U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18295434

Date: MAR. 25, 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 as a victim of qualifying criminal activity. The Vermont Service Center Director denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application) based on a discretionary determination. The matter is now before us on appeal. The Applicant bears the burden of demonstrating eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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). 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's burden includes establishing that discretion should be exercised in their favor. When making its discretionary determination, USCIS may take into account all relevant factors present in a case. 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 the presence of favorable ones. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Favorable factors include, but are not limited to, family unity, length of residence and employment in the United States while in a lawful status, 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 should 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 native and citizen of Mexico who entered the United States as a nonimmigrant in 2001. USCIS granted the Applicant U nonimmigrant status from October of 2014 to September 2018 as a victim of felonious assault who was helpful in the investigation of the crime. The Applicant timely filed the U adjustment application in March of 2018. The Director denied the U adjustment application, determining that the Applicant had not demonstrated that his adjustment of status to an LPR was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest because the adverse aspects relating to his arrest record outweighed the positive factors in the case. The Applicant has not overcome this determination on appeal.

A. Positive and Mitigating Equities

As the Director acknowledged, the positive factors present in this case relate to the Applicant's residency in the United States, his U.S. citizen child, his lawful employment, and payment of his taxes. In addition, the Director considered the supporting letters from family and friends relating to his character, and his service within his community.

B. Adverse Factors

The Applicant's primary adverse factors derive from his criminal history, including the lack of arrest reports or similar documentation describing the circumstances of his arrests. In [redacted] 2003, when the Applicant was 15 years old, he was charged with theft. As the Applicant was a juvenile for this incident, he was not required to provide any documentation from law enforcement that might detail the facts surrounding this incident. However, he did provide a statement indicating that he was in a video store and he was going to show his younger brother a movie, he walked out of the store with the video in his hand, and when he returned to the store with the item, the security guard detained him and called the police. The Applicant states that when he explained the situation to the police, they released him to his parents and he was never charged with a crime and that he never went to court for the incident. The record does not show how this incident appears in the Applicant's criminal history if he was never arrested and fingerprinted as he explained.

In [redacted] 2006 the Applicant was arrested for battery on emergency personnel, battery with serious bodily injury (both as felonies), and participation in a criminal street gang. Again, the Applicant did not offer the police report relating to this incident that might illustrate relevant facts. However, the Applicant did provide certified court dispositions reflecting that the district attorney motioned the court to dismiss the case because of a lack of a complaining witness. In the Applicant's personal statement, he claims that he was at school when some of his friends were outside and got into a fight with a group of individuals, but he was not involved in the fight. He indicated that the police were told he was in the fight but they later discovered that he was not present, so the charges were dismissed. This conflicts with the district attorney's indication that there was a lack of a complaining witness for this case that resulted in the dismissed charges. Because of the absence of any material from the police or additional documentation from the court, the Applicant has not demonstrated by a preponderance of the evidence that the charges were dropped because he was not involved in the altercation.

Later in 2006, the Applicant was twice arrested for unauthorized stay or return in a school zone; one of which was for a nonstudent's refusal to leave campus. Relating to the first of these two incidents, the record contains an [redacted] Consolidated Arrest Report in which the officer's narrative reflected that he observed the Applicant on campus at the school. The officer stated the Applicant is not a student at that high school and that he has warned him before not to be on campus when school is in session. The officer also stated that the Applicant is a known gang member, he was wearing gang colors on that day, and his presence on campus wearing gang colors caused a disruption of regular campus activity resulting in his arrest.

The Applicant provided court dispositions for this incident reflecting an initial charge of a nonstudent's unauthorized stay or return in a school zone and that, he remained incarcerated for two days, he pled "No Contest/Found Guilty" to the charge, and he stipulated to a lesser charge of disturbing the peace under section 415 of the California Penal Code. The court imposed a conditional sentence (the suspension of the imposition or execution of a sentence) of 24 months. The Applicant explains in his statement that he went to his girlfriend's school to pick her up for a doctor's appointment because she was pregnant with his child. He stated that the security guard stopped him and told him to leave, which he did and later returned to pick her up after school at which time they stopped and arrested him.

