U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21655110

Date: APR. 29, 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) based on her "U" nonimmigrant status as a victim of qualifying criminal activity under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), stating that the Applicant had not provided sufficient evidence upon which to determine whether she merits discretionary relief and based on the existing record, she had not established that she warrants a favorable exercise of discretion. The Applicant filed a motion to reopen and reconsider which the Director dismissed because the Applicant had not presented new facts or reasons for reconsideration. The matter is now before us on appeal. 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). 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 an 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) (providing 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"). 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 is security- or terrorism-related concerns. Id.

II. ANALYSIS

A. Relevant Evidence and Procedural History

The Applicant, a native and citizen of Mexico, has lived in the United States since 1992. She was granted U nonimmigrant status from October 2014 until September 2018. The qualifying crime forming the basis of her Form I-918, Petition for U Nonimmigrant Status (U petition), was domestic violence. In her U petition, the Applicant acknowledged that she had been arrested, charged with committing an offense, convicted of crimes, placed on probation, and been in jail. She included an attachment to the U petition explaining that in [redacted] 1994 her boyfriend slapped her and tried to force her to have sex. She stated she was upset and took her boyfriend's car. She said she drove to her boyfriend's home and confronted the woman he was seeing, who she blamed for "destroy[ing]" her relationship. She described fighting with the woman, scratching and punching the woman, using a stick to "defend herself," and throwing a table and other items out the window. She stated she damaged property in a "tantrum," including her boyfriend's car, items in his home, and the neighbors' windows and door while pursuing the woman. She said she was charged with a felony level assault, was released from jail after serving eight months, and the offense was reduced to a misdemeanor 18 years later. She included records evidencing her felony charge being reduced in [redacted] 2012, and a letter from a probation officer stating she was convicted under "section 245(a)(1) of the Penal Code" and her probation period ended in [redacted] 1998.[1] The Applicant also described committing a traffic violation in [redacted] 1999 and being arrested for "several outstanding traffic tickets" for which she served two weeks in jail. The Applicant submitted a Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), seeking to waive her inadmissibility under sections 212(a)(6)(A)(i) (noncitizen present without admission or parole), 212(a)(2)(A)(i)(I) (noncitizen convicted for or admitted to committing certain crimes), 212(a)(9)(A) (noncitizen previously removed), 212(a)(9)(C) (noncitizen unlawfully present after previous immigration violations), and 212(a)(4) (noncitizen likely to become a public charge) of the Act. The Director approved the waiver application in conjunction with the U petition in October 2014.

The Applicant timely filed her U adjustment application in May 2018 and responded "Yes" to a number of questions in the application relating to "Criminal Acts and Violations." She included a declaration, which again described the incident in [redacted] 1994. She stated she served her sentence because she knew she was wrong to start an argument with the woman her boyfriend was seeing and for being "violent." She also said that in [redacted] 1994, while in prison, she threw a drink at a guard,

[1] At the time of the crime, section 245(a)(1) of the California Penal Code (Cal. Penal Code) was defined as "any person who commits an assault upon the person of another with a deadly weapon or instrument or other than a firearm or by any means of force likely to produce great bodily injury . . . ." Cal. Penal Code § 245 (West 1994).

who filed charges against the Applicant. The Applicant did not contest the charges and after being released from prison, she stated she attended anger management classes because she wanted to change her behavior. The Applicant also described being arrested in [redacted] 2017 for "trespassing" at a casino and spending one night in jail. She said she had consumed alcohol because she was celebrating her birthday and refused to leave the casino after security did not allow her to enter. She stated criminal charges were not brought against her. She said she has not had "anything [with alcohol] to drink since" and did not normally drink because she has diabetes. She further explained that she has learned her lesson and tries very hard to be law abiding. She says she has lived in the United States for over 25 years, speaks "basic" English, pays taxes, and has five children who are U.S. citizens. She described working full time to support four of her children and two grandchildren. She also stated she suffers from diabetes and does not know how she would treat her condition if she left the United States. She included letters describing her good character and family photographs in support of her U adjustment application. Also included with her U adjustment application was a criminal case summary related to the [redacted] 1994 incident. According to the case summary, she pled guilty to Cal. Penal Code section 245(a)(1) and two counts of section 594(b)(3), described as "misd[emeanor] - vandalism $400 or more." She was sentenced to one year in county jail, three years of probation, and paid $200 in restitution. The case summary also indicated that the Applicant's motion, filed with the court in 2012 to reduce her felony assault charge to a misdemeanor, was granted.

