U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22240814

Date: SEP. 30, 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)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(3), based on an approved Form 1-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant (U immigrant petition). 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, concluding that there was insufficient evidence to show that the positive and mitigating equities outweigh the negative factors in the case. The matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence 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, we will dismiss the appeal.

I. LAW

Under section 245(m)(3) of the Act, the Secretary of Homeland Security may adjust the status of a qualifying family member of a U-1 nonimmigrant who was granted adjustment of status (U-1 principal) under subsection 245(m)(1), in order to avoid extreme hardship, if the qualifying family member was not previously accorded U nonimmigrant status under section 101(a)(15)(U)(ii) of the Act. *See also* 8 C.F.R. § 245.24(g)-(i). To establish eligibility under section 245(m)(3), the U-1 principal must, among other requirements, file a U immigrant petition on behalf of the qualifying family member. 8 C.F.R. § 245.24(g), (h). A qualifying family member who has an approved U immigrant petition may then request adjustment of status. 8 C.F.R. § 245.24(i)(1). The decision to approve or deny the U adjustment application is a discretionary determination that lies solely within the jurisdiction of the U.S. Citizenship and Immigration Services (USCIS). *Id.* at § 245.24(i)(2). The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

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).

II. ANALYSIS

The Applicant is a native and citizen of Mexico who entered the United States without inspection, admission, or parole in 2012. In 2019, USCIS approved a U immigrant petition, filed on behalf of the Applicant as the spouse of a U-1 adjustment applicant. The Applicant thereafter filed this adjustment application based on the approved U immigrant petition.

The Director denied the Applicant's U adjustment application, finding that he did not submit sufficient evidence to establish that he warranted adjustment of status to that of an LPR as a matter of discretion. The Director acknowledged the positive and mitigating equities present in the Applicant's case: his spouse and children in the United States; his employment; his completion of alcohol education programs; his completion of community service; and his community ties in the United States. The Director also acknowledged humanitarian factors present in the Applicant's case: the trauma he suffered as a child and the living conditions in Mexico. However, the Director found that his recent alcohol-related criminal convictions and lack of rehabilitation are negative factors in this case that are too serious to warrant a favorable exercise of discretion. The Director also noted that the Applicant's explanation of the events that led to his first arrest differ from the police report, which calls into question his remorse for his actions and whether he has taken responsibility for this arrest. The Director concluded that the Applicant did not demonstrate rehabilitation from his alcohol-related arrests to establish that his adjustment of status is warranted on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

On appeal, the Applicant submits a brief; letters from his spouse, his mother, his two stepchildren, and friends; a Certificate of Completion as evidence of his participation in a Victim Impact Panel; and information pertaining to the program assigned in his plea agreement for his [redacted] 2017 arrest.

A. Positive and Mitigating Equities

In the record before the Director, the Applicant provided evidence of his family ties in the United States, which include his LPR spouse (the U-1 principal applicant), his U.S. citizen biological son and two stepsons, and his mother, his involvement in the community and participation in the church, his length of residence in the United States, his employment, and his completion of alcohol education programs. The Applicant is also described in supporting letters from friends and family as hardworking, caring, a dedicated husband, a loving father, honest, responsible, and a changed man who has stopped drinking alcohol. Additionally, the childhood trauma the Applicant outlined in his statement before the Director and the current country conditions report provided further serve as positive humanitarian factors considered in this case.

Furthermore, on appeal, the Applicant argues that the previous finding of extreme hardship and exercise of favorable discretion when adjudicating his U immigrant petition should also be considered positive and mitigating equities in the adjudication of this U adjustment application.

B. Adverse Factors

The Applicant's primary adverse factor is his criminal history, specifically two alcohol-related arrests, one of which occurred after the approval of his U immigrant petition. In [redacted] 2017, the Applicant was arrested on two counts of "criminal damage-deface-$250-$1,000" and in [redacted] 2018, he pled guilty to one count of Criminal Damage, Class 2 Misdemeanor, and was sentenced to 24 months of probation, 5 days in jail, payment of jail costs, completion of Anger Management Counseling, and a requirement not to threaten, harm, or harass the victims. However, as part of a plea agreement, the charges would be dismissed if the Applicant completed the Positive Alternatives Diversion Program, paid restitution to the victims, and refrained from threatening, harming, or harassing the victims. The record indicates that the Applicant completed the required program and the charges against him were dismissed by the court in [redacted] 2019.[1]

