U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27640727

Date: AUG. 25, 2023

Appeal of Vermont Service Center Decision

Form I-485, Application to Register Permanent Residence or Adjust Status

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 a U Nonimmigrant (U adjustment application), concluding that the Applicant did not establish that a favorable exercise of discretion was warranted in his case. We rejected the Applicant's two subsequent appeals; the first one as untimely, and the second one for lack of jurisdiction. Following our rejection of the second appeal the Director reopened the U adjustment application on Service motion and again denied it on the same basis citing the Applicant's extensive criminal history and insufficiency of mitigating factors.[1] The matter is now before us on appeal.

On appeal, the Applicant submits additional evidence and asserts that he merits adjustment of status in the exercise of discretion. Although he indicated on the Form I-290B that he would submit a memorandum of law and supplemental documentation to our office within 30 calendar days of filing the appeal, to date we have not received any correspondence from the Applicant and consider the record complete.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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

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

[1] We note that pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii) when U.S. Citizenship and Immigration Services reopens a USCIS proceeding or reconsiders a USCIS decision on its own motion, and the new decision may be unfavorable to the affected party, USCIS must give the affected party 30 days after service of the motion to submit a brief. The record before us does not indicate that the Director afforded the Applicant an opportunity to submit a brief before denying his U adjustment application. The Director's error does not affect our de novo review of the record and adjudication on appeal.

"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; 8 C.F.R. § 245.24(b)(6).

Applicants bear the burden of establishing their eligibility for the benefit sought, and must do so by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. at 375. This burden includes demonstrating that discretion should be exercised in their favor, and, although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all relevant factors in making its discretionary determination. 8 C.F.R. §§ 245.24(b)(6), (d)(11).

A favorable exercise of discretion to grant an applicant adjustment of status to that of an LPR is generally warranted in the absence of adverse factors and presence of favorable factors. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Favorable factors include, but are not limited to, family unity, length of residence in the United States, employment, community involvement, and good moral character. *Id.*; *see also generally* 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). Where adverse factors are present, the applicant may submit evidence to establish 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.").

Depending on the nature of any adverse factors, the applicant may be required to demonstrate clearly that the denial of adjustment of status would result in exceptional and extremely unusual hardship, but such a showing might still be insufficient if the adverse factors are particularly grave. *Id.* For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. *Id.*

II. ANALYSIS

The Applicant is a citizen of Ecuador who claims to have entered the United States without inspection in 2000. In 2015, the Applicant was granted U nonimmigrant status as a victim of kidnapping and robbery. He timely filed the instant U adjustment application in April 2019.

The record reflects that from 2008 through 2018 the Applicant was convicted of multiple offenses. In 2008 he was convicted of driving while impaired by alcohol (DWI) and sentenced, in part, to complete a one-year probationary period, serve 30 days in a county adult corrections facility (stayed for one year), and attend a DWI clinic. In 2012, the Applicant was convicted of driving without a valid license, a misdemeanor for which he was sentenced to serve 30 days in jail. In 2015, he was convicted of speeding, driving without a state license, and driving after his license was suspended – all petty misdemeanors. Two years later the Applicant was convicted of failure to display current plates, a misdemeanor offense. In 2018, he was again convicted of DWI and sentenced, in part, to supervised probation for two years (until September 2020), confinement for 89 days in a county adult corrections facility (stayed for two years) and completion of a post-DWI assessment. The record also shows that

the same year the Applicant was arrested and charged with domestic assault, though the charge was later dismissed.

With his U adjustment application, and in response to the Director's subsequent request for evidence, the Applicant submitted a statement explaining the circumstances of some of his arrests and convictions, police reports, court dispositions, evidence of employment, a Form I-693, Report of Medical Examination and Vaccinations Record (medical examination), and reference letters. He asserted that although he had made mistakes in the past, he merited adjustment of status in the exercise of discretion because he complied with the court-ordered probation, completed DWI classes, and has been working hard to support his family.

The Director considered the positive equities in the case, including the Applicant's victimization and assistance to law enforcement; his statement of remorse for his past mistakes; completion of the court-ordered probation and alcohol-related programs; residence and employment in the United States for over 20 years; his family ties and responsibilities; and letters describing his positive contributions to community and overall commitment to his construction business. Nevertheless, the Director determined that these positive factors had diminished weight in the discretionary analysis because the Applicant's participation in the alcohol-intervention programs was involuntary; he was still on probation when he filed his U adjustment of status request; the letters attesting to his good character did not address his criminal history; and insufficient time had passed since his last DWI conviction to establish rehabilitation.

The Director concluded that the Applicant's criminal history raised concerns about public safety and the Applicant's regard for the well-being of others and that it outweighed the positive and mitigating factors in his case, such that a grant of adjustment of status was not warranted in the exercise of discretion. The Director also noted that the medical examination the Applicant submitted in support of his U adjustment request did not contain any references to his alcohol-related offenses, but that even if it had been properly completed, it would not have changed the outcome.

On appeal, the Applicant submits an affidavit, a statement from the alleged domestic assault victim, an updated medical examination, substance use diagnostic assessment (diagnostic assessment), and additional letters from his friends and family attesting to his good character.

Upon review of the entire record, as supplemented on appeal, we conclude that it remains insufficient to overcome the Director's adverse discretionary determination.

