U.S. Citizenship and Immigration Services

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

MATTER OF R-D-M-

DATE: JUNE 26, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

The Applicant seeks to become a lawful permanent resident 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 a subsequent motion to reopen and reconsider, concluding that a favorable exercise of discretion was not warranted on humanitarian grounds, to ensure family unity, or otherwise in the public interest because the Petitioner's criminal and immigration history outweighed his positive equities. On appeal, the Applicant submits a brief and reasserts his eligibility. 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 a lawful permanent resident (LPR) if that individual demonstrates that he or she has been physically present in the United States for a continuous period of at least three years since admission as a U nonimmigrant, has not unreasonably refused to provide assistance in a criminal investigation or prosecution, and the individual's 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(f). When exercising its discretion, USCIS may consider all relevant factors, both favorable and adverse, but the U nonimmigrant ultimately bears the burden of showing that discretion should be exercised in his or her favor. 8 C.F.R. § 245.24(d)(10)-(11).

The absence of compelling adverse factors may be sufficient to merit a favorable exercise of administrative discretion. 7 *USCIS Policy Manual* A(10), https://www.uscis.gov/policy-manual. However, where adverse factors are present, the applicant may submit evidence to establish mitigating factors. 8 C.F.R. § 245.24(d)(11). Depending on the nature of any adverse factors, the applicant may be required to demonstrate clearly that the denial of adjustment of status would result in exceptional and extremely unusual hardship, but such a showing might still be insufficient if the adverse factors are particularly grave. For example, 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 are security- or terrorism-related concerns. *Id.*

## II. ANALYSIS

The Applicant, a 43-year old native and citizen of Mexico, most recently entered the United States without inspection, admission, or parole in September 2002. In October 2012, USCIS granted the Applicant U-1 status as a victim of felonious assault who was helpful to law enforcement in the investigation or prosecution of the offense. The Applicant timely filed the instant U adjustment application in October 2015. In February 2018, the Director denied the application, and in September 2018, the Director denied the Applicant's motion to reopen and reconsider. The record indicates that the Applicant's criminal record includes convictions for operating under the influence with an occupant under the age of 16 and domestic violence and an arrest for manufacturing/delivery of a controlled substance.

### A. Favorable and Mitigating Equities

In the record before the Director, the Applicant established his lengthy residence in the United States beginning in 1990 at the age of 15. The Applicant's family ties in the United States include his U.S. citizen spouse and 20-year old daughter, and the record further shows that the Applicant's stepson died after drowning in a lake in September 2014, at the age of 20. The record reflects that the Applicant has maintained steady employment and is his family's primary source of financial support. The Applicant provided supporting letters from employers and colleagues who describe him as dependable and hardworking. He also provided copies of his Form I-1040, U.S. Individual Income Tax Return from 2012 through 2017, showing that he consistently pays income taxes. Supporting letters from the Applicant's mother, mother-in-law, spouse, and daughter describe his dedication to his family.

The Applicant also provided evidence that he and his family members suffer from multiple health issues. The record shows that the Applicant's spouse suffers from depression, diabetes, hypertension, osteoarthritis, and chronic varicose veins that have required surgery. The record indicates that the Applicant's daughter suffers from depression and has attempted suicide since the death of her brother. The record also reflects that the Applicant suffers from a degenerative joint disease that has caused pain in his lower back and leg and that he had shoulder surgery.

The Applicant stated that he deeply regretted his past misconduct and that he stopped drinking after his 2001 arrest. He provided statements from family members and friends stating that he no longer drinks. The Applicant's pastor stated that he is a dedicated father and husband who has been open about how to learn from his mistakes. In supporting letters, the Applicant's friends described him as respectful and caring.

### B. Adverse Factors

The Applicant's primary adverse factors are his criminal and immigration history. In [redacted] 2000, the Applicant was arrested in [redacted] Michigan and charged with operating under the influence with an occupant under the age of 16, a misdemeanor. According to the police report, the

officer observed a small child in the vehicle with the Applicant. In a written statement submitted with his Form I-918, Petition for U Nonimmigrant Status (U petition) and Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), the Applicant stated that he began drinking after he ran out of pain medication in the aftermath of the April 2000 stabbing that formed the basis of his U petition. The Applicant explained that he felt bad about himself due to prominent facial scarring. He stated that on the day of his arrest, he had been visiting his father and drinking, but decided to return home with his daughter because he ran out of diapers. The Applicant described the arrest as "humiliating." In [redacted] 2000, he pled guilty and was sentenced to six months of probation and payment of fines, and was required to attend counseling and treatement. The record shows that the Applicant was discharged from probation in [redacted] 2001 after he failed to comply with its terms. The Applicant stated that he unfortunately did not stop drinking after his arrest. He explained that he was supposed to attend "six classes for alcohol" but only attended four, and that after he stopped attending classes, the judge issued a warrant for his arrest and subsequently ordered him to serve 45 days in jail. The Applicant stated that he continued drinking very heavily during this period and made many mistakes.