The Director issued a request for evidence (RFE) explaining that the Applicant's criminal history check evidenced she was arrested in:

- [redacted] 1994 by the [redacted] California Sheriff's Office and charged with the felony charges of attempted murder - first degree, burglary, assault with a deadly weapon, and two counts of the misdemeanor charge of vandalism.
- [redacted] 1999 by the [redacted] California Bureau of Identification and charged with three counts of false proof, finance responsibility.
- [redacted] 2017 by the [redacted] California Sheriff's Office and charged with trespass to posted land and refusal to leave.

The RFE sought original or certified copies of documents concerning her arrests and/or citations and additional positive factors demonstrating that a favorable exercise of discretion was warranted. In response, the Applicant provided the [redacted] 1994 crime report which described the Applicant throwing hot chocolate into the face of a correctional officer after being repeatedly told to enter her cell. In her declaration submitted in response to the RFE, the Applicant explained that she threw her hot chocolate because the drink was cold and rather than giving her another one, a guard pushed her into her cell instead. Her declaration also discussed her [redacted] 1999 arrest, which she stated related to a traffic offense in [redacted] California. She explained she did not have proper insurance and was fined and does not recall showing false documents. However, we note that the Applicant, in her statement submitted with the U petition, described her [redacted] 1999 arrest as resulting in a two-week jail sentence. Also submitted in response to the RFE was a police report related to the Applicant's [redacted] 2017 arrest. The report described the Applicant being denied entry into a casino due to her level of intoxication, refusing to leave after repeatedly being instructed to do so by security, returning to the casino after leaving, and being arrested and charged with misdemeanor trespass pursuant to Cal. Penal Code section 602(l). In her declaration, the Applicant also included mitigating factors. She stated she suffers from depression, she does not have support in Mexico, she volunteers at her church

once a month to feed the homeless, and that she would suffer hardship by leaving her children and grandchildren. Also included in response to the RFE were 2018 tax records and 2019 pay statements.

In the decision denying the U adjustment application, the Director first reviewed the Applicant's criminal history that took place prior to her grant of U nonimmigrant status. The Director acknowledged that the [redacted] 1994 charges of attempted murder, burglary, assault with a deadly weapon/other, and two counts of vandalism were reduced to "assault with deadly weapon other than firearm," and noted the Applicant served one year of jail time and three years of probation but explained that the Applicant did not provide the arrest report. For this reason, the Director explained that the agency was unable to determine the totality of the circumstances surrounding the crime. The Director also included in her analysis that the Applicant's sentence was extended an additional 90 days for her battery on a peace officer charge. The Director then considered the Applicant's [redacted] 2017 arrest for trespass. The Director explained that while the Applicant has paid fines and abided by her probation, her arrests were concerning because they presented a pattern of behavior that may endanger others and show a disregard for the laws of the United States, a serious adverse factor in the Applicant's case. Reviewing the positive factors, the Director noted the Applicant has lived in the United States since 1992, has strong ties to her five children born in the United States, has been steadily employed and filed taxes, and has undergone rehabilitative efforts. The Director also considered the Applicant's victimization and history of domestic violence, which was the basis for her U nonimmigrant status, as another positive factor. Weighing the factors, the Director denied the U adjustment application determining the positive and mitigating factors in the Applicant's case did not outweigh the negative factors found in the record.

The Applicant filed a motion to reopen and to reconsider, submitting additional documents, including statements from friends, family, a reverend, and her employer, as well as photographs and 2019 and 2020 tax records. In October 2021, the Director dismissed the motion stating that the new evidence submitted was not sufficient to change the result of the case and the Applicant did not provide reasons for reconsideration.

On appeal,[2] the Applicant submits the police report from her [redacted] 1994 arrest, stating it was not previously submitted due to error by her previous counsel. The Applicant, however, denies the

