U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29585051

Date: DEC. 22, 2023

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. 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 a favorable exercise of discretion was not warranted because the Applicant's positive and mitigating equities did not outweigh the adverse factors in his case. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Applicant submits additional evidence and reasserts his eligibility for the benefit sought.

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 "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 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

The Applicant, a native and citizen of Ecuador, entered the United States without inspection or admission in January 2001. In April 2017, USCIS granted him U nonimmigrant status, based on a felonious assault he suffered in 2003. The Applicant timely filed the instant U adjustment application in September 2020. The Director denied the application, concluding 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, namely his multiple convictions for driving while intoxicated (DWI) from 2007 to 2023, outweighed the positive factors in his case. The Applicant has not overcome this determination on appeal.

A. Favorable and Mitigating Equities

The Applicant is 42 years old and has lived in the United States for approximately 22 years. The Applicant's family ties in the United States include his spouse, U.S. citizen stepson, and two biological sons.[1] The Applicant provided evidence that he is a business owner and has paid taxes from 2017-2019. In her statement, the Applicant's spouse stated that she suffers from diabetes and relies on the Applicant's assistance when her blood glucose rises. She further stated that the Applicant is her sole support system and that she and her son, who has an intellectual disability, would suffer emotionally and financially if he is not allowed to remain in the United States. Additionally, the Applicant explained that if he had to return to Ecuador, he would forfeit his construction business and ability to provide for his family in the United States.

B. Adverse Factors

The Applicant's primary adverse factor is his criminal history. The record reflects that, in [redacted] 2007, the Applicant was arrested in [redacted], Minnesota for driving while impaired (DWI) in violation of section 169A.20 of the Minnesota Statutes (Minn. Stat.). According to a [redacted] Police Department Case Report, an officer was dispatched to a report of a vehicle idling in the southbound turning lane on a two-way street in [redacted]. When the officer arrived, he observed the Applicant sleeping in the driver's seat with the engine running. The Applicant had the vehicle in drive and his foot on the brake. When the officer opened the vehicle's door, he smelled a strong odor of alcohol. He turned the vehicle off and attempted to wake up the Applicant. Officers on the scene observed that the Applicant had "watery [,] blood shot eyes, smelled of used alcoholic beverage and when asked to exit the vehicle [,] he stumbled and officers had to grab him." After several attempts, the Applicant woke up and tried to put the vehicle in gear. He was arrested for DWI and transported to a local jail for chemical testing. He later admitted to an officer that he had "four drinks" or "four

[1] The Applicant has filed a Form I-929, Petition for Qualifying Family Member of U-1 Nonimmigrant for his stepson who lives in Guatemala.

shots." In his statement, the Applicant provided a different version of the events. He explained that he was drinking at a friend's house. At some point during the evening, he decided that he wanted to sleep. He returned to his vehicle, which was parked in front of his friend's house. He put the vehicle in neutral, pulled the handbrake and went to sleep. The next thing he remembered was an officer waking him up and arresting him for DWI. He pled guilty to the amended charge of fourth degree DWI (with a blood alcohol concentration of .08% or more). As part of the plea agreement, the Applicant stated that he "drove a motor vehicle while under the influence of alcohol with a BAC of .14%." The Applicant was sentenced to 30 days and ordered to pay a $400 fine. The court stayed $300 of the fine and 28 days of the sentence for two years pending successful completion of probation.

The Applicant was arrested in [redacted] 2021 in [redacted], Minnesota for DWI in violation of section 169A.20.1(1) of the Minn. Stat. A Supplementary Investigation Report from the [redacted] Police Department indicates that an officer was dispatched to a report of two males passed out or sleeping in a dark colored SUV at a [redacted]. The officer contacted the Applicant who was sitting in the driver's seat with the vehicle running and the keys in the ignition. The Applicant had watery, bloodshot eyes and an odor of alcohol. He told the officer that he came to the [redacted] from his residence to buy cigarettes. He stated that he had stopped at other gas stations and kept going until he found a gas station that was open. He further stated that he decided to sleep in his vehicle so that he could buy cigarettes when the [redacted] opened. He later admitted that he drank "a little bit" at his residence and drove to the [redacted] because he did not have cigarettes. The Applicant again provided a different version of the events. He explained that he had been drinking at home with his cousin. They wanted cigarettes, but could not find any. He stated that his cousin drove to a few nearby gas stations including the [redacted] so that they could buy cigarettes. They decided to sleep in the vehicle until the [redacted] opened at 4 am. The Applicant got into the driver's seat, turned on the radio and went to sleep. The Applicant was arrested for DWI. He was convicted and sentenced to one year of supervised probation and ordered to attend a DWI education class, Mothers Against Drunk Driving (MADD) panel and pay a $325 fine. He submitted evidence that he completed the DWI education program, attended the panel and paid the fine in June 2022.

