



**U.S. Citizenship
and Immigration
Services**

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

MATTER OF R-A-M-M-

DATE: OCT. 21, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Applicant, who was granted U-1 nonimmigrant status, seeks to adjust his status to lawful permanent resident. Immigration and Nationality Act (the Act) § 245(m), 8 U.S.C. § 1255(m). The Director, Vermont Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the Form I-485, Application to Register Permanent Residence or Adjust Status, because the Applicant did not demonstrate that the positive factors in his case outweighed his criminal history, and therefore he did not establish eligibility for adjustment to lawful permanent residence as a matter of discretion. On appeal, the Applicant submits a brief and additional evidence.

I. 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).

II. RELEVANT FACTS AND PROCEDURAL HISTORY

On February 25, 2010, the Director granted U-1 nonimmigrant status to the Applicant based on an approved Form I-918, Petition for U Nonimmigrant Status. The Applicant's U-1 nonimmigrant

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status was valid until February 24, 2014. The Applicant filed the Form I-485 on April 5, 2013. On September 19, 2013, the Director issued a request for evidence (RFE) of, among other things, the Applicant's continuous physical presence and his eligibility for adjustment of status as a matter of discretion. The Applicant responded to the RFE with additional evidence. On August 28, 2014, the Director issued a second RFE of the disposition of an arrest that occurred on November 21, 2013, and the Applicant's eligibility for adjustment of status as a matter of discretion. The Applicant responded to the second RFE with a brief and additional evidence. The Director found the evidence insufficient to establish that the Applicant's adjustment of status was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest. Therefore, the Director denied the application as a matter of discretion.

III. 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 in the exercise 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." *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).

The record reflects that the Applicant's history of arrests and convictions is as follows:

- On [REDACTED] 2005, the Applicant was arrested and charged with aggravated driving while under the influence of an intoxicating liquor and/or drug and failure to maintain his vehicle within its traffic lane. He was found guilty and was sentenced to 90 days in prison with 88 days suspended, 364 days of community service, alcohol treatment, and fines.

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- On [REDACTED] 2008, the Applicant was arrested and charged with disorderly conduct and resisting an officer. He was convicted and sentenced to 180 days of unsupervised probation, drug and alcohol screening, anger management training, and fees.
- On [REDACTED], 2013, the Applicant was indicted by a grand jury on charges of trafficking in controlled substances and possession of drug paraphernalia and, on [REDACTED], 2015, he was convicted of both charges following a jury trial.

On his Form I-918, filed on September 25, 2009, the Applicant answered “No” in response to several questions in Part 3.1 regarding whether he had a criminal history. The Applicant indicated, in pertinent part, that he had never been arrested, cited, or detained by law enforcement for any reason, had never been charged with or convicted for committing any crime or offense, had never been placed on probation, and had never been in jail or prison. These statements, which were made under penalty of perjury, were false, as the Applicant was convicted of two crimes, as listed above, prior to submitting his Form I-918.

On his Form I-485, filed on April 5, 2013, the Applicant provided information regarding his criminal history from 2005 and 2008. However, he stated in the personal declaration submitted with his Form I-485 that he “respect[s] the laws of this country and the legal system of the U.S.A. . . . [and had] never been involved in any legal problems.” He did not address his criminal convictions in his personal declaration. In response to the 2013 RFE, the Applicant provided a second personal declaration, dated November 25, 2013, in which he expressed remorse for “the problems [he] committed in the past” and requested forgiveness. The Applicant did not specify the “problems” to which he was referring or provide any context or explanation for his actions. He did not state that he had worked to change his behavior or was rehabilitated. He indicated that he and his wife work hard for their children and consider the United States to be their home. The Applicant once again stated that he and his wife “respect the laws and the legal system, and have never been in any kind of problems.”

In the 2014 RFE, the Director noted that, on [REDACTED], 2013, [REDACTED] prior to the date on the personal declaration of remorse the Applicant submitted in response to the 2013 RFE, the Applicant was arrested and charged with trafficking in controlled substances (the Director did not mention the related charge of possession of drug paraphernalia in the 2014 RFE). Accordingly, the Director requested copies of the arrest report, evidence of the disposition of the charge, excerpts of the law showing the maximum possible penalty for the charge against the Applicant, and an explanation as to why the Applicant did not reveal this arrest and charge in his response to the 2013 RFE.