In [redacted] 2019, the Applicant was arrested on one count of each: (1) Driving Under the Influence (DUI)- Alcohol/Drugs/Vapors/Combo; (2) DUI- Blood Alcohol Content (BAC) of .08 or More; (3) Extreme DUI- BAC of 0.15 to Below 0.20 BAC; (4) Extreme DUI- BAC Above 0.20 BAC; and (5) Accidents- Fail to Stop- Damage Attended Vehicle. While several charges were dismissed, the Applicant pled guilty to the following: (1) Driving or Being in Actual Physical Control with an Alcohol Concentration of .20 or More within Two Hours of Driving or Being in Actual Physical Control, Class 1 Misdemeanor; and (2) Failure to Provide Proof of Financial Responsibility, Civil Offense. For the first charge, the Applicant was: sentenced to pay a fine, several fees, and several assessments; 48 consecutive days in jail; 31 days in jail suspended if he equips any motor vehicle he operates with a Certified Ignition Interlock device for 12 months; required to complete a Substance Abuse Screening and Treatment program; install 18-month Ignition Interlock Device; and required to complete one Victim Impact Panel. For the second charge, the Applicant was sentenced to pay an assessment and a fine plus surcharge, reduced to $0 upon proof of six months insurance. The Applicant submitted a letter certifying that he completed 26.24 hours of community service from [redacted] 2020, with the Society of [redacted] a nonprofit organization; a Certificate of Completion for the "Alcohol/Drug Education Level II – 16 hours" program in [redacted] 2020; and a letter from the [redacted] Police Department informing the Court that the Applicant completed a commitment of three days jail time in [redacted] 2020. On appeal, the Applicant submits a Certificate of Completion for a Mother's Against Drunk Driving (MADD) in-person Victim Impact Panel in [redacted] 2020. However, the Applicant has not submitted evidence that he completed the court-imposed conditions of his sentence, including installation of an Ignition Interlock Device or payment of the imposed fines, fees, and assessments.

[1] Although the 2017 charge to which he pled guilty was ultimately dismissed, the Applicant appears to remain convicted for immigration purposes pursuant to section 101(a)(48)(A) of the Act, which defines a conviction, in part, as a formal judgment of guilt entered by a court and the judge ordered some form of punishment, penalty, or restraint on the individual's liberty. A state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute is given no effect in immigration proceedings. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), rev'd on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes). Here, the charge to which the Applicant pled guilty was dismissed only after he completed court-imposed conditions, and there is no indication that the dismissal was due to a procedural or substantive defect in his criminal proceedings.

In his statement referencing the Applicant's [redacted] 2017 arrest, he stated that he "was drinking alcohol outside the apartment where [he] live[d] and was fixing [his] car." He stated that he "was mechanizing [*sic*] [his] car and then accidentally, [his] car was near [his] neighbor's window and [he] hit the window without meaning to." He explained that the neighbor then called the police without knowing it had been him who accidentally hit the window because she had been traumatized by a previous break-in. He further explained that he remained outside and when the police arrived, he advised them that he had broken the window. He stated that he told police he "only broke that window and did not break the one in [his] house[, though police] put that [he] had broken 2 windows, and it was only one window." The Applicant went on to state that he "never hurt anyone" and is "really speaking the truth." However, the arrest report, written contemporaneous with the incident, states that the incident occurred at midnight and that the officer was dispatched for a "family fight" where the Applicant was reportedly "kicking the door to the apartment" and was witnessed by a neighbor "banging on a window." The arrest report states that the officer found two large broken windows close to each other and shattered open, one in the Applicant's apartment, and one in the neighbor's apartment, with glass lying on the ground both outside and inside each separate apartment. According to the arrest report, the Applicant's girlfriend, who called police to the scene, stated the Applicant had been drinking and began arguing with her around 11:20 p.m. at their apartment. She stated that he became aggressive, which only happens when he drinks, and then said he was leaving and went to walk around the apartment complex. She stated that she tried to pull him back into the apartment, but he was not cooperating, so she got fed up and closed the front door. She stated that the Applicant then began to knock on the door, but she did not open it and he continued to knock while she was trying to put the kids to sleep. The arrest report further states that the Applicant was asked about what happened and "he tried telling [the officer] that he was not arguing with [his girlfriend] nor he broke the window." It states that the Applicant "was not being cooperative and denied all allegations." Finally, the arrest report indicates that when police encountered the Applicant, he had "several small cuts to his hands and blood was slowly coming out of the cuts," which prompted police to call the [redacted] Fire Department to medically evaluate him.

