



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

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

In Re: 17526491

Date: FEB. 14, 2022

Appeal of Vermont Service Center Decision

Form I-485, Application for Adjustment of Status of 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 to Register Permanent Residence or Adjust Status (U adjustment application), and the matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence. 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 an 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 adjustment of status determinations). However, where adverse factors are present, the applicant may submit evidence establishing mitigating equities. See 8 C.F.R. § 245.24(d)(11) (providing 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 is a 26-year-old citizen of Mexico who entered the United States without authorization along with his mother when he was approximately one month of age. In November 2015, the Director granted the Applicant U-3 derivative nonimmigrant status as a qualifying relative of a principal U-1 nonimmigrant. The Applicant filed his U adjustment application in July 2019. The Director denied the application, concluding that the Applicant's positive and mitigating equities were outweighed by his conviction for driving under the influence of alcohol (DUI) while in U status and his subsequent violation of the terms of his probation for that DUI conviction, as well as his other arrests, and that, accordingly, 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 appeal.

A. Favorable and Mitigating Equities

As noted by the Director, the Applicant provided evidence that he is the parent of two U.S. citizen children, he has demonstrated his payment of taxes, his steady history of employment in the United States, and his long residence in this country since he was an infant. The Applicant reported that while he presently resides in Oregon both his children live with his grandmother in California where they are enrolled in special education programs at school. The Applicant stated that one son has autism and the other also requires special assistance through an individual education program (IEP). Although he resides in Oregon, the Applicant asserted that "when he can get work" he provides financial support each month to his grandmother to care for his children and he also sends them clothes, shoes, and school supplies when he can.

On appeal, the Applicant submits a personal declaration, photos of him with his two sons, several letters from family members and friends all stating that the Applicant is a good person trying to improve himself despite the mistakes he has made, court documents, his children's birth certificates, school documentation showing that his sons both continue to be involved in special education curriculums, the IEP update for one son, a copy of the Applicant's own past IEP from when he was in school, copies of the Applicant's federal tax filings for the years 2018 through 2020, and internet printouts of country reports on human rights conditions in Mexico.

In his personal declaration, the Applicant states that he came to the United States when he was only one month old along with his mother, who told him that they were in danger and had to leave Mexico for safety reasons. The Applicant recounted that they settled in California, first in the southern part of the state and then subsequently in the northern part where they lived with his grandparents. He stated that he was sixteen years old when he met the young woman who would give birth to his two sons who were born approximately eleven months apart, the first in 2012 and the second in 2013. The Applicant reported that his relationship with the mother of his children was not healthy for him because she neglected the children often to go out with her friends, and this dynamic led to frequent arguments between them until she ultimately "left one day and never came back." The Applicant stated that he has not seen her since she left, and at the time he felt like his world was crumbling, which resulted in him feeling depressed and he "began to make bad choices." The Applicant recounted that his grandparents took custody of his two sons "because I wasn't doing well. I had depression and I was

doing things I wasn't supposed to do." He further stated that at the age of nineteen he moved to Oregon to live with his mother and two younger sisters. The Applicant described the challenges facing his children with special needs and his relationship with them. He stated that his grandmother brings them to Oregon every year and stays for a period of about two months and that during such visits the Applicant takes responsibility for his sons by feeding them and being with them as much as he can, and that when he "can get work" he helps his grandparents by giving money for them. He reported that he gives them \$500 per month when he can but also sends clothes, shoes, and school supplies.

The Applicant further stated that he has "made many mistakes" but he has improved to be a better person for both himself and his children. He reported that he has completed all the conditions given to him by the court and states the following:

I made a mistake before by not only getting a DUI, but not completing the classes I was supposed to on time. This is because I did not have the money to pay for the treatment classes I was required to do. I eventually completed the DUI treatment classes, but because I did not do them when I was ordered to I will now always have a conviction for a DUI on my record Regardless, having completed the treatment program for the DUI I know that that is not a mistake I will ever make again.