In [redacted] 2001, the Applicant was arrested in [redacted] Michigan in an incident of domestic assault. According to the police report, when the officer arrived at the Applicant's home, his spouse had a "swollen and bloody lip." She stated that the Applicant had "punched her with a closed fist to the mouth" during an argument, hitting her so hard that she "'blacked out' and flew up onto the living room table." The report indicates that the Applicant was under the influence of alcohol at the time. The Applicant maintained that his spouse had struck him first although witnesses did not corroborate this account. The Applicant was charged with domestic violence, a misdemeanor, to which he pled guilty and was sentenced to 24 days jail with credit for 24 days served.

The Applicant stated that after he completed his jail sentence, he was turned over to immigration authorities. In [redacted] 2001, an immigration judge in [redacted] Michigan granted him voluntary departure, and records show that the Applicant departed the United States in October 2001. In January 2002, according to the Applicant, he returned to the United States without inspection, admission, or parole.

In [redacted] 2009, the Applicant was arrested in [redacted] Illinois for felony manufacturing/delivering 900+ grams cocaine. The arrest report states that Drug Enforcement Agency (DEA) [redacted] made the arrest after the Applicant and two other individuals delivered 1662 grams of cocaine to an undercover officer. Records further indicate that after the arrest, the Applicant was held without bond. In a written statement with his U petition and waiver application, the Applicant stated that he was traveling with his brother and cousin to pick up a vehicle that his brother was going to fix, and that on the way, they stopped to purchase food and drinks and began talking to a man. The Applicant stated that the man approached him and asked him for a soda. Moments later, the man went inside the car, pulled out a gun, told them to get on the ground, and placed them under arrest. The Applicant stated that one of the detectives told him that he knew the Applicant was not involved but that his cousin had drugs in the car and was trying to sell them to a federal agent. In the complaint before the Circuit Court of [redacted] Illinois, the Applicant was charged with delivery of a controlled substance. The complaint further noted that the estimated value of the cocaine was over $200,000. The case against the Applicant was dismissed as *nolle prosequi* due to insufficient evidence in [redacted] 2012.

In response to two requests for evidence (RFE) from the Director seeking additional information about the circumstances of this arrest, the Applicant provided evidence of his efforts to obtain records, including Freedom of Information Act (FOIA) requests to the DEA and Office of the State's Attorney for [redacted] Illinois. The Applicant stated that he was never indicted on federal charges and never asked to appear before a federal judge. The Applicant provided a Defendant Disposition Report and Report of Investigation from the DEA that he obtained through the FOIA request; however, these documents are heavily redacted. The Applicant stated that he went to court three times and that the last time, the judge told him that he was "'in the wrong place at the wrong time'" and dropped the charges.

C. A Favorable Exercise of Discretion is Not Warranted

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 positive factors in this case. We acknowledge the Applicant's lengthy residence in the United States, his family ties, the medical conditions experienced by the Applicant and his spouse and daughter, and that his family would suffer hardship without him. We also recognize the Applicant's history of employment, payment of taxes, cooperation in the investigation or prosecution of the felonious assault, expression of remorse, and that he no longer drinks alcohol.

However, these factors are insufficient to overcome the severity of the Applicant's 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). First, although the Applicant's 2000 conviction for operating under the influence with a child under the age of 16 did not occur recently, it was serious, as driving under the influence (DUI) offenses pose a risk to public safety that is not inherent in other types of offenses. *See Matter of Siniauskas*, 27 I&N Dec. 207, 208 (BIA 2018) (citations omitted) (holding that in a determination of whether an alien is a danger to the community in bond proceedings, driving under the influence is a significant adverse consideration). Here, the offense is even more serious due to the presence of the Applicant's daughter, who was a small child at the time, in the vehicle with him. While the Applicant's use of alcohol to deal with personal difficulties following his victimization is supported by the record, this explanation "does not negate the dangerousness of his conduct." *Id.* at 209. Moreover, we afford additional negative weight to the Applicant's failure to comply with his probation for this offense, resulting in his discharge from probation and sentence of additional jail time.

