



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

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

In Re: 18952539

Date: JAN. 28, 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 for Adjustment of Status of U Nonimmigrant (U adjustment application), as a matter of discretion. The Director also denied a subsequent combined motion to reopen and motion to reconsider. On appeal, the Applicant submits a brief arguing that he warrants a favorable exercise of discretion and submits additional evidence. We review the questions in this matter *de novo*. See *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015); 8 C.F.R. § 214.11(d)(5). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 245(m) of the Act contains the eligibility requirements for individuals seeking to adjust status to that of an LPR based on having been granted U status. U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if, “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 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) (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

A. Procedural History

The Applicant, a 32-year-old citizen of Mexico, was granted U nonimmigrant status from October 2014 until September 2018. He filed his U adjustment application in May 2018. The Director issued a request for evidence (RFE) in March 2019 requesting additional evidence regarding the Applicant’s continuous physical presence, criminal history, evidence in support of an exercise of discretion, and an updated Form I-693, Report of Medical Examination and Vaccination Record, reflecting consideration of the Applicant’s criminal history regarding possession of marijuana and cocaine. The RFE noted that a criminal history check based on an electronic fingerprint analysis had revealed several arrests. The Director specifically asked the Applicant to provide the original or certified copies of the arresting officer’s report, criminal complaint or charging document, certified judgment and conviction documents from the court, evidence of completion of sentence, and a statement regarding the events that took place leading up to each of his arrests. The Applicant timely responded to the RFE with additional evidence with records about these arrests, including a personal statement as requested, and other evidence in support of his application.

1. Criminal History

The record reflects that the Applicant has been cited or arrested for multiple offenses in Utah between [] 2005 and [] 2014.

In [] 2007, the Applicant was arrested for graffiti, a charge to which he pled not guilty, and which was ultimately dismissed in [] 2011. According to the court documents in the Applicant’s administrative file, he failed to appear for proceedings related to this offense. The police officer’s report underlying the arrest indicated that the Applicant was involved in spray painting gang graffiti on a wall with three other individuals. According to the police report, the Applicant stated that he had tagged a bridge with gang graffiti [] and that it was in retaliation to other tagging that had taken place near where he lived. In the Applicant’s statement describing this arrest, he explained that he had been hanging out with friends who had rough childhoods similar to his. He asserted that while his friends were the ones who had tagged the bridge with graffiti, he felt pressured by the police officer to say that he had also tagged the bridge.

In [] 2007, he was cited for reckless driving and no license, both offenses of which he was found guilty and sentenced to pay a fine of \$662. The police officer’s report indicated that the Applicant was driving a vehicle with passengers who were known to be members of [] [] gang, a known affiliate of the [] street gang. The Applicant’s car accelerated quickly and almost struck a pedestrian, who had been speaking to the passengers in the Applicant’s car. According to the report, the Applicant stated that he had not realized how close the passenger was to the car and that he had forgotten to look. In the Applicant’s statement, he asserted that he was

driving his friends in his mother's car and stopped so his friends could speak to a pedestrian they knew. He contended that when a police officer pulled him over, he had seen the pedestrian move safely to the side of the road before moving his car. Although the court minutes submitted by the Applicant indicate that he eventually satisfied this judgment, they also indicate that he failed to appear for court proceedings and did not make timely payment of his sentenced fine.

In [] 2007, the Applicant was arrested for attempted possession or use of cocaine and possession of drug paraphernalia, both resulting in convictions.¹ According to court minutes in the Applicant's administrative file, he was sentenced to a year in jail, a year of supervised probation, and to complete a substance abuse and alcohol abuse assessment and comply with any recommended treatment. He was also sentenced to pay fines, for which he did not make timely payments, which were later reduced and considered satisfied according to the court minutes. The Applicant's statement describing this arrest asserted that when he was arrested, he was giving a ride to a friend who he knew had a marijuana pipe, but that he did not know his friend also had cocaine which the friend attempted to hide from the officer who searched his car.

