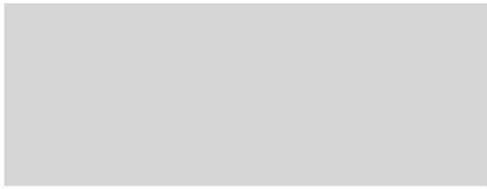




U.S. Citizenship
and Immigration
Services

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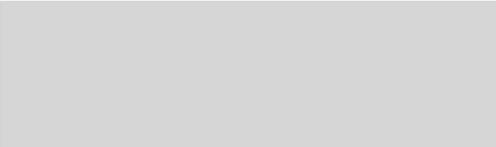
APPLICATION RECEIPT #:

IN RE: Applicant:

APPLICATION:

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

ON BEHALF OF APPLICANT:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, who was granted U-1 nonimmigrant status, seeks to adjust his status under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The director denied the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), because the applicant did not demonstrate that the positive factors in his case outweighed his criminal history, and therefore he could not show that his adjustment of status would be justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

Applicable Law

Section 245(m) of the Act states, in pertinent part:

(1) 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 CFR § 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 CFR § 214.14(h).

Facts and Procedural History

The director granted U-1 nonimmigrant status to the applicant based upon an approved Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), valid from August 6, 2009 to August 5, 2013. The applicant filed the instant Form I-485 on July 23, 2013. The director issued a Request for Evidence (RFE) that, among other things, the positive factors in the applicant's case outweighed his criminal history and acknowledged gang membership. The applicant responded to the RFE with an affidavit and additional evidence. The director found that the negative factors outweighed the positive and that the applicant had not shown that he was eligible for adjustment of status as a matter of discretion.

Analysis

We conduct appellate review on a *de novo* basis. Upon review of the record, we find no error in the director's decision to deny the 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). Although 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 the adverse factors, the applicant may be required to demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. *Id.* Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. *Id.*; *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002), *aff'd*, *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006); *see also Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Mejia 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).

In *Miguel Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000), the Board of Immigration Appeals (BIA) stated, “[w]e have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.” *Devison-Charles* at 1365; *see also Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). The Board added, “[w]e have also held that the standards established by Congress, as embodied in the FJDA (Federal Juvenile Delinquency Act), govern whether an offense is to be considered an act of delinquency or a crime.” *Devison-Charles* at 1365. The FJDA defines a “juvenile” as “a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday,” and “juvenile delinquency” as “the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.” *Ramirez-Rivero* at 137 (citing 18 U.S.C. § 5031).

Although an act of juvenile delinquency is not a criminal conviction on which to base removal or bar relief from removal, a juvenile offense can be considered in reviewing an application for a discretionary benefit, such as adjustment of status. *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006); *see* 8 C.F.R. § 245.24(d)(11).

The record demonstrates that the applicant’s history of arrests and convictions is as follows:

- On [REDACTED] 2005, as a juvenile, he was arrested for criminal conspiracy in violation of Cal. Penal Code § 182 and participation in a criminal street gang in violation of Cal. Penal Code § 186.22. In relation to this arrest, he appeared in juvenile court on [REDACTED] 2005 to face charges of fighting; noise; offensive words in violation of Cal. Penal Code § 415 and possess/manufacture/sell dangerous weapon in violation of Cal. Penal Code § 12020(a). The charges were dismissed for insufficient cause.

- The applicant states on his Form I-918 that in 2005 or 2006, as a juvenile, he was arrested for shoplifting and sentenced to community service.
- On [REDACTED], 2007, he was arrested for public intoxication in violation of Cal. Penal Code § 647(f). The documentation relating to his arrest also indicated that he was a member of the [REDACTED] gang. He was released without being charged.
- On [REDACTED] 2008, he was arrested and charged with oral copulation with a person under 18 in violation of Cal. Penal Code § 288A(b)(1), annoying and molesting a victim under 18 in violation of Cal. Penal Code § 647.6(a), contributing to the delinquency of a minor in violation of Cal. Penal Code § 272, and possession of marijuana in violation of Cal. Health and Safety Code § 11357(b). He pled nolo contendere to oral copulation with a person under 18 and was sentenced to 60 days in jail and 24 months of probation. The charge to which he pled nolo contendere specified that the minor involved was 14 years old. The remaining charges were dismissed.
- On [REDACTED] 2011, he pled nolo contendere to driving under the influence and causing bodily injury to another person in violation of Cal. Penal Code § 23153(a). The charge to which he pled nolo contendere specified that his actions proximately caused bodily injury to two people. He was sentenced to 90 days in jail and three years of probation. During the same proceedings, he was charged with failing to stop at the scene of an accident resulting in injury to another person. That charge was dismissed pursuant to plea agreement.

In a statement filed with his Form I-290B,¹ the applicant asserts that the director erred in basing the denial of his adjustment of status application on two misdemeanor convictions, other arrests that were not based on probable cause, and a false accusation of gang membership. He states that he was not a member of a criminal gang and that the accusation of membership was based on racial profiling. He notes that his arrest for participating in a criminal street gang led to dismissal of the charges for insufficient cause. He claims that he was instead a member of a Mexican folkloric dance group whose director “described him as a respectful young man who made enormous contributions to the art form and was proud of his Mexican heritage,” and that he was “an inspiration to his peers” in high school. The applicant also notes that he is currently a student at [REDACTED] is employed, and needs mental health treatment that he would be unable to obtain in Mexico. Additionally, he contends that the director erred in considering his entry without inspection at age 12 a negative factor when the director had also approved a waiver of inadmissibility for that entry on the ground that granting it was in the public interest.

