

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

(b)(6)

DATE: JUN 04 2015

FILE #: [REDACTED]

APPLICATION RECEIPT #: [REDACTED]

IN RE: Applicant: [REDACTED]

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:

[REDACTED]

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

Thank you,

A handwritten signature in cursive script that reads "Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting 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 sustained.

The applicant, who was granted U-3 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, because the applicant failed to demonstrate that the positive factors in his case outweighed his criminal history, and therefore he did not establish that his adjustment to lawful permanent residence is 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

On January 4, 2010, the director granted U-3 nonimmigrant status to the applicant based upon an approved Petition for Qualifying Family Member of a U-1 Recipient (Form I-918 Supplement A) that his mother filed on his behalf. The applicant's U-3 status was valid until September 23, 2013. He filed the instant Form I-485 on September 20, 2013. The director issued a Notice of Intent to Deny (NOID), noting that the applicant had a record of arrests and convictions, and giving the applicant an additional opportunity to demonstrate that he had been rehabilitated and that the positive equities in his case outweighed his criminal history. The applicant responded to the NOID with an affidavit and additional evidence. The director denied the applicant's adjustment of status application because the applicant had failed to show that the positive equities in his case outweighed the negative or that his adjustment of status would be in the public interest.

Analysis

We conduct appellate review on a *de novo* basis. Upon review of the record, the petitioner has established that the favorable factors outweigh the negative factors and that the applicant merits adjustment of status as a matter of discretion.

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 alien's adverse factors, such a showing might still be insufficient. *Id.*; *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 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).

The record indicates that the applicant's history of arrests and convictions is as follows:

- On [REDACTED] he was arrested for criminal trespass in the third degree in violation of N.Y. Penal Law § 140.10. He pled guilty to disorderly conduct in violation of N.Y. Penal Law § 240.20 and was sentenced to conditional discharge and community service.
- On [REDACTED] he was arrested for disorderly conduct in violation of N.Y. Penal Law § 240.20 and criminal possession of a weapon in the fourth degree in violation of N.Y. Penal Law § 265.01. He pled guilty to disorderly conduct and was sentenced to conditional discharge and community service.
- On [REDACTED] he was arrested for criminal possession of marihuana in the fifth degree in violation of N.Y. Penal Law § 221.10 and unlawful possession of marihuana in violation of N.Y. Penal Law § 221.05. The charges were dismissed and the case was sealed pursuant to N.Y. Crim. Pro. Law § 160.50.
- On [REDACTED] he was arrested for criminal possession of marihuana in the fifth degree in violation of N.Y. Penal Law § 221.10 and unlawful possession of marihuana in violation of N.Y. Penal Law § 221.05. He pled guilty to disorderly conduct in violation of N.Y. Penal Law § 240.20 and was sentenced to conditional discharge and a fine. The case was later sealed after conviction pursuant to N.Y. Crim. Pro. Law § 160.55.
- On [REDACTED] he was arrested for criminal possession of marihuana in the fifth degree in violation of N.Y. Penal Law § 221.10 and unlawful possession of marihuana in violation of N.Y. Penal Law § 221.05. The charges were dismissed and the case was sealed pursuant to N.Y. Crim. Pro. Law § 160.50.
- On [REDACTED] he was arrested for assault in the third degree in violation of N.Y. Penal Law § 120.00, criminal obstruction of breathing or blood circulation in violation of N.Y. Penal Law § 121.11, and harassment in the second degree in violation of N.Y. Penal Law

§ 240.26. The charges were dismissed and the case was sealed pursuant to N.Y. Crim. Pro. Law § 160.50.

- On [REDACTED] he was arrested for disorderly conduct in violation of N.Y. Penal Law § 240.20, operating a motor vehicle while under the influence of drugs in violation of N.Y. Vehicle and Traffic Law § 1192.4, and stopping, standing, or parking on a crosswalk in violation of N.Y. Vehicle and Traffic Law § 1202.1d. He pled guilty to disorderly conduct and was sentenced to conditional discharge, a fine, and a drinking driver referral. The case was later sealed after conviction pursuant to N.Y. Crim. Pro. Law § 160.55.
- On [REDACTED] he was arrested for criminal possession of marihuana in the fifth degree in violation of N.Y. Penal Law § 221.10 and unlawful possession of marihuana in violation of N.Y. Penal Law § 221.05. The charges were dismissed and the case was sealed pursuant to N.Y. Crim. Pro. Law § 160.50.

