exercise of discretion was not warranted and that the Applicant's continued presence in the United States is not justified on humanitarian grounds, for family unity, or in the public interest.

On motion, the Applicant reasserts that he is not a gang member, and contends that we provided him only vague information about the evidence that he is a gang member, including referencing the Director's decision that he wears gang-related clothing, associates with known gang members, and posted gang-related materials on social media. He states that he "lack[s] any personal knowledge of

what 'gang clothing' and 'gang-related materials' might constitute," but submits a new personal statement and supporting photographs regarding some of his attire, hand signals, and social media posts which he believes may be connected to the finding that he is a gang member. He explains that his clothing, hand signals, and social media posts are unrelated to gangs, but instead reflect his personal style and interests in sports and music, and asserts that he only learned of their potential association with [redacted] after an internet search about that gang. The Applicant also submits statements from two friends explaining photographs in which they appeared with the Applicant while making certain hand gestures. Although the Applicant submits new evidence on motion regarding the significance of some of his clothing, hand gestures, and social media posts, this evidence does not overcome the results of law enforcement investigations concluding that he is a member of [redacted] which is recognized as a transnational gang posing a threat to national security, public safety, and law enforcement operations.[1]

A. The Applicant Received Sufficient Notice of Derogatory Information

On motion, the Applicant argues that we abused our discretion and violated the regulation at 8 C.F.R. § 103.2(b)(16)(i) by denying him an opportunity to review the derogatory evidence against him. He notes that 8 C.F.R. § 103.2(b)(16)(i) specifies that an applicant "shall be permitted to inspect the record of the proceeding which constitutes the basis for the decision." On motion, the Applicant states that he did not have an opportunity to inspect the record of proceedings. He contends that the Freedom of Information Act (FOIA) statute at U.S.C. section 552, under which some portions of the Applicant's record were withheld, is not an applicable exception to the requirement at 8 C.F.R. § 103.2(b)(16)(i) that an applicant be permitted to inspect the record of proceeding. He notes that none of his records were excluded under the applicable exceptions at 8 C.F.R. § 103.2(b)(16)(i), which exempt USCIS from disclosing records when the decision is a matter of statutory eligibility or the agency has determined that the information is classified. However, the FOIA process is the mechanism for a member of the public to "request access to records from any federal agency," U.S. Department of Justice, *What is FOIA?*, https://www.foia.gov/about.html (last visited Dec. 12, 2018), and the evidence reflects that the Applicant requested and received copies of his records through that process. The Applicant does not assert on motion that another process exists with which we have not complied.

Furthermore, the record shows that the Applicant received sufficient notice of the derogatory information upon which our decision was based and had an opportunity to rebut that information, as 8 C.F.R. § 103.2(b)(16)(i) requires. An applicant's immigration record includes security checks that

[1] *See* Congressional Research Service, [redacted] *in the United States and Federal Law Enforcement* [redacted] 2018, https://fas.org[redacted].pdf (last visited Jan. 3, 2019) (identifying [redacted] as "a violent criminal gang operating both in the United States and abroad" whose members have been involved in murder, drug trafficking, human smuggling and trafficking, and other local crimes and transnational illicit activity); FBI, *Statement of William F. Sweeney, Jr., New York Asst. Dir. in Charge, Federal Bureau of Investigation, Before the House Homeland Security Committee,* [redacted] 2107, https://www.fbi.gov/news/testimony/combating-gang-violence-[redacted] (last visited Jan. 3, 2019) (describing [redacted] as "increasingly the most violent and well-organized" street gang in the United States).

the Department of Homeland Security conducts on individuals seeking immigration benefits. We review these records to determine if they impact an applicant's eligibility for the benefit he or she is seeking. If the information, as in this case, results in an adverse decision, USCIS is required to advise the applicant of the derogatory information of which the applicant is unaware and must provide the applicant with an opportunity to rebut the information before the decision is issued. 8 C.F.R. § 103.2(b)(16)(i). USCIS is not required to provide an applicant with an exhaustive list or documentation of the derogatory information as long as it advises the applicant of that information and provides the applicant with an opportunity to respond. *See Hassan v. Chertoff*, 593 F.3d 785, 787 (9th Cir. 2010) (concluding 8 C.F.R. § 103.2(b)(16)(i) only requires the government to make a petitioner "aware" of the derogatory information used against him or her); *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 exhaustively list all information found regarding marriage fraud and notice of intent to deny (NOID) gave plaintiffs sufficient notice and opportunity to respond to derogatory information). *See also Mangwiro v. Johnson*, 554 Fed.Appx. 255, 261 (5th Cir. 2014) (concluding 8 C.F.R. § 103.2(b)(16)(i) "does not require USCIS to provide documentary evidence of the [derogatory] information, but only sufficient information to allow the petitioners to rebut the allegations"); *Diaz v. U.S. Citizenship & Immigration Servs.*, 499 Fed.Appx. 853, 855-56 (11th Cir. 2012) (concluding 8 C.F.R. § 103.2(b)(16)(i) "only require[s] that a petitioner be advised of the derogatory information that will be used to deny the petition and be given the opportunity to respond"); *Melendez v. Dept. of Homeland Security*, No. 6:15-cv-47-Orl-22GJK, 2016 WL 3675468, at *6 (M.D. Fl. June 22, 2016) (finding the "plain language" of the regulation did "not support Plaintiff's argument that USCIS was required to produce documentary evidence of the derogatory information it relied on.").