The Applicant was arrested in [redacted] 2022 in [redacted] for fifth degree assault in violation of section 609.224.1 of the Minn. Stat. In their narrative, responding officers recounted that they were dispatched to a report of a disorderly male who had attempted to assault employees at a local bar. A security guard at the bar told them that the Applicant was yelling and acting disrespectfully towards bartenders and staff. The Applicant also refused to leave and swore at security staff. When the security guard attempted to escort the Applicant out of the bar, the Applicant punched him in the forehead three times. Officers observed "a red and swollen area in the middle of [the security guard's] forehead as well as on his left cheek and the right side of his nose." A witness told the officers that the Applicant "grabbed her by the hair" during the incident resulting in scratch marks on her neck. Another witness told the officers that the Applicant was "punching wildly" and had hit multiple people. In his statement, the Applicant conceded that there was an incident at the bar. However, he claimed that he acted in self-defense. Specifically, he stated that he had only been in the bar for 10-15 minutes when he noticed the music had been turned off. When he asked the bartender when they were going to turn the music on, the bartender threatened to have security kick him out of the bar. A security guard then approached him and asked him to leave. The Applicant told the security guard he would leave after he got his cover back. The bar staff refused to return his money. According to the Applicant, a security guard grabbed him by his arm. He told the security guard not to touch him The security guard then

"moved a chair and hit [him] with his hand." Four other security guards also hit him and sprayed him with tear gas. The Applicant maintained that, apart from speaking angrily and defending himself, he did not cause a disorder or do anything wrong. After conducting his investigation, an officer issued the Applicant a citation for fifth degree assault and trespassed him from the bar for one year. The Applicant pled guilty to an amended charge of disorderly conduct and was ordered to pay a $138 fine. He submitted evidence that he paid the fine in December 2022.

Finally, the Applicant was arrested in [redacted] in [redacted] 2023 for DWI-third degree driving while impaired and DWI-third degree driving while impaired with a BAC of .08% within 2 hours, in violation of sections 169A.26.2 and 169A.20.1(5), respectively. In the Statement of Probable Cause, a responding officer recalled being dispatched to the scene of an occupied vehicle parked in the grass. The officer observed the Applicant seated on the passenger side. The vehicle was running with its reverse lights activated. He noted that the Applicant smelled of alcohol and had bloodshot, watery eyes and his speech was slurred. The Applicant admitted to drinking alcohol, but refused to undergo field sobriety testing because he was not in the driver's seat. He later agreed to a breath test which revealed a BAC of .12%. In his statement, the Applicant explained that he asked a friend to pick him up because he was drunk. His friend's truck was low on diesel so he drove the Applicant home in the Applicant's vehicle. The vehicle skidded on a patch of ice and ended up in the grass. His friend tried to back up, but he couldn't get the vehicle out of the grass. He left the Applicant sleeping in the passenger seat and took an Uber to work. After his arrest, the Applicant's probation for his [redacted] 2021 DWI was revoked and he was issued a summons to appear in court in [redacted] 2023. The Applicant did not submit court disposition records for this arrest. Rather, he stated that his criminal defense attorney plans to submit an affidavit from his friend to the court confirming that he was the driver that night.

The Applicant expressed some remorse for his criminal history. Regarding his DWIs, the Applicant stressed that "now that [he] understand[s] better how the laws work, [he] can see that [he] should not have done that and that it was wrong." He maintains that he wants to change and hopes that he can be forgiven for his past mistakes. He asks for an opportunity to demonstrate that he will be more responsible and conscientious with everything that he does going forward.

