U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20648500

Date: FEB. 16, 2022

Appeal of Vermont Service Center Decision

Form I-485, Application for Adjustment of Status of a U Nonimmigrant

The Applicant seeks to adjust their status to that of 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 their "U" nonimmigrant status. The Director of the Vermont Service Center denied the Applicant's 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. Upon *de novo* review, we will dismiss the appeal.

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* 1 *USCIS Policy Manual* E.8(C)(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 should 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 citizen of Mexico, was the beneficiary of a Form I-918, Supplement A, Petition for Qualifying Family Member of a U-1 Recipient, which was approved in February 2016. The Applicant was granted U-3 nonimmigrant status as the child of a U-1 recipient until January 2020. The Applicant filed the instant U adjustment application in January 2020. The Director denied the application, determining 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 criminal history demonstrated a disregard for U.S. law. The Applicant has not overcome this determination on appeal.

A. Positive and Mitigating Equities

The Applicant is 24 years old and has lived in the United States for approximately 22 years. The Applicant's family ties in the United States include his U.S. citizen child, his LPR mother and step-father, and LPR and U.S. citizen siblings. He is in a long-term relationship with his lawful permanent resident partner. The Applicant provided evidence of stable employment and evidence of financial support for his partner and their child. In statements from an employer, the Applicant was described as being valuable to their team and the employer expressed their hopes that the Applicant would continue working for them in the future. He also submitted evidence of income and payment of taxes. The Applicant explained that he arrived in the United States at the age of 2, was working hard to put the past behind him, and would not bring his LPR partner and child to Mexico with him, if he were removed, because it is too dangerous, and he would not be able to support them.

On appeal, the Applicant additionally submits a written statement from his LPR partner stating that he is a caring and thoughtful father and partner.[1] The Applicant also submits a written statement from his aunt, addressing the past incident her son had with the Applicant, and how the Applicant has changed, and states that the Applicant's relationship with the victim has recovered through the years following the incident between them.

B. Adverse Factors

The Applicant's primary adverse factor is his criminal history. The record reflects that in [redacted] 2012, he was arrested and charged with felony sexual conduct in the first degree and penetration or contact with a person under 13, who was more than 3 years younger. The Applicant was 14 years old at the time of this incident. In interviews following the incident, the victim informed the police that the Applicant had, "used force to insert his penis into [the victim's] buttocks. [The victim] told him to stop, and yelled, but [the Applicant] used physical force to gain control. [The victim] further recounted that [the Applicant] covered [the victim's] mouth to prevent [the victim] from being able to scream for help." Following these statements, the Applicant was interviewed regarding the incident, and informed the officer that when he, "was watching a move in his grandparents' room [the victim] came

[1] In her statement, the Applicant's partner also asserts severe abuse that the Applicant suffered at the hands of his father. Though compelling, the Applicant has not made any of these claims in his statements contained in the record, and they are therefore afforded limited positive weight.

into the room naked and asked [the Applicant] to have sex," and the Applicant admitted to, "inserting his penis into [the victim's] anus." The Applicant further stated that the act did not "last long" as his grandmother entered the room and discovered them having sex. As noted in the Director's decision, at some point, this case became combined with a charge for disorderly conduct, though it remains unclear if that was a separate incident, as the Applicant has not provided an explanation for how the two charges were combined. Ultimately, the Applicant plead guilty to the disorderly conduct charge, and the felony criminal sexual conduct charge was continued for dismissal with conditions. The conditions placed upon the Applicant included providing a DNA sample, completing a mental health screening, apologizing to the victim, paying restitution, having no contact with the victim, attending and completing an outpatient sex offender program, cooperating with polygraph testing, having no unsupervised contact with children more than 2 years younger than him, having supervised probation of 180 days, and remaining law-abiding. In [redacted] 2014, the court found that the Applicant met the conditions of his plea and dismissed the charges of felony criminal sexual contact in the first degree and penetration or contact with a person under 13, who was more than 3 years younger. In his response submitted to a request for evidence (RFE) by the Director, the Applicant maintained that he did not use force, and the victim initiated the situation. The Applicant claimed that he was the one who called 911 and noted that he complied with the condition of a polygraph test, where he claimed that he also maintained that he did not use force during the incident, but that he was unable to obtain a copy of the results of the polygraph.