[2] The Applicant appealed the Director's October 4, 2021 decision by filing a Form I-290B, Notice of Appeal or Motion (Form I-290B), which was received on November 29, 2021. In response to the coronavirus (COVID-19) pandemic, USCIS extended filing deadlines associated with the Form I-290B. If USCIS issued the decision between March 1, 2020, and October 31, 2021—as here—an applicant may file a Form I-290B within 60 calendar days from the date of the adverse decision, with three days added for service by mail pursuant to 8 C.F.R. § 103.8(b). See "USCIS Extends Flexibility for Responding to Agency Requests" (Dec. 30, 2021), https://www.uscis.gov/newsroom/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-0. The appeal was therefore timely filed on November 29, 2021. However, on December 13, 2021, the Applicant was issued a Notice of Action stating, in relevant part, that the underlying receipt number "must be indicated on the Form I-290B" and if the Form I-290B "is submitted with more than one receipt number, it will be rejected." The Applicant then re-filed the appeal on December 17, 2021, which was not within 63 calendar days of the adverse decision. Upon review, however, we note that the regulations do not mandate a rejection based upon the erroneous listing of two receipt numbers on the Form I-290B. See 8 C.F.R. § 103.2(a)(7)(ii) (providing reasons for rejecting a benefit request). Furthermore, the Form I-290B instructions do not indicate that the Form I-290B will be rejected for listing multiple receipt numbers. See USCIS, Instructions for Notice of Appeal or Motion, (December 2, 2019). Accordingly, the Applicant's initial appeal was timely filed under the COVID-19 filing guidelines and erroneously rejected. We therefore review the appeal on the merits.

accuracy of the report since it relies on statements by the woman who was also in a relationship with the Applicant's boyfriend. The Applicant also noted that the charges were later reduced from those described in the report. The Applicant asserts her remorse and rehabilitation are sincere, which she states are evidenced by the criminal court reducing her felony charge, and the number of letters describing her good character and value to the community. She also re-asserts the factors described by the Director in her analysis, such as her length of residence in the United States, strong family ties, and steady employment. She adds that she has provided invaluable support to her community during the pandemic but does not provide details on her service. She also states she is the sole provider for her family and no one would care for her three youngest children, born between 2006 and 2010, if she was not able to remain in the United States. She states she would not likely earn enough in Mexico to support her daughters. She also asserts for the first time on appeal that her daughters suffer from medical issues including diabetes, depression, anxiety, and myopia and, in addition to diabetes, she also suffers from high cholesterol, major depressive disorder, neuropathy, gastroesophageal reflex disease, and psoriasis. She includes a letter from a nurse practitioner listing the medications she uses for treatment. She also states she would be unlikely to receive the medical care she needs in Mexico.

B. The Applicant Has Not Demonstrated That a Favorable Exercise of Discretion is Warranted

The Applicant bears the burden of establishing that she 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.

The record shows that the Applicant has presented evidence relevant to family unity and humanitarian equities, which include her family ties in the United States, history of steady employment, and positive supporting letters from her friends, family, and employer. She provided statements describing her family's reliance on her financially and her efforts to rehabilitate by taking anger management classes, to serve her community by volunteering, and to learn English. We also recognize the Applicant's victimization and the steps she took to overcome her difficult past. In supporting letters, the Applicant's friends and family describe a caring and involved friend, grandmother, and mother, who has been financially supportive and generous with her children. Both she and her children stated it would be emotionally difficult to be separated. Her former teacher described the Applicant's efforts in English classes and the reverend of her church described her volunteering at church for its anniversary event and when the church did food distribution. As stated above, the Applicant raises new claims relating to her and her children's medical conditions. She includes additional conditions she requires medication for and medical conditions for which her children seek treatment. The Applicant also describes her uncertainty at her ability to find work and pay for the treatments she and her children need.

While we acknowledge the presence of favorable and mitigating factors in the Applicant's case, they do not outweigh the Applicant's serious criminal history. 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 record reflects that the incident in [redacted]1994, while not recent, resulted in felony charges, including attempted murder, burglary, assault with a deadly weapon, and a misdemeanor charge of vandalism. While the Applicant pled guilty to the felony charge of "assault with deadly weapon other than

firearm" and the other charges were dismissed, the seriousness and nature of the offenses are highly concerning, even as relayed by the Applicant. In her statements, she acknowledged her anger and "violent" behavior. She herself stated she used a stick and her nails to harm the woman living in her boyfriend's home. While the Applicant said she fought in self-defense, she also described seeking the woman out, and actively pursuing the woman, who fled to a neighbor's home for safety. While the Applicant discredits the police report because it includes the woman's testimony, we note that it also includes statements by the police describing that the woman harmed was five months pregnant, that the boyfriend's home was damaged, that the Applicant threw large furniture pieces out of a second-floor window, i.e., a large mirror, television, that the boyfriend's car windshield was damaged and side window smashed, that the neighbor's glass door was broken. The report also contains the Applicant's testimony, which does not speak of self-defense, but rather, that she intended to hurt the woman and used a stick to repeatedly hit her. She claimed to the police that she avoided the woman's stomach area, evidencing her knowledge that the woman was pregnant. In addition, the report has statements by witnesses describing, for example, the Applicant's use of an iron object to damage her boyfriend's car as she followed the woman to the neighbor's house, and the threatening language the Applicant directed at the woman. Even though the Applicant asserts that the felony assault charge she pled to was reduced to a misdemeanor because of her rehabilitation efforts 18 years later, we still weigh the nature and seriousness of the offense. See 8 C.F.R. § 245.24(d)(11) (providing that "USCIS may take into account all factors . . . in making its discretionary decision on the application").