Additionally, the Applicant stated that becoming a better person is important to him because someday when his grandparents are no longer around he will be the only one to care for his children and he wants to be there for them. Per the Applicant, his plan is to save money, buy a house, and bring his children to Oregon to live with him. Finally, he stated that he has no connection to or family in Mexico and he would have no future there and be unable to care for his family in the United States which would result in extreme hardship particularly to his sons.

B. Adverse Factors

The primary adverse factors are the Applicant's criminal history of various offenses and arrests, some of which occurred when he was a juvenile and others occurring as an adult. Specifically, in [REDACTED] 2011, the Applicant was arrested at age sixteen for driving/taking a vehicle without consent and possession of burglary tools. Applicable records for this arrest show that the Applicant was ordered to attend counseling and perform fifty hours of community service. In [REDACTED] 2016, while in U nonimmigrant status, the Applicant was arrested and convicted of both DUI and reckless driving. A copy of the incident report that was issued by the [REDACTED] Municipal Court was provided by the Applicant in response to a request for evidence. A review of this incident report describes the arresting officer as having observed the Applicant operating a vehicle at an estimated speed of 90 miles per hour within a residential neighborhood and failing to stop for several traffic signals while also failing to maintain proper lanes. The officer indicated that he activated the overhead police cruiser lights but the Applicant failed to yield. Rather, the Applicant continued to drive the vehicle at a high rate of speed through the residential area until finally pulling into a driveway. The officer initiated the arrest and described in detail visible signs that the Applicant was impaired including the Applicant being unsure of his exact location. The officer then asked the Applicant if he would voluntarily submit to field sobriety tests, to which the Applicant agreed and performed poorly so he was placed under arrest and transported to the [REDACTED] Police Department where he provided a breath sample that measured 0.20% blood alcohol concentration (BAC). As noted by the Director, the Applicant was

convicted of DUI and reckless driving for this incident and sentenced to a fine of \$2,000 and 36 months' probation. The terms of probation stipulated that the Applicant not possess or consume any alcohol or intoxicants and "no bars or taverns." Further, the Applicant was ordered to enter and complete an Alcohol Evaluation and an Alcohol Program within separate set timeframes. The record indicates that the Applicant subsequently admitted to having not completed the evaluation and course within the specified timeframe, thereby violating the terms of his probation.

As noted by the Director, the Applicant was also arrested in [] 2016 by the [] Police Department and charged with unlawful use of alcohol in a public park and contributing to sex delinquency with a minor. Records indicate that the unlawful use of alcohol charge was dismissed, and there appears to have been no complaint filed for the other charge. The Applicant did not address this arrest in his statements or provide evidence of the disposition of the charges levied against him.

C. A Favorable Exercise of Discretion is Not Warranted

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.

On appeal, the Applicant argues, through counsel, that while he has made mistakes in the past the evidence clearly shows that "some of the charged conduct" was dismissed, and as related to other conduct the Applicant has complied with the court ordered conditions to become a rehabilitated and better person. He states that his most recent mistake resulting in the conviction of DUI is one he has paid the price for not only by having completed his alcohol treatment, but also in having lost the opportunity to ever be eligible for the Deferred Action for Childhood Arrivals program because of his conviction. The Applicant further states that he has overcome his personal setbacks to be able to help care for his two biological children with special needs, and that if he is unable to remain in the United States to continue to care for them in the future it will be a hardship to them. In addition, the Applicant argues that he provided substantial evidence to establish that his continued presence in the United States is warranted on humanitarian grounds, to ensure family unity, and in the public interest. We acknowledge that the Applicant has submitted evidence of positive and mitigating equities, including that he is a parent of two minor children who are U.S. citizens and receiving specialized treatment for having special needs. Notwithstanding this evidence, however, the Applicant has not demonstrated that he merits a favorable exercise of discretion to adjust his status to that of LPR.