For the second such incident, the record does not contain a police report or court dispositions. However, the Applicant did offer a criminal records search from the county court reflecting that it was not the official court record. That document stated that a warrant was issued for the Applicant's non-appearance, he was arrested, the warrant was recalled, and he was cited and released. In his personal statement, the Applicant indicated that he was arrested in [redacted] for a warrant in connection to his most recent arrest for unauthorized stay or return in a school zone, and that he was unaware that he had a warrant for arrest. He also indicated that he missed a court appearance triggering the warrant, and the new arrest did not result in new charges; only a continuation of the previous case.

In 2008 the Applicant's criminal history reflects that he was arrested for making criminal threats (a felony charge) and for battery against a spouse or cohabitant (a misdemeanor charge). The Applicant did not provide a police report or documentation from the courts relating to this incident. He only offered a statement reflecting that he and his girlfriend got into an argument and a neighbor must have heard them and contacted the police because the police went to his home the next day and arrested him. In his statement, he claimed both that he never placed his hands on his girlfriend, and that she confirmed with the police that they were only in a verbal argument. On appeal, the Applicant offers a statement from his former girlfriend who is the mother of his U.S. citizen child; however, her statement does not address the 2008 incident.[1]

C. 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.

[1] The Applicant did not provide the name of his girlfriend who was the other party involved in this incident, and the record does not reflect if it was the same girlfriend to whom his U.S. citizen child was born.

§ 245.45(d)(11). Upon *de novo* review of the record, as supplemented on appeal, the Applicant has not made such a showing.

We recognize the positive equities in the present case. The Applicant has resided in the United States since 2014 and acclimated to and established a life here. He also has established ties to the country in other ways such as through his U.S. citizen child, he has been lawfully employed and paid his taxes, evidence of his good character as described in the supporting letters from family and friends, and his community service. On appeal, the Applicant claims that his positive equities should win out over his arrests, none of which resulted in a conviction associated with gang activity. The Applicant ultimately conveys that the Director's decision placed too much reliance on the material that raised concerns that he was involved in gang activities in 2006.

The absence of evidence coupled with the Applicant's possible gang involvement heavily factored into the Director's determination that the negative factors in the case outweighed the positive or mitigating equities. The Applicant explains on appeal that he has been unable to obtain police reports because of the COVID-19 pandemic. However, those claims are belied by the facts in the case. The Director issued a request for evidence (RFE) on March 8, 2019, seeking the arresting officer's report, the criminal complaint or charging document, and court documents that not only demonstrated the final disposition of each of the Applicant's arrests, but also the reasoning if any charges were reduced or dismissed. The Applicant did not offer evidence that the COVID-19 pandemic had any effects during the timeframe for him to respond to the Director's RFE, and we are unaware of any such impact prior to March of 2020 when the pandemic started. Accordingly he was already on notice that this additional information was needed and he did not meet his burden of proof. The Applicant did not sufficiently explain why he could not provide the requested evidence regarding his criminal history.

The Applicant has been arrested five times has conviction. The sole police report in the record was obtained through a request that Immigration and Customs Enforcement (ICE) made to the local authorities when the Applicant was in removal proceedings. Otherwise, he has not offered police reports relating to any of his arrests. Aside from the final court disposition relating to his conviction for unauthorized presence in a school zone and another dismissing his 2006 battery charge, the only material the Applicant has offered are searches of court records databases for various jurisdictions. Considering the absence of court dispositions for several of the Applicant's arrests, this diminishes his ability to demonstrate rehabilitation. An applicant for discretionary relief "who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion." *Matter of Roberts*, 20 I&N Dec. 294, 299 (BIA 1991).

