



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

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

In Re: 21004654

Date: APR. 1, 2022

Appeal of Vermont Service Center Decision

Form I-485, Application for Adjustment of Status of 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 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. On appeal, the Applicant submits additional evidence and a brief 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, the appeal will be dismissed.

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, admission, or parole in May 2004. USCIS granted the Applicant U nonimmigrant status as the victim of a felonious assault in [] 2012. The Applicant timely filed the instant U adjustment application in September 2018 while still in U status.

A review of the Applicant’s record revealed that he had been arrested in [] 2009, [] 2010, [] 2010, and [] 2015 for offenses involving driving under the influence (DUI) and in [] 2010 on a bench warrant relating to his [] 2009 DUI arrest. As a result, the Director issued a request for evidence (RFE) for original or certified copies of the arrest documentation to include the arresting officer’s report, charging documents, court disposition records, as well as evidence of completion of any sentence and a statement regarding the arrest. In response, the Applicant provided, among other things, copies of a certified arrest report, certified incident reports, and court records from the [] Superior Court regarding his [] 2009, [] 2010 [] 2010 and [] 2015 arrests; proof of attendance at Alcoholics Anonymous (AA) meetings; proof of completion of several substance abuse treatment and multiple offender programs; and proof of early termination of probation and payment of fines for his 2015 DUI conviction. The Director subsequently 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 adverse factors, particularly his four arrests for DUI, four failures to appear in court and three probation violations, outweighed the positive factors in his case. The Applicant has not overcome this determination on appeal.

A. Favorable and Mitigating Equities

The Applicant is 34 years old and has lived in the United States for more than 17 years. The Applicant’s family ties in the United States include his LPR spouse and parents and U.S. citizen siblings and children.¹ He submitted a personal statement in which he stated that he had a difficult childhood due to sexual abuse he suffered from an uncle. Despite his difficult childhood, the Applicant asserts that he is working hard to be a good person and establish a good life for his family. Additionally, the Applicant provided evidence that two of his children suffer from attention deficit hyperactivity disorder (ADHD). He is involved with his local church and provided numerous letters of support from family and friends. He also provided evidence that he owns a landscaping business and has paid taxes from 2014 to 2017 and in 2020. We also consider the trauma that the Applicant suffered because of the felonious assault for which he was granted U nonimmigrant status, and his assistance with the investigation and/or prosecution of that crime, as a humanitarian factor weighing in his favor. Additionally, the Applicant claimed that if he had to return to his home country of Ecuador, he would be unable to support his family and they would suffer without his emotional and financial support.

¹ The Applicant has four children, two of whom are from his spouse’s previous relationship.

On appeal, the Applicant submits medical records regarding his stepson's ADHD treatment, a copy of his 2022 business license, a letter of support from a business client, and additional evidence of rehabilitation including a letter and attendance log from AA.

B. Adverse Factors

The Applicant's primary adverse factor is his criminal history. The record reflects that the Applicant was arrested in [] 2009 in [] California for DUI (drugs/alcohol) and driving while having a 0.08% or higher blood alcohol in violation of sections 23152(a) and 23152(b) of the California Vehicle Code (Cal. Veh. Code), respectively. The Applicant submitted a letter from the Department of California Highway Patrol stating that the incident report regarding this arrest was purged pursuant to their records retention policy. In an addendum to his U adjustment application (addendum), the Applicant stated that he was arrested in [] California for an "alleged" DUI offense. He claims that "although his fingerprints indicate that [he] was arrested for an alleged DUI, driving without a license and prostitution, the criminal complaint filed with the [] Superior Court only charged [him] with a DUI." The Applicant pled "no contest" to driving while having a 0.08% or higher blood alcohol. The remaining DUI charge was dismissed pursuant to a plea agreement. He was convicted and ordered to spend 30 days in jail. His driver's license was suspended for three years. He was also placed on 36 months of probation and ordered to complete a DUI first offender class and pay all applicable court costs and fines. The Applicant did not provide evidence that he successfully completed probation, the court-mandated classes or paid the fines.

