



**U.S. Citizenship  
and Immigration  
Services**

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

In Re: 19977780

Date: FEB. 1, 2022

Appeal of Vermont Service Center Decision

Form I-485, Application for Adjustment of Status of a 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 “U” nonimmigrant status. The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of a U Nonimmigrant (U adjustment application), concluding that a favorable exercise of discretion was not warranted because the Applicant’s positive and mitigating equities did not outweigh the adverse factors in his case. The matter is now before us on appeal. On appeal, the Applicant submits a brief reasserting his eligibility. The Administrative Appeals Office reviews the questions in this matter *de novo*. *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, the appeal will be dismissed.

**I. LAW**

U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if they meet all other eligibility requirements and, “in the opinion” of USCIS, their “continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.” Section 245(m) of the Act. The applicant bears the burden of establishing their eligibility, section 291 of the Act, 8 U.S.C. § 1361, and must do so by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This burden includes establishing that discretion should be exercised in their favor, and USCIS may take into account all relevant factors in making its discretionary determination. 8 C.F.R. §§ 245.24(b)(6), (d)(11).

A favorable exercise of discretion to grant an applicant adjustment of status to that of LPR is generally warranted in the absence of adverse factors and presence of favorable factors. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Favorable factors include, but are not limited to, family unity, length of residence in the United States, employment, community involvement, and good moral character. *Id.*; *see also* 7 *USCIS Policy Manual* A.10(B)(2), <https://www.uscis.gov/policy-manual> (providing guidance regarding adjudicative factors to consider in discretionary determinations). However, where adverse factors are present, the applicant may submit evidence establishing mitigating equities. *See* 8 C.F.R. § 245.24(d)(11) (stating that, “[w]here adverse factors are present, an applicant may offset

these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate”).

## II. ANALYSIS

The Applicant, a native and citizen of Mexico, entered the United States without inspection, admission, or parole in December 2003. USCIS granted the Applicant U nonimmigrant status from October 2015 to September 2019, as the victim of a kidnapping and armed robbery that occurred in [REDACTED] 2012. The Applicant timely filed the instant U adjustment application in July 2019. The Director denied the application, concluding that the Applicant had not demonstrated that his adjustment of status to that of an LPR was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest because his adverse factors, particularly his [REDACTED] 2014 conviction for Attempt to Commit Furnishing Obscene or Harmful Materials to a Minor while he held U nonimmigrant status, outweighed the positive factors in his case. The Applicant has not overcome this determination on appeal.

### A. Favorable and Mitigating Equities

The Applicant is 36 years old and has lived in the United States for more than 18 years. His family ties in the United States include his LPR mother and sister, partner,<sup>1</sup> and three U.S. citizen children. The Applicant also provided evidence of homeownership, stable employment, and payment of taxes from 2016 to 2018. Additionally, the Applicant claimed that if he had to return to his home country of Mexico, his immediate family would suffer serious hardship. Specifically, he claims that his mother has health limitations due to a stroke and relies on him for physical and financial support. He further claims his partner and children would lose their home and struggle to pay for household and educational expenses if he is unable to remain in the United States. The Applicant submitted numerous letters of support from friends and family indicating that he is a hardworking employee and caring family man who regularly contributes to his community.

### B. Adverse Factors

The Applicant's primary adverse factor is his criminal history. The record reflects that the Applicant was arrested in [REDACTED] Arizona, in [REDACTED] 2013 with two felony counts of Furnishing Harmful Material to a Minor and Luring a Minor for Sexual Exploitation in violation of sections 13-3506(A) and 13-554(A) of the Arizona Revised Statutes (Az. Rev. Stat.), respectively. According to the [REDACTED] Arizona Police Department Harassing Report (police report), D-F-<sup>2</sup>, a 17-year-old, told the police that she worked with the Applicant, 28 years of age at the time, at a local restaurant. She also told the police that the Applicant had conversations with her about sexual intercourse over the two weeks prior to the report. She stated that she tried to ignore the Applicant and his comments and conversations about sex. She further stated that, on one occasion, the Applicant offered her a ride home from work. While she was in the car, the Applicant gave her a sex toy and explained to her how she could use it. She claimed that she refused and told her father of the incident who reported it to the police. When the Applicant was questioned about the incident by the police, he acknowledged that

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<sup>1</sup> The Applicant's partner's immigration status is not clear from the record.

<sup>2</sup> Initials are used to protect the individual's privacy.

D-F- was 17 years old. He also acknowledged that he had a few conversations with D-F- with sexual overtones. The Applicant claimed that he was comfortable with the conversation and believed that D-F- was as well. He stated that “[h]e was under the belief that by speaking to [D-F-] about sexual topics and [in which] she voluntarily participated[,] it was okay to do so.” He also confirmed D-F-’s story regarding the sex toy. He stated that he and D-F- had a conversation about sex toys. He admitted that D-F- did not ask him to purchase the sex toy, but that he bought it after she expressed a curiosity about them.

