



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

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

In Re: 24247014

Date: FEB. 13, 2023

Motion on Administrative Appeals Office Decision

I-485, Application for Adjustment of Status of U Nonimmigrant

The Applicant seeks to become a lawful permanent resident (LPR) based on his “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 to Register Permanent Residence or Adjust Status (U adjustment application), and we dismissed the Applicant’s subsequent appeal. On motion to reopen and reconsider, the Applicant submits additional evidence and reasserts his eligibility. Upon review, we will dismiss the motions.

I. LAW

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of the law or U.S. Citizenship and Immigration Services (USCIS) policy and that the decision was incorrect based on the evidence in the record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and establishes eligibility for the benefit sought.

The applicant must establish that he or she meets each eligibility requirement of the benefit sought 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, 375-76 (AAO 2010).

II. ANALYSIS

The Applicant, a native and citizen of Mexico, was granted U-1 status as the victim of qualifying criminal activity from October 2015 to September 2019, and timely filed his U adjustment application in July 2019. The Director denied the application, concluding that the Applicant had not established that he warranted adjustment of status to that of an LPR as a matter of discretion. The Director acknowledged the Applicant’s positive and mitigating equities, including his lengthy residence in the United States, stable employment, payment of taxes, homeownership, and extensive family ties, including three U.S. citizen children and numerous U.S. citizen or Lawful Permanent Resident (LPR) relatives. However, the Director concluded that the Applicant’s criminal history outweighed these

positive factors. Specifically, the Director highlighted the Applicant's [REDACTED] 2013 arrest in the state of Arizona for Furnishing Harmful or Obscene Materials to Minors and Luring a Minor for Sexual Exploitation. The Director acknowledged that the charge for luring a minor for sexual exploitation was ultimately dismissed but noted that he was convicted of Attempt - Furnishing Obscene Materials to Minors. However, she emphasized that USCIS can consider all conduct as well as charges filed against him when determining whether a favorable exercise of discretion is warranted. The Director acknowledged the Applicant's expression of remorse and his assertion that he successfully completed the terms of his sentence and has grown as a person. Nevertheless, the Director noted that the Applicant's conviction for attempt to furnish obscene or harmful materials to a minor indicates he poses a risk to public safety and evinces the type of conduct that the U visa program was designed to protect against. As a result, the Director concluded that the Applicant had not submitted sufficient evidence to establish that his 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 adjustment of status as a matter of discretion.

On appeal, the Applicant submitted two non-precedent decisions and argued that an applicant's positive and mitigating equities could outweigh their criminal history so as to justify a grant of adjustment of status in the favorable exercise of discretion. We noted that non-precedent decisions apply existing law and policy to the specific facts of the cases and are not binding in the Applicant's case. We stressed that the Applicant's sexually-based offenses against a minor involved the very type of behavior that U nonimmigrant status seeks to protect against. We additionally stressed that the dismissal of the charge for luring a minor for sexual exploitation did not lessen the Applicant's culpability for his conduct, particularly since he was convicted of attempting to furnish obscene materials to a Minor.

On motion, the Applicant contends that we erred in our application of non-precedential decisions (NPDs) to his case. The Applicant reiterates that his former counsel submitted several non-precedential decisions and urges us to follow *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), in which the Supreme Court stated, "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." We note however, that *Morton* involved the publication of *binding* policies in the Bureau of Indian Affairs Manual. The decisions the Applicant's former counsel submitted on appeal were non-precedential decisions, which are not binding in the adjudication of the Applicant's U adjustment application or any other future adjudications. *See* 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act").¹

The Applicant further contends that "any criminal conduct for which he was not convicted in a criminal court is presumed not having taken place and should not be used as a negative factor in determining exercise of discretion in [his] case." We acknowledge that the Applicant was not convicted of the charge of luring a minor for sexual exploitation. However, as we noted in our prior decision, even if the Applicant was not ultimately convicted of the charges, that does not equate with a finding that the underlying conduct or behavior leading to the charges did not occur or that the charges were

¹ We reiterate that non-precedential decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

unsubstantiated. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account *all* factors in making the 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). We note that the Applicant has never denied that he engaged in the conduct that led to his arrest and his conviction for the separate offense of attempting to furnish obscene materials.

Lastly, the Applicant contends that, “finding [his] conduct present[ed] [a] safety risk is an error stemming from moralization based on the societal values that ceased to exist since the sexual revolution on the 60s.” Specifically, he argues that a 28-year-old adult male flirting with a 17-year-old female who manifested curiosity in a sex toy is not undermining the safety of the public. He maintains that there was no proposition to have sex and no touching. As we noted in our prior decision, the record indicates, and the Applicant does not dispute, that he knowingly discussed sexual activity with an underage girl on multiple occasions and gave her a sex toy. The 17-year-old girl told police that she tried to ignore the Applicant and his comments and conversations about sex. After the Applicant gave her the sex toy, the girl immediately told her father, who then filed a complaint with the police. Accordingly, we find no error in our conclusion that the Applicant’s admission that he knowingly discussed sexual activity with an underage girl on multiple occasions and gave her a sex toy evidenced problematic behavior, a serious lapse in judgment, and a risk to the personal and public safety of others.

In sum, we acknowledge the Applicant’s arguments and his submission of additional evidence of positive and mitigating equities.² However, he has not provided documentary evidence of new facts sufficient to establish his eligibility or established that our prior decision was based on an incorrect application of law or policy based on the evidence in the record of proceedings at the time of the decision. As we noted in our prior decision, the nature and seriousness of the [redacted] 2013 charges against the Applicant, which occurred after he filed for U nonimmigrant status—outweigh the positive and mitigating equities present in his case. Consequently, the Applicant has not demonstrated on motion that he is eligible to adjust his status to that of an LPR under section 245(m) of the Act.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

² The Applicant submits letters of support from his spouse and three children.