In reference to the Applicant's [redacted] 2019 arrest, he stated that "it was [redacted] and everyone was partying and at [his] work they made a meal and gave alcohol." He stated that he drank alcohol because it was a holiday, but not because he drinks daily. He stated that "it was the only time [he] drove under the influence of alcohol" and it was the last time he had alcohol. However, the arrest report, written contemporaneous with the incident, stated that around 2:00 a.m., the Applicant "collided with a vehicle and fled the area." It states that the officer contacted a witness who stated that "he observed the vehicles collide and he followed the vehicle that fled the area." It further states that the "witness and victim positively identified [the Applicant] as the driver of the vehicle that fled the collision." The arrest report states that "during a search incident to arrest [an] officer advised they observed 2 bottles of beer open inside the vehicle" and that the Applicant "stated he had been drinking and he 'messed up.'"

Thus, as evidenced by the above, the statements from the Applicant do not match up with the contemporaneous arrest reports.

As relevant to the Applicant's remorse and rehabilitation, when discussing his [redacted] 2019 arrest, the Applicant explained that he "thank[s] God," has "joined church groups that have helped [him] a

lot in not drinking again" and promises "not to drink again and not to make the same mistake." He finally stated that he asks for forgiveness and the opportunity to move ahead.

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

The Applicant bears the burden of establishing that he merits a favorable exercise of discretion. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. at 375. Upon *de novo* review of the record, the Applicant has not made such a showing.

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). Moreover, 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); *see also Matter of Marin*, 16 I&N Dec. at 588 (emphasizing that the recency of a criminal conviction is relevant to the question of whether rehabilitation has been established and that "those who have recently committed criminal acts will have a more difficult task in showing that discretionary relief should be exercised on their behalf"). To determine whether an applicant has been rehabilitated, we examine not only an applicant's actions during the period of time for which they were required to comply with court-ordered mandates, but also after they have satisfied all court-ordered and monitoring requirements. *See U.S. v. Knights*, 534 U.S. 112, 121 (2001) (recognizing that the state has a justified concern that an individual under probationary supervision is "more likely to engage in criminal conduct than an ordinary member of the community"). Finally, when an individual is on probation, he enjoys reduced liberty. *See, e.g., Doe v. Harris*, 772 F.3d 563, 571 (9th Cir. 2014) (noting that, although a less restrictive sanction than incarceration, probation allows the government to "impose reasonable conditions that deprive the offender of some freedoms enjoyed by law abiding citizens") (internal quotations omitted); *U.S. v. King*, 736 F.3d 805, 808-09 (9th Cir. 2013) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.") (internal quotations omitted).

In this case, as noted above, the Applicant was arrested on two separate occasions for alcohol-related incidents. In the first instance, the Applicant pled guilty to one count of Criminal Damage, Class 2 Misdemeanor, and although the charge was ultimately dismissed, it was dismissed after he completed what appears to have been a rehabilitative program. In the second instance, the Applicant pled guilty to one count of Driving or Being in Actual Physical Control with an Alcohol Concentration of .20 or More within Two Hours of Driving or Being in Actual Physical Control, Class 1 Misdemeanor, and one count of Failure to Provide Proof of Financial Responsibility, Civil Offense, for which a sentence was imposed. Driving under the influence of alcohol is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of our discretion. *See Matter of Siniaiskas*, 27 I&N Dec. 207, 207 (BIA 2018) (finding DUI a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (discussing the "reckless and dangerous nature of the crime of DUI"). Moreover, this most recent arrest involving drinking and driving occurred in 2019, after he filed the instant application for adjustment. Additionally, although the Applicant provided evidence that he complied with many of the terms of his sentence, he has not

provided evidence that he completed all of the conditions of his sentence for his most recent arrest and conviction, and as such, the record does not establish his rehabilitation.

