



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 20946556

Date: MAR. 4, 2022

Appeal of Vermont Service Center Decision

Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant

The Petitioner, who was granted lawful permanent residency based on her “U-1” nonimmigrant status, seeks immigrant classification of the Derivative, her spouse, as a qualifying family member under section 245(m)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(3). The Director of the Vermont Service Center (Director) denied the Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant (U immigrant petition). The matter is now before us on appeal, and the Petitioner submits a brief and no additional evidence. The Administrative Appeals Office (AAO) 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

Individuals who gain their lawful permanent residency through their U-1 status may seek lawful permanent residency on behalf of a qualifying family member who has never held derivative U nonimmigrant status if granting the immigrant status would avoid extreme hardship to either the U-1 principal or the qualifying family member. Section 245(m)(3) of the Act; 8 C.F.R. § 245.24(g). Even if hardship is established, ultimately, a petitioner bears the burden of proof to demonstrate that U.S. Citizenship and Immigration Services (USCIS) should exercise its discretion and adjust the status of a qualifying family member, including his or her spouse. Section 245(m)(3) of the Act; 8 C.F.R. § 245.24(a)(2), (h)(1)(v).

USCIS may consider all factors when making its discretionary decision, including acts that would otherwise render a qualifying family member inadmissible. 8 C.F.R. § 245.24(h)(1)(v). Where adverse factors are present, a petitioner may offset these factors by submitting supporting documentation establishing mitigating equities. *Id.*

II. ANALYSIS

After the Petitioner was granted U nonimmigrant status, she filed the instant U immigrant petition on behalf of the Derivative in April 2018. The Director denied the U immigrant petition, concluding that the Petitioner did not meet her burden of demonstrating that the Derivative warranted a favorable exercise of discretion. The Director acknowledged and considered the following positive and

mitigating equities present in the record: The Derivative's support for the Petitioner and her children, his employment, and the assistance he provides to his mother, as well as the hardship his family will incur if he returns to his home country. Against these equities, the Director weighed the Derivative's criminal history, including ten arrests, and at least two convictions.¹ After considering the entire record, the Director found that the Derivative's criminal history was a serious adverse factor that outweighed the positive and mitigating equities such that a favorable exercise of discretion was not warranted.

On appeal, the Petitioner submits a brief in response to the Director's decision. The Petitioner contends that the Director's decision afforded an inappropriate amount of weight to the adverse factors in the Derivative's case while improperly weighing the positive and mitigating equities. She asserts that the Director inappropriately treated the Derivative's arrests as convictions, and also argues that the Director failed to consider all of the evidence in the record demonstrating positive and mitigating factors. The Petitioner does not submit any new additional evidence with her appeal.

A. Adverse Factors

The adverse factors in this case relate to the Derivative's criminal history. The record reflects that the Derivative has been arrested on at least 10 occasions while living in the United States. As noted by the Director, in 1988, the Derivative was convicted for failing to stop at the scene of an accident resulting in death or injury, under California Vehicle Code section 20001, and sentenced to five years of probation. The Petitioner did not submit documentation from the court regarding the Derivative's 1988 conviction. The Director also noted that in 2000, the Derivative was convicted of a felony charge of obtaining money by fraud or trick, under Cal. Pen. Code section 332, and sentenced to three years of probation. In her decision, the Director discussed the Derivative's arrest for assault and battery with a deadly weapon in 2003, under Cal. Pen. Code section 245(a), and his five arrests from 2014 through 2017, for similar gaming without a license or work permit offenses in [REDACTED] Nevada. Finally, the Director acknowledged that in 2019, the Derivative was arrested for domestic battery, under Nevada Revised Statute (NRS)200.485(5), in [REDACTED] but the case was subsequently dismissed. We note that the Derivative has not provided the police report or any other underlying documents, besides his own affidavit, regarding his 2019 domestic violence arrest.

The record also contained adverse factors that the Director did not discuss. While noting the five arrests for gaming without a license from 2014 through 2017, she did not identify the relevant convictions stemming from those arrests. In 2014, the Derivative was convicted of trespassing and disorderly conduct in [REDACTED] under NRS sections 207.200 and 12.33.010, respectively, and the judge ordered that he stay out of the [REDACTED] for one year. In 2015, the Derivative was convicted of theft under \$650, and ordered a suspended sentence of 1 year in jail. In 2016, the Derivative was also convicted of theft under \$650, and ordered a suspended sentence of 6 months in jail and community service. Government records also indicate that the Derivative was convicted in 2020 of a felony charge of attempting to operate a gambling game without a license, under NRS section 463.750 and was sentenced to a minimum of 14 months in jail. Finally, we note that the Director did not mention that the Derivative was convicted for his 2003 arrest for assault and battery with a deadly

¹ In her decision, the Director only identified two convictions, when the record at the time indicated there were at least six convictions.

weapon, and was sentenced 60 days in jail and 3 years of probation, however, was allowed to perform 45 hours of [] required to enroll in a 12-month batterer's counseling program, and prevented from owning a firearm for 10 years in lieu of serving jail time. The Petitioner did not submit underlying police reports or other underlying documents regarding his 2003 conviction for assault and battery with a deadly weapon.² These additional convictions are also adverse factors that weigh against the Derivative.