In [] 2008, the Applicant was arrested for possession of less than one ounce of marijuana and possession of drug paraphernalia.² Although the Applicant was assessed an administrative fee of \$300, the case was closed and the two charges were dismissed with prejudice. According to the police report in the Applicant's administrative file, the Applicant stated that the items found in his vicinity were not his. The arresting officer noted that the Applicant had tested positive for marijuana consumption. Additionally, the Applicant, who was with other suspected individuals at the time, admitted to past ties to [] gangs after the officer noted that he had several tattoos. In the Applicant's statement, he claimed that he was with a friend, J-³, who had a marijuana joint in his possession which the officer saw being thrown away. The Applicant asserted that the officer found that J- also possessed a marijuana pipe, but that he was also charged with possession because J- did not take responsibility for having thrown the joint.

In response to the RFE, he submitted court minutes regarding the proceedings and dispositions regarding each of the following additional charges:

- A citation for never obtaining a license and no insurance in [] 2005, for which the Applicant was ordered to pay a fine totaling \$625. He failed to appear for several proceedings related to this citation and did not pay all fines until [] 2014.⁴
- A citation for possession of alcohol by a minor in [] 2007, for which the Applicant was found guilty and fined \$567, which he eventually paid in full. The Applicant failed to appear on several occasions for court dates related to this citation. The court minutes also referred to the Applicant's failure to attend a scheduled appointment with "court supportive services" and state that he did not complete a treatment program. The Applicant acknowledged

¹ On the same occasion, the Applicant was arrested on charges of no proof of insurance and no valid license, both of which were dismissed.

² On the same occasion, the Applicant was arrested on the charge of criminal trespass, which was dismissed without prejudice.

³ Initials used to protect the privacy of individuals.

⁴ The record reflects that the Applicant was a minor at the time of this citation.

in a statement on motion that he did not follow through on the court's orders in this case because, at the time, his housing and employment situation were not stable.

- A citation for no driver's license in [] 2007, for which the Applicant was convicted and was fined \$600, which increased when the Applicant did not remit timely payment and was issued a notice to appear, which he failed to do. The case was closed when the Applicant submitted payment in [] 2008.
- An arrest for illegal possession/use of a controlled substance in [] 2007, for which the Applicant was convicted and sentenced to \$587. The Applicant failed to appear at several proceedings related to this arrest, which resulted in additional warrants for his arrests. In his personal statement, the Applicant admitted that he smoked marijuana on this occasion.
- A citation for operating a vehicle without insurance and driving on a suspended license in [] 2008. The charges were dismissed with prejudice. The Applicant failed to appear for court and a warrant was issued for his arrest which expired in [] 2011.
- A citation for driving on a suspended license in [] 2008, for which the Applicant was eventually found guilty and granted credit for time served. He failed to appear for the citation, which resulted in a warrant for which the Applicant was later arrested on other charges.
- A citation for driving on a denied license, being an unlicensed driver, and failing to wear a seat belt in [] 2008. The Applicant was eventually found guilty of being an unlicensed driver and was fined \$200. He failed to appear for an arraignment associated with this charge prior to the case being closed.
- A citation for driving too fast for the existing conditions and for no valid license/never obtained license in [] 2013, for which he was found guilty and assessed a fine of \$305 which was paid in full. The officer report associated with this incident stated that the Applicant was driving a vehicle that struck another and did not result in any injuries.
- A citation for following another vehicle too closely in [] 2014, for which he was found guilty and fined \$120. The Applicant made some payments, but the amount became past due and was eventually sent to debt collections, resulting in a warrant for the Applicant's arrest in [] 2015. The balance was paid in full as of [] 2015.

2. Director's Decision

The Director denied the U adjustment application in April 2020 as a matter of discretion, finding that the negative factors in the Applicant's case, specifically his extensive criminal history, outweighed the positive equities in his case, including his family ties to the United States and the contributions to his community and friends. The Director found that the letters the Applicant submitted did not indicate the author's awareness of his criminal history and therefore gave them less weight in the exercise of discretion. Although the Director acknowledged that the Applicant had resided in the United States since he was a child, this positive factor was similarly given less weight in light of the fact that the Applicant was deported in [] 2008 and re-entered illegally later that month.

