U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21964014

Date: APR. 26, 2022

Appeal of Nebraska 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 Nebraska Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application). The Director also denied a subsequent motion to reconsider. The matter is now before us on appeal. On appeal, the Applicant submits a brief and asserts his eligibility for the benefit sought. We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015); 8 C.F.R. § 214.11(d)(5). 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 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) (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"). 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 may 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 31-year-old citizen of Brazil who last entered the United States without authorization in 2009. In January 2017, the Director granted the Applicant U nonimmigrant status based on his victimization and assistance to law enforcement. The Applicant filed his U adjustment application in November 2020.

In August 2021, the Director denied the Applicant's U adjustment application. The Director acknowledged the positive and mitigating equities present in the Applicant's case: his long-term residence in the United States, the presence of his lawful permanent resident spouse and four U.S. citizen children, the Applicant's gainful employment, and hardships to the Applicant and his family were he unable to remain in the United States.[1]

However, the Director determined that the positive and mitigating equities were outweighed by the adverse factor of the Applicant's criminal history. Specifically, the Applicant was arrested in [redacted] 2019, and charged with lewd or lascivious acts with child under 14 years old, in violation of section 288(a) of the California Penal Code, and sending harmful matter to minor with sexual intent, in violation of section 288.2(a)(2) of the California Penal Code. The Director noted that because the charges against the Applicant had not been adjudicated by court of law and the charges were outstanding, the Applicant's criminal history raised serious adverse factors regarding the Applicant's disregard for public safety, the well-being of others, risk to the property of others, and disregard for U.S. laws, especially since the charges were based on evidence of conduct that occurred after the Applicant was approved for U nonimmigrant status. The Director concluded that the record did not suffice to establish that the Applicant's continued presence in the United States was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest such that he warranted a positive exercise of discretion to adjust his status to that of an LPR. The Applicant submitted a motion to reconsider. The Director granted the motion to reconsider the denied U adjustment application and upheld the original denial of the Applicant's U adjustment application.[2]

On appeal, the Applicant contends that while he has been accused of a very serious crime, he has not been convicted of the charges[3] and thus, he should be granted approval of the U adjustment application. The Applicant further asserts that if he is found to be guilty of the aforementioned charges

[1] We also acknowledge the Applicant's payment of taxes

[2] In the Director's decision to grant the motion to reconsider and uphold the original denial of the Applicant's U adjustment application, the Director stated that the Applicant "will be receiving a decision letter under separate cover." On appeal, the Applicant contends that he never received the decision. The Applicant also appeals the decision to this office on its merits.

[3] Counsel states on appeal that the hearing regarding the above-referenced charges has been postponed until [redacted] 2022.

at some point in the future, USCIS could then move to rescind his lawful permanent resident status and place him in removal proceedings. Alternatively, the Applicant requests that the matter be remanded to USCIS with an order to delay issuing a decision on the Applicant's U adjustment application until the Superior Court of California has rendered a verdict on the charges.[4]

We adopt and affirm the Director's decision with the comments below. *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments rescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

The arguments advanced on appeal are not sufficient to overcome the discretionary denial of the Applicant's U adjustment application. 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). The Complaint submitted by the Applicant alleges that in [redacted] 2018, the Applicant committed lewd act upon a child, a "serious felony" and a "violent felony" pursuant to the California Penal Code; conviction of the offense would require the Applicant to register as a sex offender. We acknowledge that the Applicant has not been convicted of the charges referenced above. However, we are permitted to make inquiries into the specific circumstances that gave rise to the Applicant's [redacted] 2019, arrest for lewd or lascivious acts with child under 14 years old and sending harmful matter to minor with sexual intent, in violation of California law. *See* section 245(m) of the Act (laying out the eligibility requirements for U-based adjustment of status).

The crime report[5] in the record provides a narrative from the alleged victim, the Applicant's 12-year-old niece. In summary, the victim reported to the police that the Applicant came home from work and told the victim that she would sleep in his bedroom and he would sleep on the couch. The Applicant reportedly took a shower and when he came out he went to his bed where the victim was sleeping and asked the victim if she wanted to cuddle like he does with her aunt. The victim stated that the Applicant was only wearing his underwear. He proceeded to ask the victim if she had a boyfriend and if she wanted to watch a nasty video. The Applicant then showed the victim the video; she reported to police that the video showed a male and female naked and the male had his penis on the woman's back. The victim said the Applicant asked her if she wanted to see more and she said no. The victim reported that she was wearing pajamas and the Applicant started touching her thighs and between her belly and pubic area. The victim reported that the Applicant told the victim to do a pinky promise and that it was very important not to tell anyone about what happened.

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[4] The Applicant has not referenced any law or policy that would require USCIS to hold the adjudication of the U adjustment application in abeyance until some uncertain future date.

[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.").

The Applicant maintains on appeal that the charges against him were fabricated. Specifically, the Applicant states that his wife's sister accused him of having shown pornographic material to his niece who was approximately 11 years old and of having touched her inappropriately. The Applicant further contends that his wife's sister alleged that the incident occurred when his niece was sleeping over with his children in [redacted] 2018. The Applicant maintains that the allegations are "entirely false and I have denied the criminal charge." Her further alleges that his wife and her sister have been estranged for years and his sister-in-law has been very hostile towards him and he can only speculate that "the false allegations are due to this bitter family dispute." While we again acknowledge that at this time, the record does not establish that the Applicant has been convicted of the charges levied against him, the fact that the Applicant was not *convicted of* the underlying charges, or that the charges may ultimately be dismissed, 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). Furthermore, we note that the Applicant's written statement largely denies responsibility for any misconduct on his part. *See id.* at 588 (noting that an applicant for discretionary relief with a criminal record must ordinarily present evidence of genuine rehabilitation); *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 304-5 (BIA 1996) (stating that rehabilitation includes the extent to which an applicant has accepted responsibility and expressed remorse for his or her actions).

Ultimately, it is the Applicant's burden to establish that he warrants adjustment of status to that of an LPR as a matter of discretion. There is insufficient evidence to establish that the Applicant's arrest and the serious charges levied against him, while in U nonimmigrant status, should not be considered as adverse factors in his case or, alternatively, that lesser weight should be accorded to such evidence. Accordingly, the Applicant remains ineligible for adjustment of status under section 245(m) of the Act.

ORDER: The appeal is dismissed.