U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26431279

Date: JUL. 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 based on their "U" nonimmigrant status. *See* Immigration and Nationality Act (the Act) section 245(m), 8 U.S.C. § 1255(m). The U classification affords nonimmigrant status to crime victims, who assist authorities investigating or prosecuting the criminal activity, and their qualifying family members. The U nonimmigrant may later apply for lawful permanent residency.

The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), and subsequent motions to reopen and reconsider, 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. 8 C.F.R. § 103.3. On appeal, the Applicant submits additional evidence and reasserts his eligibility.

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; 8 C.F.R. § 245.24(b)(6). 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; 8 C.F.R. § 245.24(b); *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(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) ("[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 Background

The Applicant, a native and citizen of Mexico, was granted U-3 nonimmigrant status from June 2013 until June 2017. The Applicant timely filed the instant U adjustment application in July 2016. As indicated previously, 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).

In denying the U adjustment application, the Director listed the positive factors found in the record and concluded that they were not sufficient to overcome the adverse factors in the record. First, the Director noted that (at the time of adjudication) the Applicant had been arrested five times while in U-3 nonimmigrant status, all of which occurred after the filing of the U adjustment application. The Director indicated that the record contained documents revealing the charges filed against the Applicant including crimes of violence, controlled substance possession, and damaging property. The Director additionally acknowledged documentation indicating the final dispositions of those charges and that the charges were dismissed or pled down to violations. However, the Director emphasized that the documents provided limited insight into and were and insufficient to analyze the facts surrounding the reasons for the dismissals. The Director determined that some of the charges filed against the Applicant were serious, his criminal history showed a pattern of disregard for the laws of the United States, and both raised concerns about public safety and the well-being of others. The Director further observed that the record did not contain the requested additional evidence related to all of the Applicant's arrests, namely the police reports underlying each of his arrests. The Director acknowledged the Applicant's desire to remain in the United States with his lawful permanent resident (LPR) mother and U.S. citizen siblings and letters of support from church pastors and family. The Director further acknowledged the Applicant's statements relating to his participation in the honors program at his high school, his acceptance at four community colleges starting Fall 2019, and his commencement of an anger management program, but noted that the Applicant did not provide an evidence to corroborate his claims.

In dismissing the subsequent motion to reopen and motion to reconsider, the Director found that the Applicant did not submit new evidence to constitute new facts which were not available and could not have been presented in the previous proceeding or give reasons for reconsideration based on any

pertinent precedent decisions. The Director acknowledged the Applicant's statements concerning his efforts to further his education, attend anger management treatment, and his repeated expressions of remorse for his actions. However, and most significantly, the Director noted that recent criminal history reports showed that the Applicant had new arrests by the [redacted] Police Department—one in [redacted] 2019 for Assault-3rd Degree and one in [redacted] 2019 for Criminal Contempt - 1st Degree: Violate Order of Protection.

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

Upon de novo review, we adopt and affirm the Director's decision with the comments below. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F3d 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case.").

On appeal, the Applicant, through counsel, first contends that criminal charges dismissed by a New York state criminal court are deemed a nullity under section 160.60 of the New York Criminal Procedure Law (N.Y. Crim. Proc. Law), and as such, the Applicant's arrests that were ultimately dismissed should not be considered negative equities in his case. The Applicant then contends that the two criminal charges that were pled down to disorderly conduct violations should also not be considered negative equities because disorderly conduct is not a crime as stated in N.Y. Penal Law § 240.20, but rather a violation.[1] The Applicant further contends that his arrest where the charges were disposed of with a "youthful offender" adjudication also should not be considered a negative equity because such an adjudication "is not a judgement of conviction for a crime or any other offense," pursuant to N.Y. Crim. Proc. Law § 720.35 (2021), and not convictions for immigration purposes. *Matter of Devison-Charles*, 22 I&N Dec. 1362, 1373 (BIA 2000). In this case, although the Applicant's arrests resulted in dismissals or were pled down to violations, the fact that the Applicant was not *convicted of* the underlying charges, or that the charges were ultimately not pursued, does not equate with a finding that the underlying conduct or behavior leading to those charges did not *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 that it "will generally not exercise its discretion favorably in cases where the applicant has *committed* or been convicted of" certain classes of crimes) (emphasis added). In fact, the Applicant has shown a concerning pattern of behavior that not only occurred while in U nonimmigrant status, but also after the pendency of his U adjustment application. In considering an applicant's criminal or juvenile offense history in the exercise of discretion, we look to the "nature,