Additionally, the Applicant's personal statements relating to each arrest are insufficient to fully represent all of the facts of each incident. For instance, concerning the 2006 arrest for felony battery, the Applicant stated that when the authorities realized he was not involved in the fight, the charges were dismissed. This does not fully align with the court disposition that reflected the district attorney requested that the charges be dismissed because there was a lack of a complaining witness. Even though there may be some overlap between these two reasons, there is a large distinction between no involvement and no witness. And the Applicant's accounts relating to the remaining arrests are also not probative as they only offer his perspective of the events.

Furthermore, questions remain about the 2008 arrest for felony threats and misdemeanor battery against his then-girlfriend. The Applicant claims they had a verbal argument and nothing more. He provided a letter from a former girlfriend with the appeal, but it is not apparent that she was the person who was the target of the alleged 2008 threats and battery. The identity of the girlfriend who was the target of the 2008 offenses was not established because the Applicant does not state her name and he did not offer a police report that might have identified her. Even if the letter submitted on appeal is from the same person who was the target of the threats and battery, she did not address the incident or indicate what happened between them that might have led to the Applicant's arrest.

Within the police report for the Applicant's 2006 arrest for unauthorized presence in a school zone, the officer plainly stated that the Applicant was a known gang member. Generally, the determination of whether an individual is a gang member is within the jurisdiction of the investigating law enforcement agency and we sometimes defer to those findings. 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. Reliance on an arrest report in adjudicating discretionary relief, even in the absence of a conviction, is permissible if the report is inherently reliable and its use is not fundamentally unfair. *See Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988); *Matter of Thomas*, 21 I&N Dec. 20, 23 (BIA 1995) (citations omitted).

Here, a law enforcement officer made an indication that the Applicant was known to be a gang member to him. On appeal, the Applicant provides a letter from the current safety officer at the school district where this arrest occurred. The safety officer indicates that he knew the Applicant when he was a student at the high school and he indicates the Applicant was respectable and kind and that he never had any discipline issues. The safety officer does not however, state that the Applicant was never a known gang member. The Applicant has not demonstrated that the police report stating he was a known gang member is not reliable evidence, nor has he shown that our consideration of it in the exercise of discretion is unfair. *See id.*

For the 2006 battery and participation in a criminal street gang charges as represented on the Applicant's fingerprint results, we do not have a police report to reveal the reasons behind the arrest or the gang-related charge. And the court dispositions only reflect the dismissal of charges because of a lack of a complaining witness. That does not establish that the charges of gang participation were not applicable to the Applicant; only that the district attorney was unable to produce the complaining witness. The lack of material detailing the district attorney's basis for motioning the court to dismiss the charges, when coupled with the police report identifying the Applicant as a known gang member, leaves too many open questions of whether these elements should be considered with the other adverse factors in this case, or if they were simply misunderstandings or misconceptions. Such open questions weigh against the Applicant who bears the burden to demonstrate eligibility by a preponderance of the evidence. *Chawathe*, 25 I&N Dec. at 375.

For these reasons, the absence of materials that might reduce the ambiguity relating to the Applicant's criminal history impairs his ability to satisfy the burden to prove that discretion should be exercised in his favor in this U adjustment application. In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, recency, and seriousness" of the relevant offenses. *Matter of Marin*, 16 I&N Dec. 581, 584–85 (BIA 1978). The arrests for battery against a spouse or

cohabitant as well as emergency personnel, felony criminal threats, and participation in gang activity all involve serious criminal conduct attributed to him. As it relates to the Applicant's claims that these charges against him should not be considered serious, we are unable to agree with this statement due to the lack of documentation from law enforcement that might allow us to properly and fully consider the basis for, and specific facts surrounding, each of his arrests.

Even though the Applicant claims that he has satisfied this burden because his positive equities outweigh the adverse factors in his case, the record does not support this claim. 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.

ORDER: The appeal is dismissed.