Turning to the negative factors in the Applicant's case, the Director expressed concern for the Applicant's extensive criminal history, including convictions for attempted possession or use of cocaine a controlled substance and possession of drug paraphernalia, for which he was sentenced to one year in jail for each conviction and ordered to pay fines. Evidence in the record indicated that the Applicant had an extensive arrest history, including for drugs, drug paraphernalia, illegal alcohol consumption, and repeated vehicle citations as recently as [] 2014, as well as documentation for

19 warrants issued to the Applicant for failing to appear or make payments in association with fines imposed on him as a result of his convictions. The Director noted that the Applicant drove for at least seven years without ever obtaining a license, during which he was cited for driving infractions. Further, the Director noted that USCIS generally will not exercise its discretion favorably in cases where an applicant has committed or been convicted of multiple drug-related crimes per 8 C.F.R. § 245.24(d)(11), and that the record indicated that the Applicant had been arrested on charges of, and convicted of, two drug-related crimes. Finally, the Director observed evidence in the record that the Applicant was associated with the [] gang in 2007 and 2008, about which the Applicant had not provided additional information, as well as inconsistencies between the statements in his affidavit and information in the arresting officer's reports.

3. Motion to Reopen and Reconsider

The Applicant submitted a combined motion to reopen and reconsider in June 2020 and submitted a brief, a new personal statement, a psychological evaluation of his daughter, copies of AAO non-precedent decisions, and copies of previously submitted evidence. Regarding his failures to appear, the Applicant's statement on motion expressed regret for not having taken his responsibilities seriously when he was younger. He noted that his girlfriend, who is now his spouse, became pregnant when he was 16 years old in 2005, and that subsequently he often had difficulties finding a place to live or job to support her and their children. The Applicant further asserted that he forgot about and lost track of some of his court dates, particularly when he was busy with a new job and family responsibilities, and that he did not always update his address with the court and therefore was not notified of some of them. He contended that two [] 2008 court dates conflicted with each other and that he did not attend one court date because he was in jail in [] 2008. Finally, the Applicant stated that he did make an effort to appear and pay his sentenced fines when he could afford them. The Director dismissed this motion in March 2021. The Applicant filed the instant appeal in May 2021.

B. Arguments on Appeal

In support of his appeal, the Applicant submits a new personal statement, an excerpt of the AAO Practice Manual regarding the AAO's jurisdiction over this application, three documents relating to State of Utah Board of Pardons and Parole Notice of Expungement Order and Pardon Order and Certificate, a statement by his spouse, medical documents, a declaration by a gang expert, a statement by his sister, and a statement by his daughter.

On appeal, the Applicant contends that he merits a favorable exercise of discretion because his criminal history involves crimes that are not of a serious nature, that USCIS already considered his criminal history in granting his U nonimmigrant status, and that the State of Utah Board of Pardons and Parole has expunged and pardoned 17 of the criminal incidents in which he was involved. In support of this claim, the Applicant submits documentation that the Utah Board of Pardons and Parole has pardoned 16 of his convictions and that the records pertaining to the Applicant's arrest, investigation, detention, and conviction in the custody of any state, county, or local entity or official will be expunged and sealed. The pardoned convictions relate to misdemeanors and infractions between [] 2005 and [] 2008 and consist of five offenses for no valid license or never obtaining a license, three offenses involving possession or use of a controlled substance or drug paraphernalia, three offenses for failure to appear, two offenses involving lack of insurance, one offense driving on a suspended

license⁵, one offense for reckless driving, and one offense for unlawful possession of alcohol by a minor. Further, the Applicant argues that the Director's finding that he failed to appear or make payments in association with his convictions and citations was explained in a statement submitted below, which he attributed to miscommunication, scheduling conflicts, and other circumstances beyond his control.

