U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21383440

Date: JUN. 8, 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 his derivative "U" nonimmigrant status 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), and a subsequent motion to reopen and motion to 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. On appeal, the Applicant submits a brief and reasserts 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, 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 El Salvador, was granted U-3 nonimmigrant status from November 2013 until October 2017. The Applicant timely filed the instant U adjustment application in August 2017. 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 the Applicant was arrested six times while in U-3 nonimmigrant status, one of which occurred after the filing of the U adjustment application. The Director indicated that the record contained documents indicating the charges filed against the Applicant—to include crimes of violence, controlled substance possession, alcohol related incidents, damaging property, false reporting to law enforcement, and contributing to the delinquency of a minor—and the final dispositions of those charges, but that the documents did not provide any objective information about the Applicant's conduct and the circumstances that led to his arrests. The Director considered that the charges filed against the Applicant are very serious and his criminal history shows a pattern of negative behavior, including acts of violence, that indicates a disregard for the laws of the United States and places the public and their property in danger. The Director further observed that the record does not contain police arrest reports for any of the Applicant's arrests, nor detailed statements from the Applicant outlining the circumstances of each of his arrests. The Director acknowledged the Applicant's statements indicating that he is unable to obtain police reports from [redacted] Virginia, because they are only available to law enforcement by subpoena. However, the Director specifically observed that the information on the county's website, as well as in section 19.2-389(11) of the Virginia Code Annotated (Va. Code Ann.), discussing the dissemination of criminal history record information, contradicts the Applicant's claims as it explains the process of obtaining the necessary documentation and indicates that Virginia state law allows for the dissemination of the criminal history record information to the person requesting a copy of his or her own criminal record. Regardless, the Director further noted that the Applicant did not submit evidence of his attempts to obtain the requested evidence, nor the original response, on official letterhead, from the appropriate authority establishing the nonexistence of the required documentation. Finally, the Director also acknowledged the Applicant's statements that his life changed after getting married and having children, but found that these statements were contradicted by his criminal history, which shows a pattern of violating laws of the United States, some of which occurred after getting married and after having children.

In denying the subsequent motion to reopen and motion to reconsider, the Director found that the Applicant did not submit new evidence for consideration and did not provide new facts or give reasons for reconsideration based on any pertinent precedent decisions. The Director acknowledged the

Applicant's claims, through counsel, that USCIS placed a lot of weight on the lack of police reports and again argued that they were not available to the Applicant, only to law enforcement by subpoena, but noted that the Applicant, again, did not submit evidence of his efforts to obtain the documents, nor the original written response, on government letterhead, from the relevant government or other authority, indicating the records do not exist, and why, or if other similar records are available.

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

Upon consideration of the entire record, including the arguments made on appeal, we adopt and affirm the Director's decision with the comments below. *See e.g.*, *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that the "independent review authority" of the Board of Immigration Appeals (Board) does not preclude adopting and affirming the decision below (in whole or in part, when [the Board is] in agreement with the reasoning and result of that decision"); *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).

On appeal, the Applicant contends, through counsel, that he should not be penalized for his inability to obtain the police reports as they are only available with a subpoena. The Applicant's counsel states that USCIS "erred in finding that police reports in Virginia are readily available to the [A]pplicant," and specifically stated the following regarding the Director's observations of the Va. Code Ann.:

> . . . the Service quoted Section 19.2-389 of the Criminal Code of Virginia which states that an individual can request his own criminal record information. As previously stated in [A]pplicant's motion to reopen, an individual can request his own records, however, Section 19-2.389(11) states that criminal record information is defined in Section 9.1-101. The Code of Virginia at Section 9.1-101 defines "criminal history record information" as "records and data collected by criminal justice agencies on adult individual[s] consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges and any disposition arising therefrom." Police reports are not listed as part of the criminal history record information that is readily available to the public.

The Applicant submits, on appeal, a copy of his third child's birth certificate and a psychosocial evaluation completed in December 2021. The Applicant's counsel indicates that the psychosocial evaluation "show[s] that the [A]pplicant has suffered from [Post Traumatic Stress Disorder (PTSD)] surrounding his early life in El Salvador and the violent death of his brother and the finding[s] state that [he] and his family will suffer greatly if [he] is not allowed to obtain legal status [in the U.S.] and is forced to return to El Salvador." The Applicant's counsel further notes that the Applicant "has not had any additional problems with the law since 2018, which occurred almost [four] years ago."

While we recognize the Applicant's statements on appeal, they are insufficient to establish that his continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. As a preliminary matter, the Applicant claims that the term

"police reports" is not specifically listed in section 9.1-101 of the Va. Code Ann., and thus is not a document he is able to obtain personally from law enforcement. However, section 9.1-101 of the Va. Code Ann. refers specifically to "identifiable descriptions and notations of arrests," which is the information typically found in a "police report," and is likely described therein in a general manner in order to represent the type of information, rather than the name of a specific document. Regardless, the Applicant, again, has not presented any evidence to support that he has attempted to obtain the police reports by way of an original written response, on government letterhead, from the relevant government or other authority, indicating the records do not exist, and why, or if other similar records are available. Moreover, despite multiple opportunities to do so, the Applicant has not submitted a statement describing or otherwise directly confronting his criminal history and the specific circumstances that gave rise to each of his arrests.

Further, although several of the Applicant's arrests resulted as not guilty or not prosecuted, 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 continued into the pendency of his U adjustment application. In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, 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 on charges of crimes of violence, controlled substance possession, alcohol related incidents, damaging property, false reporting to law enforcement, and contributing to the delinquency of a minor all during the time he held U nonimmigrant status, the most recent of which was approximately one year after filing the U adjustment application and within the same month of responding to the Director's first RFE.

The new psychosocial evaluation, completed in December 2021, specifically identifies the Applicant's trauma surrounding his brother's death and indicates that he suffers from PTSD as a cause of it. While we understand and do not seek to diminish the difficulty of living through that experience, 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 history or his continued refusal to submit police reports, or evidence showing they are unavailable, as well as statements describing his behavior or what specifically led to his arrests, 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 over 10 years and has family ties in the United States, including a spouse and three U.S. citizen children, for whom he is responsible as the sole financial provider. Nonetheless, in light of the nature, recency, and seriousness of the Applicant's criminal 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,[1] 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.

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.

[1] 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.").