U.S. Citizenship and Immigration Services

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

In Re: 24041542

Date: JAN. 18, 2023

Appeal of Vermont Service Center Decision

Form I-485, Application to Adjust Status

The Applicant seeks to become a lawful permanent resident (LPR) under section 245(m)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(3), based on an approved Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant (U immigrant petition). The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), as a matter of discretion, concluding that the Applicant's favorable factors and mitigating equities were outweighed by his adverse factors. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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

Under section 245(m)(3) of the Act, the Secretary of Homeland Security may adjust the status of a qualifying family member of a U-1 nonimmigrant who was granted adjustment of status (U-1 principal) under subsection 245(m)(1), in order to avoid extreme hardship, if the qualifying family member was not previously accorded U nonimmigrant status under section 101(a)(15)(U)(ii) of the Act. *See also* 8 C.F.R. § 245.24(g)-(i). To establish eligibility under section 245(m)(3), the U-1 principal must, among other requirements, file a U immigrant petition on behalf of the qualifying family member. 8 C.F.R. § 245.24(g), (h). A qualifying family member who has an approved U immigrant petition may then request adjustment of status. 8 C.F.R. § 245.24(i)(1). The decision to approve or deny the U adjustment application is a discretionary determination that lies solely within the jurisdiction of U.S. Citizenship and Immigration Services (USCIS). *Id.* at § 245.24(i)(2).

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").

## II. ANALYSIS

The Applicant, a native and citizen of Mexico, entered the United States without inspection in June 1999. The Applicant's U immigrant petition, filed by his spouse, was approved in June 2019. The Applicant filed his U adjustment application in August 2019 based on the approved U immigrant petition.

In denying the U adjustment application, the Director first detailed the Applicant's adverse factors. The Applicant was arrested in [redacted] 2004 for operating a vehicle while intoxicated; [redacted] 2006 for failure to appear for a driving while suspended case; [redacted] 2007, [redacted] 2008, and [redacted] 2010 for driving while suspended; and [redacted] 2015 for operating a vehicle with an alcohol concentration equivalent of .08% or more. The Applicant was convicted of these offenses.[1] For the [redacted] 2015 arrest, the Applicant was also charged with operating a vehicle while intoxicated endangering a person, but this charge was dismissed.

The Applicant was also arrested in [redacted] 2003 for operating a vehicle while intoxicated; [redacted] 2004 for possession of alcohol by a minor, driving while suspended, and operating a vehicle while intoxicated; [redacted] 2007 for driving while suspended; [redacted] 2008 for driving while suspended and operating a motor vehicle without ever receiving a license; and [redacted] 2016 for domestic battery and battery resulting in bodily injury. All of these cases were dismissed, with the domestic battery and battery resulting in bodily injury charges being dismissed after pretrial diversion and the Applicant's completion of a 26-week domestic violence program.

While the Applicant's U adjustment applicant was pending, he was arrested in [redacted] 2021 for possession of cocaine, operating a vehicle while intoxicated endangering a person with a prior conviction within seven years, and operating a vehicle with an alcohol concentration equivalent of .15% or more with a prior conviction. He pled guilty in [redacted] 2021 to operating a vehicle while intoxicated endangering a person with a prior conviction within seven years and the other two charges were dismissed. The Applicant's sentence included home detention, community service, probation, alcohol evaluation and treatment as required, and drug and alcohol testing. The Director considered the recency of this arrest and conviction, as well as the Applicant being under home detention at the time of the decision, as a serious adverse factor. The Director considered these facts, along with the Applicant's history of completing court-ordered mandates only to engage in the same criminal behavior, as evidence of lack of rehabilitation. The Director also noted the Applicant had not accrued any time to be able to demonstrate rehabilitation beyond that imposed by the court.

[1] For the [redacted] 2006 arrest, the Applicant was convicted of driving while suspended.

The Director also acknowledged the Applicant's favorable factors and mitigating equities, including his residence in the United States since June 1999; his LPR spouse and stepdaughter; support he provides his spouse and stepdaughter, who was the victim of sexual abuse as a child; his two U.S. citizen children; numerous statements in support of his good character; attendance at an outpatient and aftercare group program; and his statement that he no longer drinks alcohol and takes responsibility for his behavior.

The Director determined that the Applicant's favorable factors and mitigating equities were outweighed by his adverse factors, including his entrance into the United States without inspection, the seriousness of his criminal history, his risk to public safety, and the lack of evidence of rehabilitation. As such, the Director concluded that the Applicant had not submitted sufficient evidence to meet his burden of proof that he merits a favorable exercise of discretion.