[1] The Applicant's counsel also cites two unpublished decisions where we determined that a charge against an individual that was dismissed by a New York court was a nullity and would "carry little discretionary weight" on the individual's application. According to counsel, these cases share similarities to the Applicant's case where the charges were dismissed by a New York court. Counsel also cites to two unpublished decisions where he asserts that the applicants had far more serious criminal records and less strong positive equities than the Applicant but we granted relief. However, the cited decisions were not published as precedent and, accordingly, do not bind USCIS 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.

recency, and seriousness" of the relevant offense(s). *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). As stated above, the Applicant has been arrested four times as a juvenile and an additional four times as an adult on charges of crimes of violence, controlled substance possession, and damaging property all during the time he held U nonimmigrant status, the most recent of which was approximately three years after filing the U adjustment application and within the same month of filing the motion to reopen and reconsider the Director's decision.[2]

Further, as a minor, the Applicant was arrested four times—for offenses such as, crimes of violence, controlled substance possession, and damaging property. As asserted by the Applicant on appeal, an adjudication of youthful offender status or juvenile delinquency is not a criminal conviction under the immigration laws. *Matter of Devison-Charles,* 22 I&N Dec. at 1373. However, all relevant factors are considered in assessing an applicant's eligibility for adjustment of status as matter of discretion. 8 C.F.R § 245.24(d)(11). Juvenile offenses and the circumstances surrounding them are factors relevant to the determination of whether a favorable exercise of discretion is warranted. *See Castro-Saravia v. Ashcroft*, 122 Fed. Appx. 303, 304-05 (9th Cir. 2004) (concluding that *Matter of Devison* does not preclude consideration of juvenile delinquency when making a discretionary determination). *See generally Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (including, in adverse factors relevant to discretionary relief, "the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident"). Accordingly, on appeal, we have considered the full scope of the Applicant's history of juvenile offenses.

Next, the Applicant argues that he should not be penalized for not providing police reports, particularly in the cases where the charges against him were dismissed. He asserts that in those cases, he was not convicted of any crime and did not admit to committing any offense, and police reports or complaints would amount to unsupported and uncorroborated allegations. The Applicant further argues that we cannot rely upon the information in police reports because they do not contain reliable evidence and police reports cannot be relied upon unless otherwise supported by the record.[3] While the Applicant is correct to the extent that, for police reports to be given substantial weight, they should otherwise be corroborated by the record, nothing precludes us from considering otherwise reliable police records and arrests in our exercise of discretion. *See Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) (citing to *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988) and *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995)) (finding that we may look to police records and arrests in making a determination as to whether discretion should be favorably exercised); *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (declining to give substantial weight to an arrest absent a conviction or other corroborating

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[2] Further, although not a consideration in the adjudication of this appeal, the Applicant has been the restrained party subject to two separate orders of protection—one renewed nine times since February 2018 and currently valid through March 2024, and a second renewed four times and expired in December 2019. We note that, while the Applicant made a brief reference to an order of protection stemming from his [redacted] 2016 arrest, he did not provide any documentation or additional information about said order, nor did he disclose the existence of the second order of protection for a different protected individual.

[3] The Applicant maintains that our consideration of police reports raises due process concerns; however, there are no due process rights implicated in the adjudication of a benefits application. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (explaining that although the Fifth Amendment protects against the deprivation of property rights granted to immigrants without due process, petitioners do not have an inherent property right in an immigrant visa).

evidence, but not prohibiting consideration of arrest reports). Although we do not give substantial weight to the arrest reports that did not result in convictions, we consider them in our discretionary determination. *See, e.g., Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (noting that although the Board of Immigration Appeals erred in giving substantial weight to an arrest report in the absence of a conviction, it was not *per se* improper to consider the arrest report). At issue here is that the Applicant did not submit police reports for seven of his eight arrests or his own detailed explanations regarding the events that led up to his arrests. In fact, the Applicant only provided brief explanations for his [redacted] 2016 arrests, one of which does not describe the incident in a similar fashion to the only contemporaneous police report submitted by the Applicant. In reference to his [redacted] 2016 arrest, the Applicant stated that he and his girlfriend "had an argument [in the course of a breakup] and she contacted the police leading to [his] arrest." However, the police report, written contemporaneous with the incident, stated that the Applicant took the victim's cell phone and struck her in the face causing pain and swelling and then threw her cell phone across the street causing approximately $100 in damages. The criminal complaint filed with the court further elaborated that the Applicant slapped the victim in the face with said cell phone and the victim indicated the Applicant told her that if he saw her with another guy, he was going to hit her. Here, our discretionary determination is not based on the information contained in the police reports. Rather, it is based on the fact and seriousness of the whole of the Applicant's criminal and juvenile offense history, the discrepancies between the Applicant's account of the incident and the information contained in the only police report provided,[4] and the Applicant's lack of detailed explanations for each of the remaining incidents that resulted in his arrest.