Moreover, as the record previously suggested, and the police report now confirms, the Applicant committed a "serious violent crime," for which we generally do not exercise discretion in a U adjustment applicant's favor. 8 C.F.R. § 245.24(d)(11); see also Matter of C-A-S-D-, 27 I&N Dec. 692, 700 (BIA 2019) (explaining that discretion should not be exercised favorably toward individuals who have "engage[d] in violent criminal acts") (quoting Matter of Jean, 23 I&N Dec. 373, 383–84 (A.G. 2002)). The U adjustment regulation does not define "serious violent crime," but the language on its face indicates the offense must be both serious and violent. See Black's Law Dictionary (11th ed. 2019) (defining "serious crime" or "serious offense" as "[a]n offense not classified as a petty offense and usu[ally] carrying at least a six-month sentence," and "violent crime" as one involving "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another"). Here, the Applicant was sentenced to a year in county jail, three years' probation, and ordered to pay fines after she pled guilty to felony assault pursuant to Cal. Penal Code section 245(a)(1) and misdemeanor vandalism pursuant to section 594(b)(3). In addition, as explained in detail above, the record reflects that the assault was both violent in nature and involved the actual use of significant force. The Applicant described hitting the pregnant woman with a stick and using her nails and fists to fight the woman. She acknowledged breaking things in her boyfriend's home, his car, and the neighbor's property. The police report also added details of the force used and level of violence, stating that witnesses saw the Applicant use an iron to smash the glass on the car and neighbor's door, that she threw large furniture items out of the window, that she yelled threats at the woman as she pursued her with the iron, and that the Applicant herself testified to intending to beat the pregnant woman with a stick. Furthermore, it is of considerable concern that the Applicant exhibited violent conduct of the type the U program was created to protect against. See section 101(a)(15)(U)(iii) of the Act (including, as qualifying criminal activity, "felonious assault"); 8 C.F.R. § 214.14(a)(9) (same); Interim Rule, New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53015 (Sept. 17, 2007) ("In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute

such crimes as domestic violence, sexual assault, . . . and other crimes while offering protection to victims of such crimes.").

Finally, we also afford negative discretionary weight to the Applicant's other criminal history. In [redacted] 1994, she did not contest throwing hot chocolate at a correctional officer's face while serving time for her [redacted] 1994 crime. She pled to battery on a peace officer, which added an additional 90 days to the sentence she was at the time serving. While the Applicant was candid about her 1999 arrest, her story varied in her statements, one version stating she only paid a fine while an earlier statement said she served two weeks of jail time, but neither statement clarified why she was charged with three counts of false proof. In addition, while the Applicant's 2017 arrest did not result in a conviction, we may properly consider the arrest 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 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 evidence, but not prohibiting consideration of arrest reports in a discretionary determination). Here, the circumstances surrounding the Applicant's 2017 arrest for trespass, which occurred during the time she held U nonimmigrant status, suggests that the Applicant continues to struggle with respecting persons of authority and abiding by the laws of the United States.

The Applicant asserts that she merits a favorable exercise of discretion because she has expressed remorse for her actions and her and her children would suffer emotional and financial harm if her U adjustment application was not approved. We acknowledge the emotional, financial, and possible medical hardship the Applicant and her three youngest children may face, as well as her previously acknowledged positive and mitigating factors, including her efforts to overcome her challenging personal history. However, the record indicates that the Applicant committed a "serious violent crime" within the meaning of 8 C.F.R. § 245.24(d)(11), which generally precludes us from exercising discretion in her favor. The record further reflects that the Applicant has been arrested and sentenced for various other offenses. Reviewing all the factors as a whole, the Applicant has not demonstrated that the positive and mitigating equities outweigh the nature, recency, and serious of the adverse factors present in her case, such that her continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Accordingly, she has not met her burden of establishing that she merits a favorable exercise of discretion and her U adjustment application remains denied.

III. CONCLUSION

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

ORDER: The appeal is dismissed.