In [redacted] 2018, the Applicant was seen failing to stop at a stop sign. When he was pulled over, the officer noted the smell of marijuana, and the Applicant admitted to possessing marijuana. He was cited and convicted on charges of failure to stop at a stop sign, failure to use a seat belt, driving an uninsured vehicle, and possession of marijuana. The Applicant was forced to pay $535 in fines because of these charges.

In [redacted] 2019, the Applicant was cited for driving after his driver's license was revoked and failure to carry proof of insurance. The Applicant was convicted of a misdemeanor charge of driving after revocation and forced to pay fines of $310.

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 factors in this case. We acknowledge the Applicant's residence in the United States, family ties, history of employment, evidence of payment of taxes, and expression of remorse. 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 his brief on appeal, the Applicant argues that the Director erred in her review of his juvenile arrest and that arrest and resulting guilty plea for disorderly conduct should not have been considered a criminal offense. The Applicant is correct in stating that an adjudication of youthful offender status

or juvenile delinquency is not a criminal conviction under the immigration laws. *Matter of Devison-Charles,* 22 I&N Dec. 1362, 1373 (BIA 2000). However, all relevant factors are considered in assessing an applicant's eligibility for adjustment of status as matter of discretion. 8 C.F.R § 245.24(d)(11). Juvenile offenses are factors relevant to the determination of whether a favorable exercise of discretion is warranted. *See Castro-Saravia v. Ashcroft*, 122 Fed. Appx. 303, 304-05 (9th Cir. 2004) (concluding that *Matter of Devison* does not preclude consideration of juvenile delinquency when making a discretionary determination). *See generally Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (including, in adverse factors relevant to discretionary relief, "the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident").

In our review of the Director's decision, the Director did not apply the heightened standard as provided under 8 C.F.R. § 245.24(d)(11) and did not consider the Applicant's 2012 arrest as a conviction for immigration purposes. Therefore, while the Applicant's arrest and criminal charges occurred while he was a juvenile, we find no error in the Director's decision to afford significant negative weight to this incident. While the Applicant was not *convicted of* the charges, that does not mean the act 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 decision (emphasis added). The Applicant plead guilty to disorderly conduct, and the more severe charges were later dismissed after he complied with the conditions placed upon him. In the Applicant's statements previously in the record, he does not deny that the event took place, but denied that he initiated the contact and that he used force.

In considering an Applicant's criminal record in the exercise of discretion, we consider multiple factors including the "nature, recency, and seriousness" of the crimes. *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978). We acknowledge that the Applicant was not convicted of the juvenile charges he initially faced, which was plead down to disorderly conduct; however, the description of the events in the record that the Applicant committed a sexual act with the victim is particularly serious. Further, the Applicant had two encounters with law enforcement after he was granted U nonimmigrant status, which resulted in misdemeanor convictions for failure to stop at a stop sign, failure to wear a seatbelt, driving an uninsured vehicle, possession of marijuana, and driving after his license was revoked. As these incidents occurred after the Applicant was granted U nonimmigrant status, they are also afforded negative weight.

The Applicant argues that the Director's decision erred in denying for an incident which had already been waived when the Applicant's Form I-192, Application for Advanced Permission to Enter as a Nonimmigrant, was approved. We acknowledge that USCIS previously waived the Applicant's juvenile offenses in granting him U nonimmigrant status and afford positive weight to this decision. Nonetheless, a U adjustment application is a separate adjudication and USCIS is not bound by its prior determination on a waiver application.