The Applicant was again arrested in [] 2010 in [] for DUI (drugs/alcohol) and driving while having a 0.08% or higher blood alcohol in violation of sections 23152(a) and 23152(b) of the Cal. Veh. Code, respectively. In the *Declaration of Probable Cause* from the [] California Police Department, an officer recounted that he was on patrol when he noticed a vehicle stopped at an intersection. The brake lights were on indicating that the driver was stepping on the brake. When the officer approached the vehicle, he noticed the Applicant sleeping with the gear shift in the drive position. He also noticed a "half full bear bottle" in the center console and an empty Sky vodka bottle on the Applicant's lap. The officer opened the driver side door and put the vehicle in the park position. He woke the Applicant, who stated that he was driving to his girlfriend's house. The officer smelled a strong odor of alcohol coming from the Applicant's person and noted that the Applicant had "red-watery eyes, [and] a slow, slurred and deliberate speech." The Applicant subsequently failed a field sobriety test. A background check revealed that the Applicant did not have a driver's license. He was arrested for DUI and driving without a driver's license. He was transported to a local jail for booking. At the jail, the Applicant underwent two breathalyzer tests, which revealed a blood alcohol level of 0.21%. In his addendum, the Applicant explained that he was arrested for an "alleged" DUI in [], California. He stated that he was booked for DUI and later transferred to Immigration and Customs Enforcement (ICE) custody. He paid an immigration bond and resumed his criminal court proceedings. The Applicant was subsequently found guilty of driving while having a 0.08% or higher blood alcohol. The remaining DUI charge was dismissed pursuant to a plea agreement. The Applicant was ordered to spend 10 days in jail. He was also placed on 36 months' probation and ordered to complete an 18-month second offender program. Because the Applicant was still on probation for his [] 2009 DUI conviction, his sentence for his [] 2010 DUI conviction ran concurrently. Lastly, the Applicant was instructed to install an ignition interlock device on his

vehicle² and pay all applicable court costs and fines. The Applicant submitted a receipt from the [] Superior Court indicating that he paid \$100 for an unknown certification. However, he did not provide evidence that he successfully completed probation and the court-mandated classes or paid the fines.

The Applicant was arrested in [] 2010 in [] for DUI (drugs/alcohol) and driving while having a 0.08% or higher blood alcohol in violation of sections 23152(a) and 23152(b) of the Cal. Veh. Code, respectively. The Applicant submitted a letter from the Department of California Highway Patrol stating that the incident report regarding this arrest was purged pursuant to their records retention policy. In his addendum, the Applicant stated that he was arrested for DUI in []. He was in custody for a few days before being transferred into ICE custody. He further stated that while he was in ICE custody, a hearing for his DUI in criminal court was scheduled. After he missed the hearing, a bench warrant was issued for his failure to appear. He later went to court in [] 2012 to recall the bench warrant and plead to the criminal charges for his DUI.³ He pled “no contest” and was convicted of both charges and sentenced to 60 days in jail in [] 2012. He was placed on 60 months of probation and ordered to complete a 30 month multiple offender program. His driver’s license was suspended for 24 months and ordered to pay all applicable court costs and fines. The Applicant did not provide evidence that he successfully completed probation, the court-mandated classes or paid the fines.

Finally, the Applicant was arrested in [] 2015 in [] for DUI (drugs/alcohol) and driving while having a 0.08% or higher blood alcohol in violation of sections 23152(a) and 23152(b) of the Cal. Veh. Code, respectively.⁴ An incident report from the [] Sheriff’s Office states that an officer observed a 2000 Nissan pickup driving behind his patrol car without its headlights on. The officer allowed the pickup to pass his patrol car and then initiated a traffic stop. He ordered the Applicant to exit his vehicle. The officer noted that the Applicant had red, watery eyes and he could smell the odor of an unknown type of alcoholic beverage on his breath. The Applicant’s face was flushed and his words were slurred. Given the signs of a possible DUI, the officer administered a series of field sobriety tests. The Applicant failed the tests and preliminary alcohol screening tests revealed that the Applicant had 0.232% and 0.230% blood alcohol concentrations. The Applicant later admitted that he had consumed “two bottles of wine about 4 hours prior to [his] contact [with law enforcement].” The Applicant was arrested and transported to [] jail for booking. Due to his three prior DUI convictions, the Applicant was convicted of a felony DUI, with three prior DUI convictions. He was sentenced to nine months in jail, placed on five years’ probation, and ordered to complete six months in a residential rehabilitation program (with the remaining three months to be completed on an electronic monitoring program). He was also ordered to complete an 18 month drinking driver program and attend a Mothers Against Drunk Driving (MADD) victim impact panel. The Applicant submitted evidence that he completed the court-mandated rehabilitation including the electronic monitoring program, victim impact panel, residential rehabilitation and drinking driver

² The ignition interlock device requirement was later removed after the Applicant signed a *Declaration of Non Ownership of Vehicle*.

³ The amended criminal complaint noted that the Applicant had a blood alcohol concentration of alcohol of 0.15% or more.

⁴ The criminal complaint noted that the Applicant had three prior convictions for DUI or driving while having a 0.08% or higher blood alcohol, and that his blood alcohol concentration was 0.15% or more.

program by [] 2017. The Applicant also submitted evidence that he paid a \$732 fine and that his probation was terminated in [] 2019.

