

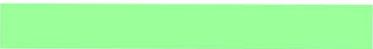
(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



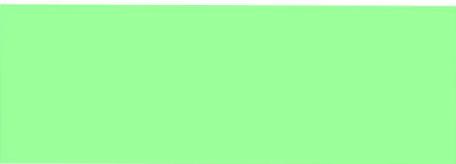
U.S. Citizenship
and Immigration
Services

Date: Office: VERMONT SERVICE CENTER FILE: 
NOV 13 2013

IN RE: APPLICANT: 

APPLICATION: Application to Adjust Status (Form I-485) for an Alien in U Nonimmigrant Status Pursuant to Section 245(m)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1255(m)(1)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the Application to Register Permanent Residence or Adjust Status (Form I-485), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application will remain denied.

The applicant, who was granted U-1 nonimmigrant status, seeks to adjust his status under section 245(m)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(1).

Applicable Law

Section 245(m)(1) of the Act states:

The Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 101(a)(15)(U) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 212(a)(3)(E), unless the Secretary determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if --

(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section 101(a)(15)(U); and

(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

The regulation at 8 C.F.R. § 245.24 provides, in pertinent part:

(b) *Eligibility of U Nonimmigrants.* Except as described in paragraph (c) of this section, an alien may be granted adjustment of status to that of an alien lawfully admitted for permanent residence, provided the alien:

(1) Applies for such adjustment;

(2)(i) Was lawfully admitted to the United States as either a U-1, U-2, U-3, U-4 or U-5 nonimmigrant, as defined in 8 C.F.R. § 214.1(a)(2), and

(ii) Continues to hold such status at the time of application; or accrued at least 4 years in U interim relief status and files a complete adjustment application within 120 days of the date of approval of the Form I-918, Petition for U Nonimmigrant Status;

(3) Has continuous physical presence for 3 years as defined in paragraph (a)(1) of this section;

(4) Is not inadmissible under section 212(a)(3)(E) of the Act;

(5) Has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence; and

(6) Establishes to the satisfaction of the Secretary that the alien's presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

(c) *Exception.* An alien is not eligible for adjustment of status under paragraph (b) of this section if the alien's U nonimmigrant status has been revoked pursuant to 8 C.F.R. § 214.14(h).

Facts and Procedural History

The applicant was initially granted interim relief on July 23, 2004 based upon a request for U nonimmigrant status pending publication of the U nonimmigrant visa interim rule. On January 4, 2010, the director approved the applicant's Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition). The applicant's U-1 status was valid from July 23, 2004, when he was granted interim relief, until January 3, 2011. The applicant filed the instant Form I-485 on December 23, 2010, and the director denied the applicant's adjustment of status application on discretionary grounds. The petitioner timely appealed the denial of his Form I-485.

On appeal, counsel submits a brief stating that the applicant merits a favorable exercise of discretion because the positive factors outweigh his criminal conviction.

Analysis

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Based on the evidence in the record, we find no error in the director's decision to deny the applicant's adjustment of status application.

Section 245(m) of the Act makes adjustment of status a discretionary benefit. The applicant bears the burden of showing that discretion should be exercised in his favor. 8 C.F.R. § 245.24(d)(11). While U adjustment applicants are not required to demonstrate their admissibility, U.S. Citizenship and Immigration Services (USCIS) may consider all factors when making its discretionary decision on the application. *Id.* Generally, favorable factors such as family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion. However, where adverse factors are present, it will be necessary for the applicant to offset these factors by showing sufficient mitigating factors. *Id.* This rule permits applicants to submit information regarding any mitigating factors they would like USCIS to consider when determining whether a favorable exercise of discretion is appropriate. *Id.* Depending on the nature of an applicant's 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. *Id.* Moreover, depending on the gravity of the alien's adverse factors, such a showing might still be insufficient. *Id.*; see *Matter of Jean*, 23 I&N Dec. 373, 383-384 (A.G. 2002), aff'd *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006); see also *Pinentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Meija v. Gonzales*, 499 F.3d 991 (9th Cir. 2007). For example, only the most compelling positive factors would justify a favorable exercise of discretion 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. 8 C.F.R. § 245.24(d)(11).

On May 11, 2011, the applicant was arrested for recording his minor stepdaughter in the bathroom. He pled guilty, and on October 5, 2011, he was convicted of improper photography/visual recording and sentenced to two years of incarceration suspended and five years of probation. On appeal, counsel claims that the applicant's presence in the United States is justified on humanitarian grounds, to ensure family unity, and is in the public interest. Counsel states that the applicant is the victim of a heinous crime committed by his stepfather, he suffers from two serious mental health disorders, and if he returns to Mexico, his existing trauma would be exacerbated because of the country conditions in Mexico. She also contends that the petitioner's mental health disorders "played a role in his indiscretion." However, there is no evidence in the record to support this contention. The applicant's medical records showing that he suffered from depression and post-traumatic stress disorder (PTSD) are dated 1998 and earlier, and the applicant's crime occurred over 14 years after his own victimization by his stepfather. There is no evidence indicating that the petitioner still suffers from mental health disorders, or that they would be aggravated upon his return to Mexico. Furthermore, even if there were evidence in the record that the applicant is still suffering from depression and PTSD, this would not negate his culpability, nor does the record show that at the time he committed the crime, he was unable to understand the wrongfulness of his behavior.

Counsel also alleges that the applicant would have no protection in Mexico against his stepfather's family who would likely retaliate against him for his cooperation in sending his stepfather to prison. Again, there is no evidence to support this contention, and the petitioner himself makes no mention of such a concern in his affidavits. While the record establishes that the applicant was the victim of a heinous crime and suffered from serious mental health disorders, the overall evidence does not establish that the applicant's presence in the United States is justified on humanitarian grounds when balanced against the negative factors.

In his statement dated December 3, 2010, the applicant states all of his "loved ones" reside in the United States, including his wife and stepchildren, and he wants to continue to provide support to them. However, the applicant admits that he is not allowed near his stepdaughter while he is on probation. Counsel states that the applicant has resided in the United States for the last 15 years, he is an asset to his community, and he is gainfully employed. Counsel claims that the applicant was placed on community supervision because the criminal court judge believed the applicant was "not a danger to the community and deserve[d] another chance." Counsel reports that the applicant makes his scheduled fine payments

and completed his community service hours. However, the record shows that the applicant has not completed his probation. Counsel's assertions are insufficient to show that the applicant's presence in the United States would be in the interest of the public given the severity of his conviction.

The favorable and mitigating factors in the present case are the applicant's family in the United States and his history of employment. However, only the most compelling positive factors would justify a favorable exercise of discretion since the record shows that the applicant's crime was of a sexual nature and committed against a child, the applicant's 14 year old stepdaughter. *See* 8 C.F.R. § 245.24(d)(11). In addition, other adverse factors include the applicant's entry into the United States without inspection and unlawful presence in the United States. The AAO finds that when taken together, the adverse factors in the present case outweigh the favorable factors; therefore, the AAO denies the applicant's application on discretionary grounds, and concurs with the director's negative discretionary finding.

Conclusion

In these proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 245.24(b),(d). Here, that burden has not been met as to the applicant's eligibility to adjust status under section 245(m)(1) of the Act and the appeal shall be dismissed.

ORDER: The appeal is dismissed. The application remains denied.