In his November 2021 affidavit, the Applicant states that he recognizes he has made mistakes in the past and is aware that his conduct with respect to his traffic violations has been hazardous to himself and public safety. He further states that he is remorseful for his mistakes and that it has never been his intention to cause harm to anyone. He explains that "in [his] defense," he has been through some very stressful, strenuous times and, although his judgement had been affected due to his circumstances, he has since changed his conduct; he no longer drinks and drives, and he is acutely aware of the consequences that will follow if he engages in such conduct.

Regarding the 2018 domestic assault arrest, the Applicant explains that he and his ex-girlfriend had an argument "where the police was called and the case was later dismissed." The Applicant's ex-

girlfriend confirms in a November 2021 unsigned letter,[2] that she and the Applicant continue to be friends. She states that in February 2018 they were driving together and began to argue about personal things; she got very upset and called the police while they both were still in the car. The ex-girlfriend explains that although she subsequently told the police that she called them because she was angry at the Applicant and did not "mean for the situation to escalate to that point," they arrested him and took him to jail. She states that the Applicant was never violent towards her, she did not press charges, and the case was resolved.

According to the Applicant's November 2021 diagnostic assessment, he reported that he continued to drink alcohol approximately once a month at social gatherings, but was motivated to keep his physical and mental health well, and had strong support from his family and friends. The assessment indicates, however, that the Applicant did not recognize problems related to substance use or verbalize willingness to follow treatment recommendations. The Applicant's updated medical examination, in turn, completed by a civil surgeon in March 2023, indicates that he has "History of Physical/Mental Disorder with Associated Harmful Behavior Unlikely to Recur, Class B";[3] specifically he "has a history of [a]lcohol abuse, which has resolved with counseling and alcohol cessation. He completed the program on April 08, 2019."[4]

Lastly, the Applicant's friends, neighbors, and business associates describe him as an active community member and a hard worker; a helpful, honest, and responsible person; a man of integrity who respects the laws and people of the United States; and a caring father.

We acknowledge the submission of this additional evidence, but find it inadequate to cure the deficiencies identified in the Director's decision. As stated, the record reflects, and the Applicant does not dispute, that he was convicted of two alcohol-related offenses, one of which occurred in 2018 while he held U nonimmigrant status. In evaluating the Applicant's criminal record to determine whether his adjustment of status is warranted as a matter of discretion, we consider multiple factors including the "nature, recency, and seriousness" of his criminal history. *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978).

DWI is both a serious crime and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of discretion. *See Matter of Siniaiskas*, 27 I&N Dec. 207, 207 (BIA 2018) (finding driving under the influence of alcohol (DUI) to be 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 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI"). Moreover, because the Applicant's DWI conviction occurred shortly before he filed the instant U adjustment application and he remained on probation for over a year after the filing, we consider his conviction to be not only *serious*, but also *recent*. When viewed in the context of the Applicant's previous conviction for an alcohol-related offense, numerous arrests and

[2] We note that the Applicant's 2021 affidavit and the girlfriend's letter were previously submitted in support of the Applicant's first appeal, which we rejected as untimely.

[3] Class B conditions are defined as physical or mental health conditions, diseases, or disability serious in degree or permanent in nature; they do not render an applicant inadmissible. *See generally* 8 *USCIS Policy Manual*, *supra*, at B.2(B).

[4] This appears to be a reference to the *Driving With Care Level 2 [24 education hours] DUI Alcohol/Drug Use Cognitive Behavioral Program* the Applicant completed on that date as part of his sentence for the 2018 DWI conviction.

convictions for traffic-related violations and misdemeanors, and his arrest for domestic assault, the record shows a pattern of criminal behavior which weighs heavily against him.

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); *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.").

Here, the Applicant remained on probation until September 2020, while his U adjustment application was pending. Although he provided evidence that he completed the court-ordered 24-hour program related to alcohol and drug abuse in 2019, and that his progress was assessed in 2021, according to the assessment, he continues to drink and does not recognize problems related to substance use and has not expressed willingness to follow treatment recommendations. Moreover, the Applicant's characterization of his DWI convictions as "traffic violations," as well as his statement attributing his criminal history to "some very stressful, strenuous times," indicates that he has not acknowledged the gravity of his conviction and has not taken full responsibility for his actions. Nor has the Applicant fully explained the circumstances of his 2018 domestic assault arrest and, although we recognize that his ex-girlfriend chose not to pursue the charge against him, his underlying behavior is relevant in determining whether a favorable exercise of discretion is appropriate. We also acknowledge the letters attesting to the Applicant's good character; however, we cannot give them significant weight, as none of the writers address his criminal history or attempts at rehabilitation. Considering these deficiencies, and the recency of the Applicant's arrest for domestic assault and his DWI conviction, we conclude that the Applicant has not established he has been genuinely rehabilitated.

Lastly, we acknowledge the civil surgeon's determination that the Applicant's history of alcohol abuse has resolved with counseling and alcohol cessation,[5] and that he has a Class B condition due to his past physical or mental disorder that is unlikely to recur. However, while the civil surgeon's determination is relevant to the Applicant's admissibility, it does not have significant weight in demonstrating that the Applicant has been rehabilitated or that he otherwise merits a favorable exercise of discretion.

In conclusion, although we recognize that there are favorable factors in the Applicant's case, they remain outweighed by his criminal history. Consequently, we agree with the Director that the Applicant has not met his burden of proof to establish 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 he warrants a favorable exercise of discretion to adjust his status to that of an LPR under section 245(m) of the Act. His U adjustment application will therefore remain denied.

ORDER: The appeal is dismissed.

[5] The civil surgeon did not explain the basis for this determination, and the Applicant has not provided evidence to indicate that he had been in counseling or abstained from alcohol following his 2021 diagnostic assessment.