On appeal, the Applicant submits a new statement, a statement from his mother and sister, a psychological report, a copy of his high school diploma, a letter confirming his enrollment and participation in Batterers Intervention counseling with an expected completion date of February 2020, and court dispositions for his arrests in [redacted] 2018 resulting in a youthful offender adjudication, in [redacted] 2019 resulting in a guilty plea to disorderly conduct, and in [redacted] 2019 also resulting in a guilty plea to disorderly conduct.

In his personal statement submitted on appeal, the Applicant states that it has been four years since his last arrest and he has always expressed remorse for his actions. He explains that he now understands that, had he received more psychological and emotional support when he was younger to help him deal with and process the violence and abuses he witnessed, he may have had better coping skills and avoided acting out in the manner that led to his arrests. He indicates that he is embarrassed when he thinks back on his arrests and the pain he caused his family, and is grateful for the opportunity to participate in anger management classes and batterer's intervention counseling. He also acknowledges that he has made mistakes and takes full responsibility for his actions as he continues to work on learning to exercise better judgement. The Applicant concludes that he believes the past four years demonstrate that he has in fact been rehabilitated, not only because he has not had any police involvement, but also because he has become a more thoughtful, caring, and empathetic person and

[4] We note that the Applicant discussed this incident within the psychological evaluation, provided details leading up to the incident, and admitted to getting "physical" with his then girlfriend who obtained a restraining order against him. However, the Applicant did not describe the "physical" altercation or provide any additional information about the actual incident. The Applicant also did not discuss any of his other arrests or incidents leading up to his remaining seven arrests within the evaluation.

he wants to be a role model to his siblings and anyone willing to see that people can change and live an improved lifestyle.

The psychological evaluation submitted on appeal, completed in September 2020, specifically identifies the Applicant's trauma surrounding his exposure to domestic abuse and alcohol abuse in his home and witnessing a sexual act between his father and aunt, which led to his parents' separation. The evaluation asserts that the Applicant acted out (during the time period of his arrests) due to the traumatic events he witnessed and experienced as a child, leading to confusion in his developing psyche when it came to self-restraint and impulse control and appropriate behavior when interacting with an intimate partner. It further asserts that the Applicant was severely impaired in his judgement and decision making at the time when he was engaged in troubling behaviors and his acting out stemmed from poor role-modeling by his parents in the area of intimate partner relationships and his deprivation of basic stability and basic needs. The evaluation concludes that when the Applicant was reflecting on his past behavior, he was genuinely remorseful for acting out, and when reflecting on the programs he completed and participated in afterward, he was regretful about the negative impact of his earlier aggressive behavior upon others and upon his own life course. While we understand and do not seek to diminish the difficulty of living through those experiences, particularly at a young age, this evaluation does not overcome the basis of the Director's decision. In this instance, the U adjustment application was denied 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 new evidence submitted on appeal, while relevant in the balancing of his positive and mitigating equities and adverse factors, does not lessen the seriousness of the Applicant's criminal and juvenile offense history, especially considering the repetitive charges during the time he held U nonimmigrant status and following his application to reside permanently in this country as an LPR, which remain negative factors outweighing the positive and mitigating equities present in his case such that he has not established that he warrants a favorable exercise of discretion based on the totality of the evidence.

In sum, we acknowledge the record contains positive and mitigating equities. The Applicant has been in the United States since he was about four years old and has family ties in the United States, including his LPR mother and U.S. citizen siblings, for whom he provides love and support on a daily basis. Nonetheless, in light of the nature, recency, and seriousness of the Applicant's criminal and juvenile offense history, and in the absence of additional information or documentation which allows us to properly and fully consider the basis for and specific facts surrounding all of the Applicant's multiple arrests, such as the underlying police or arrest reports[5] and detailed explanations from the Applicant regarding the events that led up to his arrests, we agree with the Director that 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 he warrants a positive exercise of our discretion to adjust his status to that of an LPR under section 245(m) of the Act. The application will remain denied accordingly.

[5] Reliance on an arrest report in adjudicating discretionary relief—even in the absence of a criminal conviction—is permissible provided that the report is inherently reliable and its use is not fundamentally unfair. *See e.g.*, *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.").

III. CONCLUSION

The Applicant has not established that his adjustment of status is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Consequently, he has not demonstrated that he is eligible to adjust his status to that of an LPR under section 245(m) of the Act.

ORDER: The appeal is dismissed.