The Applicant briefly addressed his arrests in a statement submitted before the Director. He stated that he is “full of remorse for what [he] has done . . . [and knows] there is never an excuse for drinking and driving, and [he] take[s] full responsibility for his negligent behavior.” He explained that he was struggling with anxiety and major depression as a result of years of child sexual abuse and rape in Ecuador. He contends that he began abusing alcohol in order to cope with his past abuse, which resulted in arrests for three DUI offenses in 2009 and 2010. Regarding his arrest in 2015, the Applicant claimed that it was the result of several life stressors including the sudden illnesses of his mother and grandmother. He acknowledged the danger that he put himself and others in by choosing to cope with alcohol. He further acknowledges the shame and disappointment his family and church experienced after his sustained period of sobriety. He argues that, after his 2015 DUI conviction, he realized that he needed to make permanent changes in his life. He referenced his participation in the residential rehabilitation program, completion of MADD victim impact panel, voluntary AA attendance, mental health treatment, and church involvement as examples of his recovery efforts. He conceded that his DUI arrests and subsequent convictions were negative factors, however, he maintained that “[he has] done (and continue[s] to do) everything possible to rectify [his] past mistakes.”

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. We acknowledge the Applicant’s victimization and assistance to law enforcement in the investigation of the crime committed against him, lengthy residence in the United States, family ties, ADHD diagnoses and treatment for two of his children, business ownership and employment history, evidence of his payment of taxes, church involvement, community ties, and the evidence of rehabilitation efforts. We further acknowledge the Applicant’s past sexual abuse in Ecuador and its effect on his mental health, and his efforts to rehabilitate from that trauma. 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.

In the decision below, the Director determined that the adverse factors outweighed the positive and mitigating equities in the Applicant’s case. On appeal, the Applicant argues, through counsel, that the Director did not adequately consider evidence of his substantial family and community ties. He notes that numerous family members and friends submitted letters of support attesting to his good character. He further notes that he has maintained stable employment since he entered the United States, and now owns a landscaping business and real estate in [] California. Additionally, the Applicant argues that he submitted sufficient evidence of his rehabilitation. He emphasizes that the Director ignored his psychological evaluations, medical examination and supporting declarations—all evidence of his efforts to rehabilitate beyond court-mandated rehabilitation. He notes that, contrary

to the Director's assertions, he is not like the respondent in *Matter of Sinauskas*, 27 I &N Dec. 207 (BIA 2018), and was not on probation during the pendency of his U adjustment application. Lastly, he maintains that he is not a danger to society as he has taken significant steps to ensure that he will not reoffend in the future.

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, in addition to an arrest on an outstanding bench warrant, the Applicant was arrested four times for DUI (drugs/alcohol) and/or driving while having an 0.08% or more blood alcohol in [] 2009, [] 2010, [] 2010 and [] 2015 and was convicted of one or both offenses on all four occasions. 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. See *Matter of Siniauskas*, 27 I&N Dec. at 208-09 (finding driving under the influence a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); *Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (BIA 2019) (discussing the "reckless and dangerous nature of the crime of" driving under the influence). Most critically, the Applicant was arrested for driving under the influence in [] [] in [] 2015, an arrest which occurred while he held U nonimmigrant status. Additionally, contrary to his assertion on appeal, the Applicant was still on probation for that conviction until [] 2019, well after he filed the instant U adjustment application seeking to reside in this country permanently as an LPR in August 2018.

Additionally, although the Applicant expressed general remorse for his criminal history, beyond court records indicating that he successfully completed court-ordered probation, substance abuse treatment, a victim impact panel, and electronic monitoring program, the record 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"). Rather, the record indicates that the Applicant's 2009 DUI arrest and court-mandated rehabilitation was unable to deter him from committing three additional DUIs in 2010 and 2015. In fact, when the Applicant committed his second and third DUIs one month apart in 2010, he was still on probation from his prior DUI conviction. Moreover, the Applicant was arrested for his most recent DUI in [] 2015 while he was still on probation for his DUI conviction stemming from his [] 2010 DUI arrest. 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 seriousness and repeated nature of the Applicant's criminal history, he has not submitted sufficient evidence to establish his rehabilitation.

To summarize, the Applicant was arrested for DUI (drugs/alcohol) and driving while having an 0.08% or more blood alcohol on four occasions between 2009 and 2015— offenses which posed a significant

risk to the personal safety of others and evidenced a repeated disregard for the laws of the United States. While we acknowledge the Applicant's arguments and evidence of his positive and mitigating equities submitted below and supplemented on appeal documenting including, among others, his lengthy residence in the United States, family ties, mental health treatment, children's treatment for ADHD, business ownership, church involvement, letters of support from friends and family, and hardship to his family, 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 nature and seriousness of his arrests and criminal convictions for DUI, one of which occurred while he held U nonimmigrant status. Consequently, the Applicant 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.