Further, and critically, the Applicant's explanations of the circumstances giving rise to both of his arrests are inconsistent with the contemporaneous arrest reports outlined above, and he does not take any accountability for his actions leading to his arrests and convictions. The Applicant's statement in the record expresses his remorse and states only that he promises in advance "not to drink again and not to make the same mistake" and asks for forgiveness and the opportunity to move ahead. However, his statements attempt to minimize his culpability and do not acknowledge the seriousness of his criminal conduct. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 304-5 (BIA 1996) (explaining that rehabilitation includes the extent to which an applicant has accepted responsibility and expressed remorse for his or her actions); *Matter of Arreguin*, 21 I&N Dec. 38, 40 (BIA 1995) (finding that the applicant's acceptance of responsibility and achievements in prison are favorable indicators of efforts at rehabilitation). Most glaring, the record reflects that the Applicant's most recent DUI, after the approval of his U immigrant petition, resulted in a vehicle collision where he fled the scene of the accident—facts that he has not directly acknowledged or addressed in his statements. Consequently, the Applicant's statement providing that he promises not to drink again is not sufficient on its own to demonstrate his rehabilitation.

The Applicant contends that that we failed to consider the Board of Immigration Appeal's (Board) decision in *Matter of Arreguin*, 21 I&N Dec. at 42, warning against giving substantial weight to arrest records absent a conviction or corroborating records, which undermines our ability to give uncorroborated police report such weight, resulting in an erroneous application of law or policy. We acknowledge the Applicant's discussion of this case law but note that discretionary determinations in U adjustment applications are guided by 8 C.F.R. 245.24(i), providing us with the sole authority to make a discretionary determination in the adjudication of an adjustment application under section 245(m)(3) of the Act. Moreover, in this case, unlike in *Matter of Arreguin*, the Applicant was convicted following both arrests.

The Applicant also asserts that his DUI in [redacted] 2019 does not rise to a level that now outweighs the positive factors in this case based on the holding in *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970), because his family ties, hardship, length of residence, etc., will be considered as countervailing factors meriting a favorable exercise of discretion. However, this claim is unpersuasive, as the Board determined that the respondent in *Matter of Arai,* unlike the Applicant, had no adverse factors, signifying that he merited a favorable exercise of discretion without needing to reach whether he had outstanding equities. *Id.* at 495-96. The Applicant further asserts that USCIS' consideration of extreme hardship to the Applicant or his spouse in the adjudication of the U immigrant petition, which was approved, should be considered as a positive factor in the adjudication of the U adjustment application. *See* 8 C.F.R. § 245.24(h)(1)(iv) (providing that "evidence establishing that either the qualifying family member or the U-1 principal [applicant] would suffer extreme hardship if the qualifying family member is not allowed to remain in or join the principal in the United States" is required for adjudication of the U immigrant petition). He claims that such a finding also lends itself to a favorable exercise of discretion when adjudicating his U adjustment application. However, while we acknowledge that USCIS previously found extreme hardship and exercised favorable discretion in approving the U immigrant petition filed on the Applicant's behalf, and we consider those findings are relevant considerations here, this U adjustment application is a separate adjudication and USCIS

is not bound by its prior determination on the immigrant petition. *See* 8 C.F.R. § 245.24(i) (stating that the decision to approve or deny an adjustment application under section 245(m)(3) of the Act is a discretionary determination that lies solely in USCIS' jurisdiction).

The Applicant argues that he merits a favorable exercise of discretion because his positive equities outweigh his adverse factors. However, the record shows that the Applicant has engaged in a pattern of alcohol-related incidents, to include a DUI, and that he poses a risk to public safety. The record reflects that the Applicant's most recent alcohol-related offence, a DUI, occurred after the approval of his U immigrant petition. The record further indicates that the Applicant has not fully acknowledged the severity of his actions or provided evidence that he completed the court-ordered conditions of his sentence for his DUI conviction. The Applicant's prior victimization, family and community ties, employment, length of residence in the United States, and evidence of extreme hardship, while favorable, are not sufficient to establish that his adjustment application merits a favorable exercise of discretion.

As stated, the Applicant bears the burden of establishing his eligibility in these adjustment proceedings, including that favorable discretion is warranted. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. at 375. Here, we acknowledge the record contains positive and mitigating equities as discussed. Nonetheless, considering the nature, recency, and seriousness of his criminal history, including a DUI arrest and conviction while this application was pending, and the lack of sufficient evidence to establish his rehabilitation, we agree with the Director that the Applicant has not met his burden to show that his adjustment application warrants a positive exercise of our discretion to adjust his status to that of an LPR under section 245(m)(3) of the Act. The application will remain denied accordingly.

III. CONCLUSION

The Applicant has not established that his adjustment of status merits a favorable exercise of discretion. Consequently, he has not demonstrated that he is eligible to adjust his status to that of an LPR under section 245(m)(3) of the Act.

ORDER: The appeal is dismissed.