U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19845689

Date: MAR. 23, 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 a 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 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, 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 Mexico, entered the United States without inspection, admission, or parole on or around October 2000. In October 2015, USCIS granted the Applicant U nonimmigrant status, based on a felonious assault he suffered in 2011. The Applicant timely filed the instant U adjustment application in December 2018 while in U status. The Director denied the application, determining 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 criminal history, namely his [redacted] 2011 and [redacted] 2019 convictions for driving under the influence (DUI), outweighed the positive factors in his case.[1] The Applicant has not overcome this determination on appeal.

A. Favorable and Mitigating Equities

The Applicant is 48 years old and has lived in the United States for approximately 22 years. The Applicant's family ties in the United States include his 18 year old U.S. citizen daughter. The Applicant provided evidence of stable employment and payment of taxes since 2015. In her statement, the Applicant's daughter recounted her physically and abusive relationship with her mother and the mental health symptoms, including cutting, that she still suffers as a result of it. She stated that the Applicant is her sole support system and that she would suffer emotionally and financially if the Applicant could not remain in the United States. Additionally, the Applicant explained that if he had to return to Mexico, he would be forced to bring his daughter and would fear for her health and safety there.

On appeal, the Applicant contends that the Director erred as matter of fact and law and abused discretion in denying his U adjustment application. Specifically, the Applicant argues that the Director mischaracterized his probationary status and incorrectly determined that he did not warrant a favorable exercise of discretion based on an inadequate evaluation and weighing of the evidence in the record.[2]

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[1] The Director also determined that the Applicant's updated Form I-693, Report of Medical Examination and Vaccination Record (medical examination), did not indicate whether he still had a substance abuse problem.

[2] The Applicant also contends that "his criminal record does not render him inadmissible, and denying his case based solely on discretion [because of his two DUI convictions] contradicts the legislative intent of U Visa Provisions." As support, he notes that the Federal Register, and later 8 C.F.R. § 245.24(d)(11), outline the commission of four crimes — serious violent crimes, crimes involving sexual abuse committed upon a child, multiple drug-related crimes or where are there are security or terrorism-related concerns — that would only merit approval of a U adjustment application if balanced by "the most compelling positive factors." He argues that his two DUI convictions do not fall within any of the aforementioned named crimes and thus, a lower level of scrutiny must be applied. However, the regulation at 8 C.F.R. § 245.24(d)(11) provides that, USCIS "may take into account all factors, including acts that would otherwise render [him] inadmissible, in making a discretionary decision on the application." Consequently, whether or not the Applicant is inadmissible due to his criminal record is not relevant in this case, and we may consider all factors, including his two DUI convictions, in determining whether a favorable exercise of our discretion is warranted. *See id.* (stating that applicants bear the burden of showing that discretion should be exercised favorably and where adverse factors are present, applicants "may offset" them by submitting evidence of mitigating equities).

The Applicant argues that he has submitted sufficient evidence to demonstrate his rehabilitation and establish that the favorable factors in his case warrant a favorable exercise of discretion. In support of these contentions, he submits on appeal an additional medical examination indicating that his alcohol addiction is "unlikely to recur," an updated personal statement, court disposition records from the [redacted] District Court regarding his [redacted] 2019 DUI arrest, documents from [redacted] regarding his substance abuse treatment, documents from [redacted] District Court Probation Services Division regarding his active probation and compliance monitoring, a copy of his Washington State driver license, a letter from his mental health provider; a copy of his daughter's birth certificate, her personal statement and mental health treatment records; a lease agreement, monthly household budget, a letter from his employer, a copy of various utility bills, a copy of his 2020 Internal Revenue Service Form W-2, Wage and Tax Statement, and federal tax return; a copy of money transfers to Mexico, and various family photographs.

B. Adverse Factors

The Applicant's primary adverse factor is his criminal history. The record reflects that, in [redacted] 2011, the Applicant was arrested in [redacted] Washington for DUI in violation of section 46.61.502 of the Revised Code of Washington Annotated (Wash. Rev. Code Ann.). According to a State of Washington Traffic Collision Report (collision report), a police officer was assisting a colleague when he heard the sounds of screeching tires and observed a vehicle collide with something a few blocks away. The police officer drove to the scene of the collision where he found a Chevrolet pickup with heavy front end damage. He removed the Applicant who had an "overwhelming odor of alcohol coming his person" from the driver side of the vehicle. Based on his investigation, the police officer determined that the Applicant was driving at a high rate of speed when he struck a Honda Civic parked in a driveway. The police officer noted that the impact of the collision pushed the Honda Civic into another vehicle parked in the garage of the residence causing "severe structural damage" to it. In his statement, the Applicant explained that he went dancing at a nightclub in [redacted] Washington. He consumed "four or five drinks" and made the horrible decision to drive home. He stated that he was "too drunk" to drive home and crashed into an empty, parked car. He was convicted of DUI and given a suspended sentence of 363 days and 24 months of unsupervised probation. He was also ordered to install an interlock ignition device in his car, participate in a victim impact panel, complete 15 days of electronic home monitoring (EHM), attend substance abuse treatment, and pay all applicable fines and court costs. The Applicant submitted evidence that he complied with all of the terms of his sentence.