Based on the Applicant’s and D-F-’s statements to the police, the Applicant was charged with Luring a Minor for Sexual Exploitation and Furnishing Obscene or Harmful Items to Minors, both felony charges. He pled guilty to an amended charge of Attempt to Commit Furnishing Obscene and Harmful Materials to a Minor in [ ] 2014. The charge for Luring a Minor for Sexual Exploitation was dismissed. The Applicant was placed on three years of supervised probation and ordered to complete 30 hours of community restitution, refrain from any contact with the victim, and pay all court costs and fines. After the Applicant completed 30 hours of community restitution, his probation officer petitioned the court to adjust his period of supervised probation to reflect the award of 446 days earned time credit for completing community restitution, paying court costs and fines, and displaying positive progression towards the end of his probation. In [ ] 2016, the court granted the petition, changing the Applicant’s discharge date from [ ] 2016 to [ ] 2016. The Applicant submitted evidence that he paid all court costs and fines and was discharged from supervised probation in 2016.

The Applicant expressed remorse for his arrest and subsequent conviction. He acknowledged that he “made a terrible mistake of communicating with an underage girl about sexual activity.” He further acknowledged the hardship his conduct caused his partner of 19 years. He emphasized that, although his partner was upset and hurt by his conduct, she supported him and guided him through the entire criminal case. He further emphasized that his partner accepted that he committed the biggest mistake of his life and yet she stayed by his side as they worked to rebuild their relationship and family. The Applicant claims that he has had time to reflect on his mistakes and put himself in his victim’s father’s shoes. He asserts that he no longer “engage[s] in or sustain[s] any inappropriate conversation and [he] remain[s] respectful and professional no matter what environment [he is] in.”

#### C. A Favorable Exercise of Discretion is Not Warranted Based on Humanitarian Grounds, to Ensure Family Unity, or in the Public Interest

The Applicant bears the burden of establishing that he merits a favorable exercise of discretion on humanitarian grounds, to ensure family unity, or as otherwise in the public interest. 8 C.F.R. § 245.45(d)(11). Upon *de novo* review of the record, as supplemented on appeal, the Applicant has not made such a showing.

We have considered the favorable and mitigating equities in this case. We acknowledge the Applicant’s lengthy residence in the United States, family ties, homeownership, stable employment, and payment of taxes. We further acknowledge the hardship that the Applicant and his family would suffer if he was unable to remain in the United States. However, notwithstanding these factors, the Applicant has not demonstrated that he merits a favorable exercise of discretion to adjust his status to that of an LPR.

In the decision below, the Director determined that the Applicant's adverse factors outweighed the positive and mitigating equities in his case. On appeal, the Applicant disputes this determination. Specifically, he highlights his lengthy residence and extensive family ties in the United States, his expression of remorse for his criminal history, successful completion of probation, and his community ties as a volunteer and homeowner. He cites to two non-precedent decisions issued by our office as evidence that an applicant's positive and mitigating equities can outweigh their criminal history so as to justify a grant of adjustment of status in the favorable exercise of discretion.

As a preliminary matter, the cited decisions were not published as precedent and, accordingly, do not bind USCIS in future adjudications. *See* 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act"). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

Furthermore, in considering an Applicant's criminal history in the exercise of discretion, we consider multiple factors including the "nature, recency, and seriousness" of the crimes and underlying conduct. *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978). Here, the Applicant's [redacted] 2013 arrest for lewd offenses against a minor occurred while he was in U nonimmigrant status. The offense is particularly serious as the record reflects, and the Applicant does not dispute, that the victim was a minor who was disturbed enough by the Applicant's behavior to disclose it to her father who later contacted the police. It is of further significance that the incident involved lewd and lascivious behavior, which is the very type of behavior that U nonimmigrant status seeks to protect against. *See* 8 C.F.R. §§ 214.14(a)(9) (including, as qualifying criminal activity, "sexual assault" and "sexual exploitation") and 245.24(d)(11) (stating that USCIS may take into account all factors in making its 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, including sexual abuse of a minor). *See also* Interim Rule, *New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53015 (Sept. 17, 2007) ("In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of . . . sexual assault . . . while offering protection to victims of such crimes."). As the Director noted, the Applicant's own admission that he knowingly discussed sexual activity with an underage girl on multiple occasions and gave her a sex toy evidences serious and problematic behavior and indicates a serious risk to the personal and public safety of others.

While we acknowledge that the [redacted] 2013 charge for Luring a Minor for Sexual Exploitation against the Applicant was ultimately dismissed pursuant to a plea agreement, the fact that he was not convicted of the underlying charge, or that the charge was ultimately not sustained by the Criminal Court, does not equate with a finding that the underlying conduct or behavior leading to the charge did not occur. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all factors in making its 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). Moreover, as stated above, the Applicant ultimately pled guilty to, and was convicted of, Attempt to Commit Furnishing Obscene and Harmful Materials to a Minor.

To summarize, the Applicant has a criminal history, which includes an arrest for Furnishing Harmful Material to a Minor and Luring a Minor for Sexual Exploitation and a subsequent conviction for Attempt to Commit Furnishing Obscene and Harmful Materials to a Minor—offenses which evidence a serious risk to public and personal public safety of others, and for which the U visa program was designed to protect against. The Applicant's arrest and conviction occurred while he held U nonimmigrant status. While we acknowledge the positive and mitigating equities including the Applicant's family ties, lengthy residence in the United States, stable employment, payment of taxes, and homeownership, they are not sufficient to establish that his continued presence is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest given the nature, recency, and severity of his arrest and criminal conviction while he held U nonimmigrant status. Consequently, the Applicant has not demonstrated that he is eligible to adjust his status to that of an LPR under section 245(m) of the Act.

**ORDER:** The appeal is dismissed.