The Applicant responded to the 2014 RFE with a brief and additional evidence. In his brief, counsel for the Applicant asserted that the [REDACTED] 2013 arrest and charge occurred “while Applicant was in the process of responding” to the 2013 RFE. Counsel also alleged that, although the Applicant’s declaration bore the date of November 25, 2013, he wrote the declaration prior to his arrest on [REDACTED] 2013. Counsel claimed in the brief that the Applicant remained in jail until [REDACTED] 2013, and that the Applicant’s wife delivered his declaration to counsel on November 25, 2013, at which point counsel asked the Applicant’s wife to write the current date at the top of the declaration.

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Additionally, counsel stated that she had the declaration translated on November 27, 2013 and mailed it to the Director on December 10, 2013. With regard to the Director's request for the arrest reports relating to the [REDACTED] 2013 arrest, the Applicant stated, through counsel, that he would not provide such reports for fear that they would be used against him in a later removal proceeding. In response to the Director's request for information regarding the disposition of the charges, the Applicant stated that the case was still pending, and he provided a trial scheduling order indicating that jury selection was set to occur on [REDACTED] 2015. He also declared that there were several favorable factors in his case.

In his brief on appeal, which was submitted less than one week prior to the jury trial on the trafficking in controlled substances and possession of drug paraphernalia charges, the Applicant contends that the Director erred by focusing on the negative factors in the Applicant's case and not addressing the favorable factors in detail. He also alleges that his convictions – for aggravated driving while under the influence of alcohol or drugs in 2005 and disorderly conduct and resisting an officer in 2008 – were misdemeanors that occurred many years ago and do not outweigh the favorable factors in his case. Additionally, he contends that the criminal trial for his 2013 arrest for trafficking in controlled substances and possession of drug paraphernalia is pending, and that the presumption of innocence for criminal defendants could be considered a favorable factor. He further asserts that we should delay adjudication in the present case to await the conclusion of his criminal proceedings.

The Applicant's contention that we should delay our adjudication is without merit. In support of his assertion, the Applicant cites *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), in which the Board of Immigration Appeals discussed the possibility of administrative closure or continuance of removal proceedings pending an appeal of a criminal conviction. The Applicant is not in removal proceedings before us. He cites no binding legal basis for us to delay our discretionary determination regarding his Form I-485. And, in any event, there is now no reason to delay our decision: on [REDACTED] 2015, the Applicant was convicted of trafficking in controlled substances and possession of drug paraphernalia and, on [REDACTED] 2015, he was sentenced for those offenses.

The Applicant provides on appeal a declaration from counsel, who claims that she has represented the Applicant since 2008. Counsel states that she does not recall obtaining fingerprints for the Applicant in relation to applications for Temporary Protected Status she filed on the Applicant's behalf, and believes that she answered "no" to all questions regarding crimes on all applications she filed for him prior to 2013, without asking the Applicant about his criminal history. Counsel asserts that she did not become aware of the Applicant's criminal history until she prepared his Form I-485, and that the Applicant did not deliberately withhold information about his criminal history in his applications. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, although counsel prepared the Form I-918, the Applicant signed it under penalty of perjury, certifying that all information in the petition was true and correct. Additionally, despite the claim that the omission of

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the Applicant's criminal history on his Form I-918 was the fault of counsel, the Applicant has not complied with the procedural requirements as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), for making an ineffective assistance of counsel claim.

The Applicant also submits on appeal a new personal declaration, in which he acknowledges his arrests. He states that, although he indicated in a previous statement that he did not have legal problems, he has been arrested three times in the United States. The Applicant claims that his first arrest was for drinking and driving and that he was charged with "aggravated drinking" because he did not take the breathalyzer test. He avers that the police officer would not allow him to call a lawyer, so he did not know what to do. The Applicant states that his second arrest was "for being loud in a dancing place." He requests forgiveness for this arrest. With regard to his third arrest, the Applicant states that he cannot discuss it, but believes that he will be found innocent. The Applicant indicates that his children are sad about the Applicant's problems and that his wife has suffered. He states that he has a close, loving relationship with his family and regrets his mistakes.