The Applicant was arrested in [redacted] 2013 in [redacted] for driving while license suspended-3rd degree, failure to surrender a suspended driver's license, and an interlock ignition device violation in violation of sections 46.20.342, 46.20.0921 and 46.20.740 of the Wash. Rev. Code Ann., respectively. He was also cited for cell phone use while driving, failure to sign/carry/display vehicle registration, and operating a motor vehicle without insurance in violation of sections 46.61.667, 46.16A.180, and 46.30.020 of the Wash. Rev. Code Ann., respectively. An incident report from the [redacted] Washington Police Department indicates that a police officer observed the Applicant driving a white Ford Ranger while talking on his cell phone. When the police officer ran the Applicant's license plate, he discovered that his driver's license had been suspended for cancelled insurance related to a previous DUI and that he was required to drive with an ignition interlock device. The police officer stopped the Applicant's vehicle and asked him for his driver's license, registration, and proof of insurance.

The Applicant provided his Washington driver's license. However, he informed the police officer that he did not have his registration or proof of insurance with him. He also informed the police officer that he did not have an ignition interlock device installed in his vehicle. The Applicant was subsequently arrested and placed in the officer's patrol car. The police officer noted a "moderate odor of alcoholic beverages" on the Applicant. He further noted that the odor was distinctly odd and he suspected that the Applicant was trying to mask it with gum. A preliminary breath test administered approximately an hour and half after the Applicant was arrested revealed that his blood alcohol concentration was .075%, just below the DUI limit of .08% in the state of Washington. In his statement, the Applicant explained that he was stopped by a police officer for using his cell phone while driving. The police officer ran a check and discovered that the Applicant's license was still suspended from his 2011 arrest and that he was supposed to drive with an interlock ignition device installed in his car. He claimed that he mistakenly believed that a judge told him he would remove the interlock ignition device. Regarding his driver's license, the Applicant claimed that he did not realize that it was still suspended. The Applicant pled guilty to the interlock ignition device violation and for driving while license suspended. The charge for failure to surrender his suspended driver's license under section 46.20.0921 of the Wash. Rev. Code Ann. was dismissed pursuant to a plea agreement. He was sentenced to 90 days in jail (with 88 days suspended) and 12 months of unsupervised probation. He was also ordered to install an interlock ignition device and pay all applicable fines and court costs. The Applicant was ordered to pay $372 for the citations, which he paid in [redacted] 2013.

The Applicant was cited in [redacted] 2014 in [redacted] for operating a motor vehicle without insurance in violation of section 46.30.020 of the Wash. Rev. Code Ann. The Applicant submitted evidence that the charge was dismissed.

Finally, the Applicant was arrested in [redacted] 2019 in [redacted] for DUI in violation of section 46.61.502 of the Wash. Rev. Code Ann. for a second time. In an arrest report from the [redacted] Washington Police Department, a police officer described observing a silver Honda Accord travelling almost 20 mph over the speed limit. The police officer also observed that the driver was "unable to maintain lane control, crossing both the right limitation line and the double yellow center line several times." The police officer initiated a traffic stop and subsequently questioned the Applicant. He noted that the Applicant's eyes were "watery[,]glassy and bloodshot [and his] face [was] flushed with the odor of intoxicants coming from his breath." The Applicant told the police officer that he had a few drinks at a local bar. The Applicant exited the vehicle and agreed to undergo several field sobriety tests. However, he was unable to follow the officer's instructions and "his balance was unsteady with a heavy sway while standing." A portable breathalyzer registered blood alcohol levels of .185% at the time of arrest and .186% several hours later. The Applicant was arrested and transported to the [redacted] Police Station for booking. The Applicant explained that he was driving home from a bar at 2 am. He stated that he had "more than five drinks that night" and was driving over the speed limit. He took a breathalyzer which revealed that his blood alcohol concentration was over the legal limit. He was arrested and spent one night in jail. The Applicant pled guilty to DUI. He was given a suspended sentence of 364 days in jail, six months of supervised probation and $4650 fine for 60 months with following conditions: completion of alcohol evaluation and treatment, attendance at a victim impact panel, installation of an interlock ignition device installation, and no further criminal or driving-related violations. The Applicant provided evidence that he completed his substance abuse treatment in

2019. He also submitted documentation that his supervised probation was terminated in 2020, and was subsequently placed on compliance monitoring until 2024.