In response to the Director's determination that there were inconsistencies between the police reports and his own statements about the criminal incidents in which he was involved, the Applicant asserts that he had stated below that he did not recall all of the specific facts and did not willfully misrepresent the facts or conceal information in his immigration application. The Applicant additionally contends that the Director erred in concluding that the authors of the letters submitted in support of the instant application did not demonstrate an awareness of the Applicant's criminal history; pointing out that one letter did acknowledge his criminal record.

Regarding the allegations of the Applicant's gang involvement, the Applicant submits a declaration authored by a gang expert asserting that the Applicant does not possess typical indicators of gang involvement and that the evidence of gang membership, particularly the police reports, is not sufficiently reliable. The Applicant renews contentions that he is not associated or affiliated with any gang, aside from past friendships with individuals who became involved with gangs.

In a new personal statement, the Applicant argues that his family ties, particularly his daughter's diagnosis of post-traumatic stress disorder (PTSD) after being sexually abused and his son's recent diagnosis with autism, and support letters attesting to his good moral character, further establish that he warrants a favorable exercise of discretion. In her statement, the Applicant's daughter describes her father as the foundation of their family and explains that he has helped her to heal from her trauma and anxiety, which she fears would regress if the Applicant were separated from their family. The Applicant's spouse submits a statement detailing the autism diagnosis of the couple's youngest child and the financial and emotional hardship she contends she would experience if the Applicant were deported, and she had to care and provide for their children alone. The Applicant's spouse states she and the Applicant did not have support or guidance when they were young and that the Applicant has learned from his mistakes of the past, which both did not realize would continue to impact their lives negatively. Finally, the Applicant asserts that it is in the public interest for him to remain in the United States due to his fear of violence in Mexico after the violent death of his brother and submits a statement from his sister in support of this assertion.

⁵ As discussed previously in this decision, the court minutes related to this offense indicate that the charge against the Applicant was dismissed without prejudice in [REDACTED] 2011, rather than characterizing it as a conviction.

C. A Favorable Exercise of Discretion is Not Warranted

The Applicant bears the burden of establishing that he merits a favorable exercise of discretion. 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 acknowledge the favorable considerations in the Applicant's case, including the Applicant's U.S. citizen children and the claimed hardship to them and his spouse if he were not able to remain in the United States, including to his daughter who has been the victim of sexual abuse and his son who has recently been diagnosed with autism. Further, we recognize the Applicant's statements of remorse, efforts to resolve his outstanding criminal history, and his stated desire to live a law-abiding life after his past mistakes. The Applicant's personal statement reflects that he came to the United States at a young age with his mother, who was verbally and physically abusive, and that he had a difficult childhood lacking parental supervision which he contends led to him making bad choices when he was young. The Applicant also noted that he had friends who he felt owed loyalty, even though they had done bad things, because they offered him clothing and shelter when his mother kicked him out of his house. Finally, we have also considered the statements of support submitted by the Applicant's family and friends, some of whom are aware of his criminal history, who attest to the supportive and positive role he plays in his family and community. However, we find these positive factors do not outweigh the Applicant's significant criminal history and evidence of gang affiliation.

Discretionary determinations in U adjustment applications are guided by section 245(m)(1)(B) of the Act and 8 C.F.R. § 245.24(d)(11), which provide us with the authority to consider all relevant factors in determining whether an applicant warrants a favorable exercise of discretion. 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). Relevant factors may also include evidence of criminal conduct that has not resulted in a conviction as well as information taken from police reports and similar documents. *See Matter of Thomas*, 21 I&N Dec. 20, 23-24 (BIA 1995) (holding that evidence of criminal conduct that has not culminated in a final conviction may nonetheless be considered in discretionary determinations); *see also 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."). Finally, as noted above, the regulations expressly provide that USCIS will generally not exercise its discretion favorably in cases where an applicant "has committed or been convicted of . . . multiple drug-related crimes." 8 C.F.R. § 245.25(d)(11). Here, the record indicates that the Applicant was convicted of attempted possession or use of cocaine and possession of drug paraphernalia in [redacted] 2007 and illegal possession/use of a controlled substance in [redacted] 2007. He was also arrested for possession of less than one ounce of marijuana and possession of drug paraphernalia in [redacted] 2008 and admitted in a personal statement to having used drugs on this occasion. As these three convictions constitute "multiple drug-related offenses" within the meaning of 8 C.F.R. § 245.45(d)(11), which generally precludes us from exercising our discretion in a U adjustment applicant's favor, they represent a significant adverse factor in the Applicant's case.⁶