The Applicant also submits several supporting letters from family members. In a statement submitted on appeal, the Applicant's wife states that the Applicant is an important part of the family and that their children will miss him and be sad without him. She asserts that it would be very difficult for her and her children to live without the Applicant, and that she would struggle to support the children in his absence. She also claims that she fears that the Applicant would be unsafe in El Salvador because a person that assaulted and tried to kill the Applicant lives there. The Applicant's former sister-in-law claims that the Applicant helped her and her children during difficult times and that her children are grateful for the support of the Applicant.

The Applicant's U.S. citizen daughter, [REDACTED], recounts in a statement submitted on appeal that she cannot imagine her life without the Applicant because he does a lot for her. She claims that the Applicant is a strong person and a good father. [REDACTED] also indicates that her mother would be unable to support her and her brother in the Applicant's absence, and that [REDACTED] would be unable to afford college without the Applicant's help. Another of the Applicant's daughters, [REDACTED] a lawful permanent resident, states that her family is very close and that her parents have been good examples for her. [REDACTED] asserts that the Applicant is a responsible and supportive father and "is everything" to her and her siblings. She states that she and her family would struggle without the financial and emotional support of the Applicant, and that it would be very difficult to be separated from him. She also claims that they would fear for the safety of the Applicant's life in El Salvador because the man who previously attempted to kill the Applicant resides there. The Applicant's other lawful permanent resident daughter, [REDACTED] contends that separation from the Applicant would be devastating for her and her family. She notes that she and her sister [REDACTED] were previously separated from their family while residing in El Salvador, and that they were depressed during that time. [REDACTED] indicates that her family is very close, and that the Applicant is responsible for the economic and emotional well-being of the children. In particular, [REDACTED] notes that the Applicant spends a lot of time with the youngest child, [REDACTED] who relies on the presence of his father. [REDACTED] also states that her sister [REDACTED] needs the Applicant's support during her adolescence. [REDACTED]

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alleges that her mother would struggle to provide financially for the children in the Applicant's absence, and that all members of the family would suffer without the Applicant's support.

On appeal, the Applicant also submits a letter from the registrar at [REDACTED] school, indicating that [REDACTED] is a high school student, resides with her parents, and that "[b]oth parents are responsible for [REDACTED] academics as well as her well being." The Applicant also provides a letter from his son's kindergarten teacher, who states that the Applicant's son arrives on time, is rarely absent, has done very well academically, and that his parents have attended conferences. In his RFE response, the Applicant submitted a letter from [REDACTED] third grade teacher, who stated that [REDACTED] was very successful academically and that the Applicant and his spouse were "supportive and provided a stable environment" for her. In another letter, [REDACTED] teacher stated that the Applicant and his spouse provided support which was important to [REDACTED] "emotional as well as academic well-being."

Additional supporting evidence includes the U.S. birth certificates of the Applicant's children, [REDACTED] and [REDACTED] the lawful permanent resident cards of the Applicant's spouse and two older daughters, [REDACTED] and [REDACTED]; the U.S. birth certificate of [REDACTED] daughter, born [REDACTED] Forms W-2 and partial copies of income tax returns for 2002 through 2012; the Applicant's Employment Authorization Cards for most months between January 2002 to September 2013; the Applicant's marriage certificate, indicating that he married his spouse in New Mexico on [REDACTED] 2009; a Deed of Trust for the house the Applicant and his spouse purchased in 2011; and two family photographs. The record also contains documentation of the aggravated assault of which the Applicant was a victim, and on which his approved Form I-918 U petition was based.