On appeal, the Applicant has submitted an updated statement, a psychological evaluation for his stepdaughter, a statement of support from his stepdaughter, a statement of support from his spouse, statements of support from his pastor and friends, educational records for his stepdaughter, and evidence that he completed home detention, an outpatient and aftercare group program, and a Mothers Against Drunk Driving (MADD) online victim impact panel. The Applicant asserts that the Director erred in determining he does not warrant a favorable exercise of discretion. The Applicant claims that his rehabilitation, hardship to his family members, and positive contributions to society outweigh his risk of harm to the public. For his most recent conviction, the Applicant emphasizes that he has completed his home detention and alcohol counseling program. He states that he is working on his community service hours, has not failed any alcohol or drug tests, and is voluntarily attending Alcoholics Anonymous meetings. As further evidence of his favorable factors, mitigating equities, and rehabilitation, the Applicant states that he has resided in the United States since he was 15 years old and would be unable to function in Mexico; he has been employed and meets his financial obligations, including paying taxes, home expenses, and financial support for his spouse and children; and he provides emotional support to his stepdaughter who was the victim of sexual abuse.

In support of the Applicant's claim of rehabilitation, he cites to *Vissian v. Immigration and Naturalization Service,* 548 F.2d 325, 329 n.4 (10th Cir. 1977) (noting the passage or nonpassage of time should not be the sole determinative factor in considering reformation). Although we acknowledge this citation, here, the Director did not refer to the lack of time without criminal behavior as the sole determinative factor for rehabilitation, rather it was one factor among many. Additionally, we note that the Applicant resides outside of the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit and therefore this case is not binding in this matter.

The Applicant also refers to our non-precedent decision related to a waiver of inadmissibility due to having a mental disorder (alcohol abuse) associated with harmful behavior. Specifically, the Applicant asserts that he was not diagnosed with alcoholism and therefore he is not inadmissible. The issue before us is whether the Applicant merits a favorable exercise of discretion and not whether he is inadmissible under health-related grounds. Therefore, the decision provided is not relevant to this decision. Furthermore. this decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent 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.

Upon de novo review of the record, the evidence and arguments submitted on appeal are not sufficient to overcome the discretionary denial of the Applicant's U adjustment application. We acknowledge the updated evidence on appeal and the Applicant's favorable factors and mitigating equities, including his residence in the United States since June 1999; his LPR spouse and stepdaughter; support he provides his spouse and stepdaughter; his two U.S. citizen children; numerous statements in support of his good character; attendance at an outpatient and aftercare group program; and his statements that he no longer drinks alcohol and takes responsibility for his behavior. However, the Applicant entered the United States without inspection and his residence in the United States has been without status. Furthermore, while the role he plays in his stepdaughter's life is significant in light of her difficult past, there is no evidence of his role in his other children's lives. Last, the statements in support of the Applicant's good character do not indicate the authors are aware of his lengthy criminal history. Therefore, we give diminished weight to these three favorable factors.

The Applicant's favorable factors and mitigating equities do not outweigh his adverse factors, which include his lengthy, serious criminal history and lack of rehabilitation. In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, recency, and seriousness" of the relevant offenses. *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). We note that we may also consider an arrest record in an exercise of discretion, depending on the evidence in the record. *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). The record reflects that the Applicant has a history of serious criminal behavior spanning from [redacted] 2003 until [redacted] 2021, which includes the time his U adjustment application was pending. One of his arrests was for domestic violence issues, and several of his arrests and convictions involved driving under the influence of alcohol. Driving under the influence of alcohol is both a serious crime 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, 207 (BIA 2018) (finding DUI a significant adverse consideration in determining a respondent's danger to the community in bond proceedings); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (A.G. 2019) (discussing the "reckless and dangerous nature of the crime of DUI"). The fact that the Applicant committed his latest alcohol-related crime while his U adjustment application was pending is an additional adverse factor to be considered. Furthermore, the Applicant's behavior involved dangerous and unsafe behavior, and he put the safety of the public at risk.

Moreover, 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." *Matter of Roberts*, 20 I&N Dec. 294, 299 (BIA 1991); *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"). To determine whether an applicant has established rehabilitation, we examine not only the applicant's actions during the period of time for which she was required to comply with court-ordered mandates, but also after her 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"). Further, when an individual is on probation, they enjoy reduced liberty. *See, e.g., 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); *U.S. v. King*, 736 F.3d 805, 808-09 (9th Cir. 2013) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.") (internal quotations omitted). We acknowledge the Applicant's statement that he has not had a drink since his last arrest, his September 2021 completion of an outpatient and aftercare group program, his February 2022 home detention completion, attendance of Alcoholics Anonymous meetings, and his [redacted] 2021 completion of a MADD online victim impact panel. However, according to the Applicant's Notice of Release to Probation, he is required to complete a term of probation after completing his home detention component. The record does not establish that he has completed his term of probation, and he has not submitted evidence he completed his community service requirement. Even if the Applicant met these requirements, he has a history of completing court-ordered mandates only to engage in the same criminal behavior. In light of the above, we do not find that the Applicant has established, by a preponderance of the evidence, that he has been rehabilitated.

Under these circumstances, the Applicant has not demonstrated that his favorable factors and mitigating equities outweigh his adverse factors such that he warrants a favorable exercise of our discretion to adjust his status to that of an LPR under section 245(m)(3) of the Act.

**ORDER:** The appeal is dismissed.