⁶ The Applicant argues that the instant case is similar to our non-precedent decisions in which we found that positive

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. The Applicant argues on appeal that he has not committed any crimes in nearly 12 years, aside from minor traffic violations. The Applicant has also expressed regret for his criminal history and contends that he was young and that his life was unstable at the time of many of his arrests and citations. However, his characterization of his offenses does not indicate an understanding that his actions, particularly his more recent driving offenses, could have harmed others or damaged property. His statements regarding his failures to appear to further indicate that he has not taken responsibility for these actions, as on appeal he contends that his failures to appear were for circumstances beyond his control, which is not consistent with his personal statements before the Director that he forgot or lost track of his court dates or notices, or otherwise “did not take [his] responsibilities seriously” at the time.

We acknowledge that the Applicant has sought and been granted pardons or expungement for many of his older convictions. Nonetheless, the documentation from the State of Utah also does not provide a specific reason why the Applicant was issued these pardons or otherwise establish that the underlying conduct did not in fact 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 it “will generally not exercise its discretion favorably in cases where the applicant has *committed* or been convicted of . . . multiple drug-related” or other crimes). As outlined above, the documentation underlying the Applicant’s various arrests documents him possessing or using drugs, possessing drug paraphernalia, or vandalizing property. Additionally, upon review of the Applicant’s criminal history as a whole, the documentation submitted on appeal indicates that he was not pardoned for his two most recent convictions, specifically a citation for driving too fast for the existing conditions and for no valid license/never obtained license in [redacted] 2013 and a citation for an infraction for following another vehicle too closely in [redacted] 2014.

Further, the Director’s decision noted that that law enforcement records indicated that that the Applicant was involved in spray painting gang graffiti. While we acknowledge the Applicant’s assertions that he has never been involved or associated with a gang and the evidence submitted in support of that assertion, in our discretionary determination, we do not make a formal determination of whether an applicant is or is not a gang member; instead, we consider whether, as here, there is sufficient evidence to support a law enforcement finding of gang membership or association and whether, in light of such a determination, the Applicant warrants a favorable exercise of discretion. See 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all relevant factors in making its discretionary determination). As noted by the Director, the police report underlying the Applicant’s [redacted] 2007 arrest noted that the Applicant was arrested and given a citation for his involvement in spray painting gang graffiti on a wall with three other individuals. The police report regarding the Applicant’s [redacted] 2007 arrest indicated that the Applicant was driving a vehicle with known gang members. The Applicant stated on motion that he denies any current gang affiliation or association,

equities outweighed the adverse factors of a criminal history in the exercise of discretion. These decisions were not published as a precedent and therefore do not bind USCIS officers 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. Regardless, as discussed, the instant case is distinguishable from others involving a criminal history due to the Applicant’s convictions for multiple drug-related crimes per 8 C.F.R. § 245.45(d)(11).

but admits that he had friends who became gang members after he became friends with them and continued to spend time with them. On appeal, the Applicant has not provided additional detail to resolve the inconsistencies noted in the Director's decision in this regard. We therefore agree that the evidence in the record regarding his association with gang members represents a negative discretionary factor.

Finally, we acknowledge the Applicant's argument on appeal regarding much of his criminal history having occurred prior to his grant of U nonimmigrant status, and that USCIS previously waived the Applicant's criminal violations 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. Furthermore, the Applicant continued to violate the law after he was granted U nonimmigrant status, which diminishes his argument that USCIS has already considered and previously waived his criminal violations to exercise discretion positively.

III. CONCLUSION

The Applicant has not demonstrated that his continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest such that a favorable exercise of discretion is warranted. Accordingly, the Applicant is ineligible to adjust his status to that of LPR under section 245(m) of the Act.

ORDER: The appeal is dismissed.