On appeal, the applicant asserts that the director erred in finding him ineligible for adjustment of status based on “consistent criminal activity since [REDACTED]” The applicant states that although he has been arrested eight times, he has never been convicted of a crime. He notes that four of his arrests resulted in dismissal of the charges and sealing of the case. He further states that the other four of his arrests resulted in convictions for disorderly conduct, which under New York law is a violation, not a crime. Therefore, he alleges that his history of arrests does not constitute a criminal history and that it should not prevent him from demonstrating eligibility for adjustment of status as a matter of discretion. The applicant also contends that he has demonstrated sufficient positive equities to outweigh his history of arrests.

In an affidavit submitted on appeal, the applicant states that he has lived in the United States since he was nine years old and attended school here. He states that he is close to his family, friends, and girlfriend in the United States, and that being separated from them would be very difficult. He indicates that he is particularly close with his mother, who was abused by his father when the applicant was a child. The applicant asserts that he and his mother share the financial responsibilities for their house and that he intends to help take care of her when she is older. He notes that he is also very close to his girlfriend, who lives with him and relies on him for support. He also fears that he would be targeted by criminals if he were to return to Ecuador because he would be considered an outsider. The applicant also states that he is an active member of his church and that he participates in community service activities there. He also claims that he has owned a business since 2012 and that he employs four other people. He states that he is grateful for the opportunities he has had in the United States and hopes to continue his work and education here. He expresses remorse for his arrests and states that he wants to contribute to his community and support his family. In affidavits submitted below, the applicant explains the circumstances of his arrests and convictions, claiming that some incidents resulted from misunderstandings or were related to items belonging to others, and again expresses remorse for his mistakes.

In support of the applicant’s assertions, the record contains documentation that he owns a delivery business, letters of support from friends and family members who state that the applicant is a responsible and helpful person, an article and photographs to show that he has assisted his mother

with her farming business, and letters from friends who assert that the applicant attends church and participates in community service activities.

Favorable factors in this case are the applicant's long history of residence in the United States since he was nine years old, his close ties to his family, his involvement in church, the fact that he owns a business, and his remorse regarding his past mistakes.

The negative factors include the applicant's history of arrests and his convictions for disorderly conduct. Although we do not give them significant weight, it is appropriate for us to consider arrests that do not lead to conviction and non-criminal violations in our discretionary analysis. *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995); *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014); *Sorcía v. Holder*, 643 F.3d 117, 126 (4th Cir. 2011). The applicant acknowledges in his affidavit submitted below that at least four of his arrests involved marijuana, that one arrest involved violence in relation to a domestic dispute with his father and brother, and that during one arrest, the police discovered a box cutter in a bag the applicant was holding.

Despite the negative factors, we find that the applicant has demonstrated that he merits adjustment of status as a matter of discretion. Of the applicant's eight arrests, four cases were dismissed and sealed pursuant to N.Y. Crim. Pro. Law § 160.50, which provides for sealing of a criminal action when that action has been terminated in favor of the accused. Therefore, the arrests that were sealed pursuant to N.Y. Crim. Pro. Law § 160.50 do not weigh heavily against the applicant because their disposition indicates that he was not found guilty of the charges against him.

Of the remaining four arrests, all resulted in convictions for disorderly conduct under N.Y. Penal Law § 240.20, which states, "Disorderly conduct is a violation." N.Y. Penal Law § 10.00 provides, in pertinent part:

3. "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.
4. "Misdemeanor" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.
5. "Felony" means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.
6. "Crime" means a misdemeanor or a felony.

Therefore, while the applicant's convictions for disorderly conduct are negative discretionary factors, they are convictions for violations, not crimes, and do not carry significant weight. Additionally, two of the applicant's disorderly conduct convictions were sealed pursuant to N.Y. Crim. Pro. Law

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§ 160.55, which provides for the sealing of a criminal proceeding that resulted in a conviction for a “noncriminal offense.”

When viewed in their totality, the positive factors in the present case outweigh the adverse factors. Accordingly, we withdraw the director’s decision and sustain the appeal, as the applicant merits a favorable exercise of discretion.

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; 8 C.F.R. § 214.14(c)(4); *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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.