As discussed, the Applicant requested and received copies of his records through FOIA, and has had opportunities to rebut the Director's findings before us on appeal and again on motion. Although the Applicant now contends that we provided only vague descriptions of the derogatory evidence against him and discussed previously undisclosed information in our decision on appeal, the record does not support his claim. We and the Director informed the Applicant of the Immigration and Customs Enforcement (ICE) and Homeland Security Investigations (HSI) determinations of his gang membership based on investigations of his clothing, hand signals, and social media posts. On motion, the Applicant acknowledges that the new information he alleges we provided in the appeal decision was limited to "the timeframe of the investigation and the responsible agencies" involved in the investigation, rather than any substantive derogatory evidence against the Applicant.

As stated in our prior decision, the law enforcement determination of the Applicant's gang membership was based on a 2016 ICE investigation and photographs posted on the Applicant's social media in 2016, most of which were removed by the Applicant after the Director issued a NOID. USCIS records show the photographs and social media account investigated by ICE and HSI match the Applicant's biometric data and other photographs of the Applicant in the record of proceedings. Contrary to his claim on motion that we must provide him with copies of his own social media posts, 8 C.F.R. § 103.2(b)(16)(i) requires only that we notify the Applicant of

derogatory information of which he is unaware. The Applicant's argument that he is unaware of the content of his own social media posts is not persuasive.

Although the Applicant also claims a violation of due process, there are no due process rights implicated in the adjudication of a benefits application. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) (holding that "[w]e have never held that applicants for benefits . . . have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (finding that the Fifth Amendment protects against the deprivation of property rights granted to immigrants, but petitioners do not have an inherent property right in an immigrant visa). In addition, even where due process rights are implicated, an individual must show prejudice to establish a violation. *See generally Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008) (stating that "[p]arties claiming denial of due process in immigration cases [involving removal proceedings] must, in order to prevail, allege some cognizable prejudice fairly attributable to the challenged process") (citations omitted). Here, the Applicant has been afforded multiple opportunities to rebut the derogatory information regarding his affiliation with [redacted] in initial response to the Director's NOID, in response to the Director's denial on appeal, and again on motion. *See Hassan v. Chertoff*, 593 F.3d at 789 (USCIS did not violate 8 C.F.R. § 103.2(b)(16)(i) or due process where applicant had notice of derogatory information and opportunity to respond); *Diaz v. USCIS*, 499 Fed. Appx. at 855-56 (USCIS did not violate U.S. citizen's due process rights in declining her request for a second interview as regulation only required agency to provide petitioner with notice of derogatory evidence and a rebuttal opportunity.).

B. We Properly Relied on Law Enforcement Verification of the Applicant's Gang Membership

The Applicant also argues on motion that we "impermissibly abrogated [our] obligation to exercise [our] own discretion to adjudicate his claim" because we relied on the results of investigations by ICE and HSI verifying his membership in [redacted]. He asserts that we abused our discretion by "failing to make [our] own assessment of the reliability of ICE/HSI's determination and then affording undue weight to that determination." Contrary to the Applicant's assertion, we do not "make [our] own determination as to [the Applicant's] gang membership." Instead, as we explained on appeal, the determination of whether an individual is a gang member is within the jurisdiction of the investigating law enforcement agency and we defer to that finding. Although the Applicant correctly notes that some law enforcement agencies have misidentified other individuals as affiliated with gangs, the Applicant has not presented evidence of unreliability or otherwise established an error in his case.

Furthermore, in exercising its discretion, USCIS may consider all relevant factors, both favorable and adverse, but the U nonimmigrant ultimately bears the burden of showing that discretion should be exercised in his or her favor. 8 C.F.R. § 245.24(d)(10)-(11). Our responsibility is to determine the weight to give to the evidence in the record and weigh whether the adverse factors—which in this case are the Applicant's gang membership, risk to the public safety, and failure to disclose the gang membership—outweigh the positive factors such that a favorable exercise of discretion would

be warranted. Section 245(m) of the Act; 8 C.F.R. § 245.24(d)(11); *see also* 7 *USCIS Policy Manual* A.10(B)(1)-(2), www.uscis.gov/policymanual. The Applicant provides no evidence to support his assertion that we did not confirm the reliability of the law enforcement investigations regarding his gang membership or that we otherwise erred in relying on that information. Contrary to the Applicant's claim on motion that we did not properly weigh the "evidence of non-gang membership" and other favorable factors in his case, we discussed the favorable and unfavorable factors in the Applicant's case in detail. We noted the Applicant's long period of residence in the United States, family ties here, the financial support he provides to his family, his tax payment history, and his employment in the United States, and explained why a favorable exercise of discretion was not warranted. The Applicant's evidence and assertions on motion do not overcome our prior decision or establish error in that decision.

III. CONCLUSION

The Applicant's evidence, when considered individually and in the totality, does not overcome information in the record from law enforcement agencies verifying the Applicant's [redacted] gang membership. The record does not support the Applicant's assertions on motion that we violated regulatory requirements and abused our discretion. The Applicant does not establish new facts supported by documentary evidence or establish that our prior decision was based on an incorrect application of law or policy and was incorrect based on the evidence in the record at the time. He has not established that his continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or otherwise in the public interest and that a favorable exercise of discretion would be warranted to adjust his status.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of N-A-C-R-*, ID# 1878859 (AAO Jan. 31, 2019)