The Applicant further argues that the Director's decision erred in relying on the arrest report alone for the denial of his U adjustment application. He cites decisions issued by the Board of Immigration Appeals (BIA); however, he misinterprets them. He cites *Matter of Thomas*, 21 I&N Dec. at 24-25 (BIA 1995), in which the BIA stated, "that police reports implicating respondent in criminal activity, but which never resulted in prosecution due to lack of sufficient evidence were not probative." However, in that case, the court declined to give substantial weight to an arrest record that did not lead to a conviction, which would have corroborated the arrest record. *See id.* Here, the Applicant plead

guilty to the initial charges, which were then dismissed only upon completion of court-ordered conditions, and therefore the arrest records are corroborated. *See id.* Further, "the probative value of and corresponding weight, if any, assigned to evidence of criminality will vary according to the facts and circumstances of each case and the nature and strength of the evidence presented" and "a conviction resulting from an alien's own guilty plea clearly is entitled to substantial weight in the exercise of discretion." *See id.* at 24. Here, the Applicant plead guilty to the initial charges of his 2012 arrest, and they are entitled to substantial weight. *See id.* Additionally, reliance on an arrest report in adjudicating discretionary relief—even in the absence of a criminal conviction—is permissible provided that the report is inherently reliable and its use is not fundamentally unfair. *See e.g.*, *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988) ("[T]he admission into the record of . . . information contained in the police reports is especially appropriate in cases involving discretionary relief . . . , where all relevant factors . . . should be considered to determine whether an [applicant] warrants a favorable exercise of discretion."). Therefore, the Director did not err when giving the arrest records and guilty plea substantial weight in the discretionary analysis.

Next, the Applicant argues that the Director should have considered the Applicant's childhood trauma and criminal activity of his father as positive discretionary factors. This information is provided in the record by the Applicant's attorney on appeal, and a statement submitted by the Applicant's partner. The Applicant himself has made no statements contained in the record regarding the impact of his father's criminal activity or made personal statements regarding any abuse he experienced when he was a child. While we do not seek to dismiss or diminish these concerns, these allegations are not corroborated in the record by the Applicant himself and we afford them minimal positive weight. Further, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

The Applicant also argues that the Director's request, and use, of the 2012 arrest records was in violation of Minnesota state law. Critically, however, Minnesota state law does not address, nor does it govern, the Applicant's eligibility for adjustment of status to that of an LPR as articulated under the Act, and the provisions cited to by the Applicant do not foreclose inquiry into the specific circumstances that gave rise to his 2012 arrest. *See* section 245(m) of the Act (laying out the eligibility requirements for U-based adjustment of status). Further, the Director did not request the records from the relevant authorities in Minnesota, nor did the authorities in Minnesota provide the records directly to the Director. The records were requested in the process of the discretionary review of the Applicant's U adjustment application, and an applicant must establish that he meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. at 375.

Finally, the Applicant argues that USCIS violated his Fifth and Eighth Amendment rights under the U.S. Constitution, against due process and cruel and unusual punishment. Regarding his Fifth Amendment claims, 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). Regarding his Eighth Amendment claims, we note that the Applicant's U adjustment application resulting in

denial does not constitute the Applicant being "punished for his crimes," but that he, "is merely being held to the terms under which he was admitted." *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). *See also, Santelises v. Immigration and Naturalization Serv.*, 491 F.2d 1254, 1255–56 (2d Cir. 1974) (holding that "[i]t is settled that, deportation being a civil procedure, is not punishment, and the cruel and unusual punishment clause of the Eighth Amendment is not applicable."). As it has previously been determined that removal from the United States does not constitute cruel and unusual punishment under the Eighth Amendment, nor would the denial of the Applicant's U adjustment application constitute such.

III. CONCLUSION

To summarize, due to the Applicant's criminal history, including his juvenile arrest in 2012, and arrests and citations in 2018 and 2019, the Applicant has not established that it is in the public interest to adjust his status to that of an LPR. The Applicant's family ties, lengthy residence in the United States, employment history, and payment of taxes, while favorable, 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 severity and recency of the conduct that led to his arrests. 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.