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). In addition, DUIs pose a risk to public safety that is not inherent in other types of offenses. See *Matter of Siniauskas*, 27 I&N Dec. 207, 208 (BIA 2018) (citations omitted) (holding that in a determination of whether an alien is a danger to the community in bond proceedings, driving under the influence is a significant adverse consideration); *Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (discussing the "reckless and dangerous nature of the crime of DUI"). As noted, the record indicates that the Applicant was arrested, charged, and convicted of DUI and reckless driving while he held U nonimmigrant status. Documents indicate that the Applicant was driving upwards of 90 miles an hour in a residential neighborhood prior to being stopped by the police, and had a BAC of .20 shortly

thereafter. Furthermore, the Applicant was subsequently found guilty of violating the terms of his probation for the DUI conviction. Finally, and less than two months after his DUI arrest, the Applicant was again arrested for unlawful use of alcohol in a public park and contributing to sex delinquency with a minor. Despite the opportunity to do so, the Applicant has not addressed or otherwise explained the specific circumstances around this arrest, nor has he submitted any evidence regarding the disposition of the same.

In addition, an applicant for discretionary relief with a criminal record must ordinarily present evidence of genuine rehabilitation. *Matter of Roberts*, 20 I&N Dec. 294, 299 (BIA 1991); *Matter of Marin*, 16 I&N Dec. at 588. To determine whether an applicant has established rehabilitation, we examine not only the applicant's actions during the period of time for which he or she was required to comply with court-ordered mandates, but also evaluate the applicant's conduct after he or she has satisfied all court-ordered and monitoring requirements. With respect to applicants on probation, the U.S. Supreme Court has recognized that the state has a justified concern that a probationer is "more likely to engage in criminal conduct than an ordinary member of the community." *U.S. v. Knights*, 534 U.S. 112, 121 (2001). Further, when an individual is on probation, he or she enjoys reduced liberty, as the criminal proceedings remain pending during probation and the Applicant must report periodically to the probation officer and the court. See *Doe v. Harris*, 772 F.3d 563, 571 (9th Cir. 2014); *U.S. v. King*, 736 F.3d 805, 808-09 (9th Cir. 2013).

Based on our review of the whole of the evidence, including that submitted on appeal, the Applicant has not submitted sufficient evidence to establish his rehabilitation. Although the Applicant has now completed the alcohol treatment program ordered by the court, he acknowledged that his failure to complete the program initially led to his violating the terms of his probation. Additionally, as we have noted, he had another alcohol-related arrest following his DUI. In his personal statement, the Applicant acknowledges his mistakes with alcohol, but does not appear to express remorse for the dangerous act of driving under the influence recklessly at high rates of speed and disregarding traffic signals, and the fact that such actions put others at risk. Furthermore, the Applicant does not provide any explanation at all nor even reference the circumstances leading to his arrest in the public park involving alcohol and a minor. The recency and nature of these charges show the Applicant's behavior—his unlawful use of alcohol in a public park and contributing to sex delinquency with a minor less than two months after his DUI arrest, which occurred while the Applicant was in U nonimmigrant status—does not reflect well on any stated efforts to demonstrate rehabilitation. We view the Applicant's failure to acknowledge this incident as a negative factor with regard to any expression of remorse—or lack thereof as is the case here—for his actions.

We acknowledge as a mitigating factor the hardship that the Applicant is likely to face upon return to Mexico and the effect it may have on his children. However, we also note that the Applicant's children live with his grandparents in their custody in another state, the Applicant only sees them a limited portion of the time, and he has no legal responsibility to provide for their care at this time. Regardless of the positive weight afforded to any future hardship to be faced by the Applicant and his children, it remains outweighed by his adverse factors.

Ultimately, it is the Applicant's burden to establish that he warrants adjustment of status to that of an LPR as a matter of discretion. Here, the Applicant has presented evidence of humanitarian, public interest, and family unity considerations. However, due to the Applicant's serious and recent DUI

conviction, his violation of the terms of probation for such conviction, his follow-on arrest involving alcohol and contributing to sex delinquency with a minor, and the lack of evidence regarding the circumstances that gave rise to it, as well as insufficient evidence to establish his rehabilitation, the Applicant has not established that his continued presence is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Consequently, the Applicant has not demonstrated that he merits a favorable exercise of discretion to adjust his status under section 245(m) of the Act.

ORDER: The appeal is dismissed.