The applicant also asserts on appeal that discretionary relief cannot be denied based solely on uncorroborated arrest records. However, the case he cites in support of this assertion indicates that arrest reports can be considered negative discretionary factors. In *Matter of Arreguin*, the Board of Immigration Appeals (Board) stated that it was “hesitant to give substantial weight to an arrest

¹ In Part 3 of his Form I-290B, filed December 15, 2014, the applicant checked the box which states, “I am filing an appeal to the AAO. My brief and/or additional evidence will be submitted to the AAO within 30 calendar days of filing the appeal.” He also indicated in a statement accompanying the Form I-290B that he would file a full brief and supplemental documentation. However, we have not received any additional brief or evidence as of the date of this decision. Therefore, we consider the record complete.

report, absent a conviction or corroborating evidence of the allegations contained therein.” 21 I&N Dec. 38, 42 (BIA 1995); *see also Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (finding that the Board erred in giving an arrest report “significant weight” but clarifying that “this is not to say that we read *Arreguin* to prohibit any consideration of arrest reports in the weighing of discretionary factors.”); *Sorcía v. Holder*, 643 F.3d 117, 126 (4th Cir. 2011) (noting that *Arreguin* “did not indicate that it was *per se* improper to consider an arrest report . . .”). Therefore, although we do not give them substantial weight, we are not precluded from considering the applicant’s arrests as negative factors in our discretionary determination.

In light of his waiver of inadmissibility, we do not find the applicant’s entry without inspection to be a negative discretionary factor in his application for adjustment of status. Instead, we find the applicant’s long history of residence in the United States since he was a child to be a favorable factor. Additional favorable factors include his close ties to lawful permanent resident and U.S. citizen family members and the support he provides to them, his remorse for his mistakes and criminal activity, his employment, and his college attendance. In submissions below, he included proof of his employment and school attendance, letters of support from family members, co-workers, and friends, his high school diploma, and additional certificates of participation and awards.²

We have considered the favorable factors in this case, but we do not find that they outweigh the negative factors. The applicant was arrested at least five times since 2005. At least one of those arrests involved a weapon, three involved drugs or intoxication, and one involved fighting. His final two arrests, which occurred when he was an adult, resulted in convictions for serious crimes. The records for the first conviction, for oral copulation with a minor in violation of Cal. Penal Code § 288A(b)(1), indicate that at the time of the incident, he was 19 and the victim was 14. Additionally, his conviction under Cal. Penal Code § 23153(a) involved bodily harm to two people, which he admits resulted from driving while intoxicated.

Although the applicant has expressed remorse for these incidents, they were serious offenses, one of which involved a sexual crime with a child and the other of which involved bodily injury to others. Furthermore, the applicant’s three-year probation was scheduled to end in January 2014, several months after he filed his adjustment of status application. The applicant has not demonstrated that a sufficient amount of time has passed since his last contact with the criminal justice system such that he is fully rehabilitated. Additionally, in response to the RFE he submitted a letter from [REDACTED] LCSW, dated April 10, 2014, which states that the applicant is undergoing mental health treatment with the goals of “reducing mental health symptoms and staying out of contact with the criminal justice system.” Ms. [REDACTED] further states that the applicant’s participation in his treatment “speaks to his commitment to self-improvement.” Although the applicant’s participation in mental health treatment is positive, the fact that he was still working toward a goal of avoiding law enforcement contact as of April 10, 2014 indicates that he has not yet reached rehabilitation.

² He also submitted a document which appears to be from Alcoholics Anonymous, but it is in Spanish and is not accompanied by a certified translation, so we cannot consider it. 8 C.F.R. § 103.2(b)(3).

Additionally, the applicant has provided insufficient evidence to outweigh information that he was involved in a criminal gang. Records of the applicant's arrest for public intoxication on [REDACTED] 2007 indicate that he was a member of a criminal gang called the [REDACTED]. The applicant admits to having been a member of a group with this name, although he claims it was a group of friends and was not intended to be related to a gang. In his statement submitted in response to the RFE, the applicant notes that the allegation of his gang involvement was provided to the police by a resource officer and a probation officer assigned to "monitor[] the student body at the school" Although he alleges that the officers simply assumed he was in a gang because he associated with a group of friends, his statement alone is not enough to outweigh these reports. Furthermore, according to the police report related to the qualifying criminal activity for which the applicant obtained U nonimmigrant status, the applicant told the police at that time that he "had been an associate of a [REDACTED] gang" Additionally, during an interview with Immigration and Customs Enforcement (ICE) on August 12, 2008, the applicant stated that he was a member of the [REDACTED] gang.

After considering the evidence in its totality, based upon our discretion, we find that the applicant's criminal history and the evidence of his gang affiliation outweigh the favorable factors in his case. Therefore, the applicant has not demonstrated that his adjustment of status would be justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Section 245(m) of the Act.

Conclusion

In these proceedings, the applicant bears the burden of proving his eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

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