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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

[Redacted]

DATE:

MAY 01 2015

[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.

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,

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

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-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 May 7, 2010, the director granted U-3 nonimmigrant status to the applicant based upon an approved Petition for Qualifying Family Member of U-1 Recipient (Form I-918 Supplement A) that his mother filed on his behalf. The applicant's U-3 status was valid until October 15, 2013. He filed the instant Form I-485 on October 15, 2013. The director issued a Notice of Intent to Deny (NOID), noting that the applicant had a record of arrests, criminal charges, 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, we find no error in the director's decision to deny the application for adjustment of status.

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 Pinetel 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 BIA 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).

A conviction that is vacated or expunged for rehabilitative reasons or to avoid adverse immigration consequences still qualifies as a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd* on other grounds, *Matter of Pickering* 454 F.3d 525 (6th Cir. 2006).

The applicant's history of arrests and convictions is as follows:

- On [REDACTED] 2009, the applicant was arrested for malicious burning of property in violation of Cal. Penal Code § 451(b). The charges were dismissed.
- On [REDACTED] 2009, the applicant was arrested for vehicle theft in violation of Cal. Vehicle Code § 10851(a), possession of burglary tools in violation of Cal. Penal Code § 466, and burglary in violation of Cal. Penal Code § 460(b). The charge of vehicle theft was sustained in Juvenile Court and the court ordered juvenile detention and probation. The other charges were dismissed based on plea bargain.
- On [REDACTED] 2009, the applicant was arrested for possession of burglary tools in violation of Cal. Penal Code § 466. No charges were filed.
- On [REDACTED] 2011, the applicant was arrested for possession of burglary tools in violation of Cal. Penal Code § 466 and receipt of stolen property in violation of Cal. Penal Code § 496(a). The charge of possession of burglary tools was dismissed. The charge of receipt of stolen property was sustained in Juvenile Court.
- On [REDACTED] 2011, the applicant was arrested for receipt of stolen property in violation of Cal. Penal Code § 496(a) and petty theft in violation of Cal. Penal Code § 488. The charge of receipt of stolen property was sustained in Juvenile Court and the court ordered juvenile detention and probation. No charges were filed for petty theft.
- On [REDACTED] 2012, at the age of 18, the applicant was arrested for loitering on private property in violation of Cal. Penal Code § 647(h) and attempted first degree burglary in violation of Cal. Penal Code § 460(a). The charge of loitering on private property was dismissed based on plea bargain. The applicant was convicted of attempted first degree burglary and sentenced to six months of imprisonment, three years of probation, and restitution to the victim.

In his appeal brief, the applicant asserts that the director erred in finding him ineligible for adjustment of status based on "consistent criminal activity since 2009." The applicant states that although he has been arrested, his acts in 2009 and 2011 were acts of juvenile delinquency and should not be considered crimes. He states that his only criminal conviction as an adult was for attempted residential burglary in 2012, and that he has not engaged in criminal activity since that time. He also notes that he has petitioned the Superior Court for early termination of probation and expungement of his criminal record based on his rehabilitation. The applicant also contends that the director failed to consider the positive equities in his case, including his residence in the United States since he was a young child, his regular employment, the financial support he provides to his family, and his ties to U.S. citizen and lawful permanent resident family members.

In his affidavit submitted on appeal, the applicant states that he has learned from his mistakes and regrets the poor choices he made. He asserts that he has worked to become a productive member of society by furthering his education and obtaining employment. He notes that he wants to support his family. He also states that his younger sister has been diagnosed with Systemic Lupus Erythematosus, a chronic autoimmune disorder, and that he is responsible for picking up her medication and taking her to the doctor when his mother and brother cannot do so. The applicant also notes that he entered the United States when he was approximately five years old, was educated here, and wants to make a life in this country.

The applicant also submits on appeal evidence that establishes that since his conviction in 2012, the applicant has earned a High School Equivalency Certificate (GED), obtained a driver's license, participated in a community reentry program, completed a vocational training program with perfect attendance, and obtained regular employment. He has submitted letters of recommendation from his counselors and teachers indicating that he has dedicated himself to making positive changes in his life and has been successful in his counseling and training programs. The applicant's probation officer also states in a letter that the applicant has not engaged in any criminal activity since his conviction in 2012, has complied with all conditions of his probation, and was expected to complete his probation by April 2, 2015. The applicant has also submitted a letter from his mother, who states that the applicant contributes to his family financially and helps his sister when she needs care at home and in the hospital.

Additionally, the record demonstrates that on [REDACTED] 2014, the Superior Court, [REDACTED] California, granted the applicant's petition for early termination of his probation, dismissed the charges against him, and vacated his conviction based on the applicant's rehabilitation.

Favorable factors in this case are the applicant's long history of residence in the United States since he was five years old, his close family ties in the United States, his contributions to the financial and physical wellbeing of his family, his employment, his efforts to obtain a GED and participate in rehabilitation programs, the fact that his probation was terminated early, and his expressions of remorse for his mistakes.

The negative factors are the applicant's six arrests between 2009 and 2012, his three juvenile delinquency adjudications, and his conviction for attempted first degree burglary. Although his juvenile arrests and delinquency adjudications do not qualify as crimes, they are relevant to our discretionary determination. *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006); *see also* 8 C.F.R. § 245.24(d)(11). Additionally, the applicant's conviction for burglary, which was vacated for rehabilitative purposes, remains a conviction for immigration purposes and is relevant to our analysis. *Matter of Roldan*, 22 I&N Dec. at 523; *Matter of Pickering*, 23 I&N Dec. at 624. We acknowledge that the applicant has made efforts to rehabilitate himself, including complying with the terms of his probation, participating in vocational training and a community reentry program, furthering his education, and finding employment, and that his probation was terminated on this basis. However, the applicant's most recent conviction was in April 2012. At the time of filing and throughout the adjudication of his application, he remained on probation. His probation was

ultimately terminated one month after the filing of this appeal. Given the applicant's latest conviction and the minimal amount of time that has passed since his even more recent probationary status, the applicant has not sufficiently demonstrated that he has been fully rehabilitated.

When viewed in their totality, the negative factors in the present case outweigh the positive factors. Accordingly, the applicant has not demonstrated that he is rehabilitated or that his adjustment of status is warranted for humanitarian reasons, for family unity, or is otherwise in the public interest.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.