B. Positive and Mitigating Factors

With regard to positive equities, the Petitioner acknowledges that the Director generally considered the Derivative's wife and U.S. citizen children as positive equities in his case. The Director also specified that the Derivative's assistance to his mother was a positive equity. Now, the Petitioner asserts that the decision does not reflect meaningful consideration of the scope of those and other relevant positive and mitigating equities.

The Petitioner submitted evidence, in the form of two statements from the Derivative, detailing his explanation for his arrest history. This statement explains that the Derivative was not at fault for the majority of the convictions and otherwise describes the circumstances of the arrests that led to the convictions. The Petitioner also submitted an affidavit stating that she depends on the Derivative for financial support and this is considered a positive factor weighed in his favor.

On appeal, the Petitioner argues that the Director ignored "letters, statements and affidavits from family and friends," but a review of the record does not indicate that there were any affidavits from family or friends, aside from the Petitioner's affidavit, submitted to USCIS or the AAO on his behalf. In his removal proceedings, the Derivative submitted letters and statements from family and friends to the Executive Office of Immigration Review (EOIR). Those letters spoke to his positive character traits and we now have considered them and weigh them in his favor.

C. A Favorable Exercise of Discretion is Not Warranted

Discretionary eligibility for adjustment of status to that of an LPR under section 245(m)(1) of the Act is based on a consideration of the totality of the adverse, positive, and mitigating factors at the time the application is adjudicated. 8 C.F.R. § 245.24(d)(11); *see also Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (providing that an application for adjustment of status is a continuing application and one "determined on the basis of the facts and the law at the time the application is finally considered"). Rehabilitation is also a "significant factor" to be considered in the exercise of discretion "in view of the nature and extent of the [individual]'s criminal history." *Matter of Edwards*, 20 I&N Dec. 191, 198 (BIA 1996); *see also Matter of Marin*, 16 I&N Dec. 581, 588 (BIA 1978) (stating, in the context of discretionary relief under former section 212(c) of the Act, that "applicants . . . who have criminal records will ordinarily be required to make a showing of rehabilitation" and that "the

² We note that the Derivative's affidavit and the Petitioner's brief on appeal claim that the charges were dismissed, however, the court records submitted by the Petitioner indicated that the Derivative was convicted and sentenced for these charges. The court records further indicated that the Derivative complied with the sentence and reported to the court when he attended his battery counseling program. Therefore, the preponderance of the evidence shows that the Derivative was convicted of assault and battery with a deadly weapon in 2003.

fact of confinement [or] the recency of the offense” are relevant to whether rehabilitation has been established).

The record contains evidence of positive and mitigating equities relevant to family unity and humanitarian concerns, including: the Derivative’s residence and family ties in the United States. We also acknowledge that multiple letters were submitted to EOIR that speak to the positive attributes of the Derivative. However, these letters hold less weight because none of them indicated a knowledge of the Derivative’s past and continuing criminal behavior. While we acknowledge that three of his convictions, for failing to stop at the scene of an accident resulting in death or injury, obtaining money by fraud or trick, and assault and battery with a deadly weapon, occurred decades ago, we also underscore that each are significant adverse factors due to their severity. We also note that the Derivative’s four convictions in the past 10 years, including in 2020, are significant adverse factors and show a continuing pattern of disregard for U.S. law. Therefore, the positive factors are not sufficient to overcome the adverse factors of the Derivative’s criminal history.

The Petitioner argues that any arrests that did not lead to convictions should not be held against the Derivative and the Director erred in requiring him to demonstrate that he is admissible. However, the Director’s decision did not indicate that the Derivative was required to show that he is admissible. The Petitioner also argues that the Director “focused entirely on the conducted alleged in the police reports,” but in her decision, the Director does not mention police reports, nor were the police reports submitted by the Petitioner, and instead the Director relied on court documents and the Derivative’s affidavit and statement regarding his criminal history. Further, contrary to the Petitioner’s argument, “although qualifying family members are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act other than on section 212(a)(3)(E) of the Act, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision.” *See* 8 C.F.R. § 245.24(h)(1)(v). While the Derivative was arrested more times than he was convicted, he has been convicted of seven crimes, including four convictions in the last 10 years.

Upon *de novo* review, the Petitioner has not demonstrated that the Derivative warrants a favorable exercise of discretion. We acknowledge the assertions that the Derivative provides for his family and cares for his mother. While we have considered and are sympathetic to the fact that the Derivative’s spouse, children, and mother would suffer financial and other hardships if he is forced to return to his home country, the record does not show that the positive equities in the Derivative’s case outweigh the Derivative’s significant and continued criminal history.

Accordingly, the Petitioner has not demonstrated, by a preponderance of the evidence, that USCIS should exercise its discretion favorably to grant the Derivative adjustment of status under section 245(m)(3) of the Act.

ORDER: The appeal is dismissed.