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 and mitigating equities in this case, including the evidence on appeal. We acknowledge the Applicant's lengthy residence in the United States, his family ties, business and homeownership, payment of taxes, and efforts at rehabilitation after multiple DWI convictions. We further acknowledge the Applicant's close relationship with his spouse, son and stepson and the hardship they would experience if the Applicant is unable to remain in the United

States. 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.

The Director determined that the Applicant's positive and mitigating equities did not outweigh the adverse factors in his case. The Director specifically highlighted the facts and circumstances surrounding the Applicant's [redacted] 2007 and [redacted] 2021 DWI arrests. She noted that those DWI arrests and convictions, which occurred *after* being granted U nonimmigrant status and applying to reside permanently in the United States, demonstrated a risk to public safety. Additionally, she noted that the Applicant remained on active probation for his [redacted] 2021 arrest until June 2023. As a result, the Director concluded that the Applicant had not submitted sufficient evidence to establish that a favorable exercise of discretion to adjust his status to that of an LPR was warranted in his case.

On appeal, the Applicant contends that the Director erred in denying his U adjustment application. Specifically, he cites *Matter of Siniauskas*, 27 I&N Dec. 207, 208-09 (BIA 2018) (finding DUI a significant adverse consideration in determining a respondent's danger to the community in bond proceedings)and *Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (BIA 2019) (discussing the "reckless and dangerous nature of the crime of DUI"). and submits copies of several non-precedent decisions from the AAO involving DUIs, and he argues that his case is distinguishable from those decisions because he never drove a vehicle while intoxicated. Additionally, the Applicant argues that the Director erred in determining that he did not warrant a favorable exercise of discretion based on a misapplication of the law and an inadequate weighing of his mitigating equities. In support of his contention, he submits letters from his spouse, employer, witnesses to the [redacted] 2022 incident, his stepson's social worker and special education teacher, and proof of his attendance with Alcoholics Anonymous (AA).

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). Here, the record indicates that the Applicant was arrested four times for DWI or assault between 2007 and 2023. He pled guilty to or was convicted of DWI and disorderly conduct. We note specifically that driving under the influence of alcohol is both a serious crime that poses a risk to others and a significant adverse factor relevant to our consideration of whether the Applicant warrants a favorable exercise of our discretion. *Siniauskas*, 27 I&N Dec.at 208; *Castillo-Perez*, 27 I&N Dec. at 671. As the Director previously noted, the Applicant's two DWI and one disorderly conduct convictions occurred after he was granted U nonimmigrant status and while he was pursuing this discretionary adjustment application. Moreover, there are inconsistencies between the police officer's and Applicant's description of the circumstances surrounding his [redacted] 2007 and [redacted] 2021 arrests casting doubt on the Applicant's claim that he never drove his vehicle while intoxicated.

Additionally, although the Applicant expressed general remorse for his criminal history, the record as a whole does not sufficiently establish his rehabilitation. *See Matter of Roberts*, 20 I&N Dec. 294, 299 (BIA 1991) (stating that 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"); *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"). We note that the Applicant was arrested for his most recent

DWI less than one year ago, after he completed a DWI education program and attended a [redacted] Victim Impact Panel in June 2022. The record indicates that he was placed in an Intensive Supervision Program (ISP) for that conviction this year. Moreover, the Applicant submitted records showing that he only began attending AA meetings in June 2023— just six months ago. The record also indicates that the Applicant violated the terms of his sentence for his [redacted] 2021 DWI conviction resulting in the revocation of his probation. To determine whether an applicant has established rehabilitation, we examine not only the applicant's actions during the period of time for which he was required to comply with court-ordered mandates, but also after his successful completion of them. *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"); *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). Based on the recency and seriousness of the Applicant's criminal history, he has not sufficiently established his rehabilitation.

To summarize, the Applicant has three DWI convictions and one disorderly conduct conviction — offenses which evidenced a repeated disregard for public safety and the laws of the United States. While we acknowledge the Applicant's arguments and his evidence of positive and mitigating equities including his close relationship with his spouse, son and stepson, they 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 recency and severity of his DWI convictions before and after he was granted U nonimmigrant status and the insufficient evidence of his rehabilitation in the record. Consequently, the Applicant has not demonstrated that he warrants a positive exercise of discretion to adjust his status to that of an LPR under section 245(m) of the Act.

ORDER: The appeal is dismissed.