The Applicant expressed remorse for his criminal history. He acknowledged that "[he] should have learned [his] lesson the first time [he] was arrested for DUI in 2011." He stated that his 2019 DUI arrest was an eye opener for him and made him realize how badly he needed to turn his life around. He claimed that he has not consumed alcohol since 2019, and has taken up positive habits such as exercising, hiking and eating healthier foods. He highlighted the two victims panels he attended, which ingrained in him the impact that one mistake can have on his life and the lives of others. In a statement submitted on appeal, the Applicant details the negative impact that alcohol has had on his life, particularly his relationship with his daughter. He explains that he is now doing his best to be a better father and a good role model. He maintains that his goal is to never reoffend again and that "[he is] absolutely committed to never again experiencing such personal humiliation or breaking [his] promise to [his] daughter."

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, including the evidence on appeal. We acknowledge the Applicant's lengthy residence in the United States, his family ties, stable employment, payment of taxes, and efforts at rehabilitation after two DUI convictions. We further acknowledge the Applicant's close relationship with his daughter and the hardship she would experience if the Applicant is unable to remain in the United States. 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.

The Director determined that the Applicant's positive and mitigating equities did not outweigh the adverse factors in his case. Specifically, the Director noted that the Applicant's DUI arrests and convictions, including one after being granted U nonimmigrant status and applying to reside permanently in the United States, demonstrated an extreme public safety concern. Additionally, the Director noted that it was unclear whether lasting rehabilitation or reform of character had occurred because the Applicant remained on active probation until 2024. As a result, the Director concluded that the Applicant had not submitted sufficient evidence to establish that a favorable exercise of discretion to adjust his status to that of an LPR was warranted in his case.

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, the record indicates that the Applicant was cited or arrested four times between 2011 and 2019. He pled guilty to or was convicted of DUI, driving while license suspended, an ignition interlock violation, cell phone use while driving, failure to carry vehicle registration, and operating a vehicle without insurance. We note specifically that 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. 207, 208-09 (BIA 2018) (finding DUI 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 DUI"). Most critically, the Applicant was arrested in [redacted] 2011 and more recently in [redacted] 2019 for DUI, a crime involving behavior which posed a significant risk to others, both before *and* after he was granted U nonimmigrant status and while he was pursuing this discretionary adjustment application.

Additionally, although the Applicant expressed general remorse for his criminal history and submitted a letter of support from the clinical director at [redacted] therapy records, an updated medical examination indicating a low probability of alcohol recidivism and court records confirming that he successfully completed active probation and court ordered alcohol and drug treatment that he was required to complete, the record as a whole does not sufficiently 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"); *see also Matter of Marin*, 16 I&N Dec. at 588 (emphasizing that the recency of a criminal conviction is relevant to the question of whether rehabilitation has been established and that "those who have recently committed criminal acts will have a more difficult task in showing that discretionary relief should be exercised on their behalf"). As a preliminary matter, we concede that the Director mischaracterized the Applicant's probationary status. Upon *de novo* review, the record reflects that the Applicant's active probation for his [redacted] 2019 DUI conviction was terminated in [redacted] 2020. However, he remains on compliance monitoring with the [redacted] District Court Probation Services Division (Probation Services) until [redacted] 2024. In their Notice of Transfer from Active Probation Supervision to Compliance Monitoring, Probation Services reminded the Applicant that he was still required to use an ignition interlock device, refrain from any marijuana or alcohol use, and avoid incurring any criminal law violations or alcohol or drug related infractions. Moreover, the record indicates that the Applicant's first DUI and court-mandated rehabilitation was insufficient to deter him from committing a subsequent DUI offense. The record also indicates that the Applicant violated the terms of his sentence for his 2011 DUI arrest resulting in the imposition of 60 days of EHM. 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). Finally, while we acknowledge that the Applicant's Washington driver's license was reinstated, its issuance was conditioned upon the Applicant's use of an ignition interlock device until [redacted] 2023, evidencing the risk the state of Washington still believes he poses to the public. Based on the recency and seriousness of the Applicant's criminal history, he has not sufficiently established his rehabilitation.

To summarize, the Applicant has numerous citations, including for driving while using a cell phone, driving without insurance, registration, or a court-mandated ignition interlock device —offenses which evidenced a repeated disregard for public safety and the laws of the United States. The Applicant also has two convictions for DUI, which posed a significant risk to others. While we acknowledge the Applicant's arguments and his evidence of positive and mitigating equities including his close relationship with his daughter, 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 severity and recency of his two DUI convictions and driving related offenses before *and* after he was granted U nonimmigrant status and insufficient evidence of his rehabilitation in the record. Consequently, the Applicant has not demonstrated that he warrants a positive exercise of discretion to adjust his status to that of an LPR under section 245(m) of the Act.

ORDER: The appeal is dismissed.