The record further demonstrates the severity of the acts that led to the Applicant's 2001 domestic violence conviction. According to the record, the Applicant punched his spouse in the face with such force that she "'blacked out' and flew up onto the living room table." Based on this factual account, the record indicates that the Applicant committed and was convicted of a "serious violent crime" within the meaning of 8 C.F.R. § 245.24(d)(11), for which USCIS will not generally exercise its

discretion in a U adjustment applicant's favor. Although the offense is not recent, the regulations do not place a time limit on when the commission of or conviction for the offense must have occurred.

Regarding the Applicant's 2009 arrest for felony manufacturing/delivering 900+ grams cocaine, the Director determined that given the severity of the charges, the Applicant had not provided sufficient evidence of the circumstances leading to his arrest or the dismissal of charges. On appeal, the Applicant does not dispute the seriousness of the charges; however, he argues that he provided a detailed written account of what happened and copies of all records obtained. He claims that the state-level charges against him, the only charges he faced, were dismissed due to insufficient evidence, with the judge recognizing that he was in the wrong place at the wrong time. He further asserts that USCIS failed to consider this evidence, as he was not involved in the sale of narcotics and has no other narcotics-related arrests or convictions.

Although we do not give substantial weight to arrests absent convictions or other corroborating evidence of the allegations, we may consider them 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). Here, the record shows that the Applicant provided a detailed statement regarding this arrest, court records, the disposition, and redacted records obtained through FOIA requests. Although the arrest is not a significant negative factor, given the dismissal of the charges for insufficient evidence, we may afford it some adverse weight. Nonetheless, due to the severity of the Applicant's convictions, this issue is not determinative, because notwithstanding the 2009 arrest the Applicant has not demonstrated that he warrants a favorable exercise of discretion.

The Applicant also claims on appeal that USCIS erred in denying his adjustment application because he has no new negative discretionary factors since the approval of his U petition, he disclosed his prior criminal and immigration history when he applied for U status and USCIS approved his waiver application. While we acknowledge that USCIS previously waived the Applicant's criminal and immigration violations in granting him U status, and afford positive weight to this decision, a U adjustment application is a separate adjudication and we are not bound by our prior determinations.[1] Moreover, U adjustment applications follow a different regulatory standard than U petitions and associated waivers of inadmissibility, given that the language of 8 C.F.R. § 245.24(d)(11) generally precludes us from exercising our discretion in favor of a U adjustment applicant who has committed or been convicted of a "serious violent crime."

The Applicant further argues that he merits a favorable exercise of discretion because he has learned from his mistakes, his convictions occurred more than 17 years ago, and the record shows that he and his family would suffer extreme hardship upon his removal. We recognize that the Applicant's

[1] The Applicant further claims that USCIS erred in denying his motion to reconsider because the denial was based on an incorrect application of 8 C.F.R. § 245.24(d)(11). Citing to 8 C.F.R. § 212.17, which governs waivers of inadmissibility for U nonimmigrants, he claims that there was no recognition that discretion was already exercised in his favor, or why it is not warranted in the instant case with the same set of facts, and only additional positive factors, since his grant of U status. However, as discussed herein, as the Applicant has not established that he warrants a favorable exercise of discretion under 8 C.F.R. § 245.24(d)(11), he has not established that USCIS incorrectly applied relevant law or policy.

convictions occurred in 2000 and 2001, that his family may suffer hardship upon his removal, and that he provided evidence of other family unity and humanitarian considerations including his lengthy residence in the United States, role as provider to his family, history of employment and payment of taxes, and expression of remorse. However, due to the severity of the Applicant's criminal and immigration violations, which consist of a conviction for operating under the influence with an occupant under the age of 16, a conviction for domestic violence that is a "serious violent crime" within the meaning of 8 C.F.R. § 245.24(d)(11), an entry without inspection following voluntary departure, and a 2009 arrest on felony drug-related charges, the Applicant has not established that it is in the public interest to adjust his status to that of an LPR such that a favorable exercise of discretion is warranted. Consequently, the Applicant has not demonstrated that he satisfies the eligibility requirements for adjustment of status under section 245(m) of the Act.

## III. CONCLUSION

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 a favorable exercise of discretion is warranted. As such, the Applicant is ineligible to adjust his status to that of an LPR.

**ORDER:** The appeal is dismissed.

Cite as *Matter of R-D-M-*, ID# 4132584 (AAO June 26, 2019)