Negative factors in this case include the Applicant's arrests and convictions. Although the Applicant's convictions in 2005 and 2008 were for misdemeanors, the Applicant did not reveal his criminal history on his Form I-918, despite signing the petition under penalty of perjury. Additionally, although he did provide information regarding this criminal history on his Form I-485, he did not mention or explain, in his statement submitted with the Form I-485, why he omitted it in his Form I-918. Also, with his Form I-485, he did not express remorse or provide any proof of rehabilitation, and he incorrectly asserted that he had never had legal problems. In response to the Director's 2013 RFE, the Applicant briefly expressed remorse in only vague terms, without acknowledging the specific criminal acts for which he was apologizing, providing any explanation, or indicating that he had sought to rehabilitate himself. Furthermore, he again incorrectly claimed to have had no legal problems despite the fact that he had two criminal convictions and had been charged with trafficking in controlled substances and possession of drug paraphernalia before a grand jury only four days prior to the date on his statement. Despite receiving several opportunities to do so, the Applicant did not fully address his 2005 and 2008 convictions, with a statement of acknowledgement, explanation, and remorse, until his declaration on appeal.

Furthermore, the Applicant did not reveal his full criminal history in his response to the 2013 RFE, despite the fact that he was charged before a grand jury for serious drug-related offenses shortly before the submission of his response. Despite counsel's explanation that the Applicant wrote his

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personal declaration prior to being arrested in [REDACTED] 2013 and that it was dated while he was in jail, the statements of counsel do not constitute evidence. *Obaighena*, 19 I&N Dec. at 534; *Laureano*, 19 I&N Dec. 1; *Ramirez-Sanchez*, 17 I&N Dec. at 506. Additionally, even if the Applicant did write his statement prior to his arrest, his response to the 2013 RFE was mailed six days after the Applicant was released from jail, and 19 days after his arrest. The Applicant could have revised the response prior to submitting it to accurately reflect his criminal history, which was at issue in the RFE. Moreover, the Applicant's wife and his attorney, who allegedly dated the Applicant's letter and prepared it for submission while he was in jail, were aware that he was in jail for a charge that was not listed in the Applicant's letter or elsewhere in the 2013 RFE response. The 2013 RFE response did not accurately reflect the Applicant's criminal history, and it could have been corrected between the date of his arrest and the date of submission.

On [REDACTED], 2015, the Applicant was convicted of trafficking in controlled substances in violation of New Mexico Stat. Ann. 1978 § 30-31-20A(3), a second degree felony, and possession of drug paraphernalia in violation of New Mexico Stat. Ann. 1978 § 30-31-25.1, a misdemeanor. Despite the Director's request in the 2014 RFE for records relating to this arrest, the Applicant refused to supply them. Given the serious nature of these drug-related convictions, we cannot determine that the Applicant merits adjustment of status in the exercise of discretion. Furthermore, the Applicant's refusal to provide any information regarding these offenses suggests that the Applicant continues to deliberately withhold information regarding his criminal history.

Favorable factors in this case include the Applicant's long history of residence in the United States since May 20, 1995, at the age of 22; his receipt of Temporary Protected Status in 2002; his legal employment in this country since 2002; his payment of federal income taxes since 2002; and the fact that he purchased a home with his spouse in 2011. Additionally, the Applicant has close ties to family members in the United States, including his lawful permanent resident wife, two U.S. citizen children, two lawful permanent resident children, and a U.S. citizen infant grandchild. Statements from the Applicant's spouse, children, and former sister-in-law demonstrate that the Applicant's family is close-knit, that the Applicant plays an important role in supporting his family financially and emotionally, and that he spends significant time with his children, particularly his two younger children, who are U.S. citizens. The statements establish that the Applicant's spouse and children do not want to be separated from him, will miss him if he returns to El Salvador, and rely on his assistance in the United States. Letters from teachers of the Applicant's children also show that the Applicant supports his children in their education. Furthermore, the Applicant was the victim of a felonious assault in which he was stabbed, and for which he received U-1 nonimmigrant status. The Applicant and his family members assert that they will fear for his safety if he returns to El Salvador because the perpetrator of the crime against him now lives there.

However, as discussed above, the Applicant has not provided full, accurate information regarding his criminal history, despite several requests by the Director that he do so. To the contrary, the evidence indicates that he deliberately omitted relevant evidence regarding his criminal history in his Form I-918, his Form I-485, and in his RFE responses. Additionally, the Applicant's close ties to his lawful permanent resident wife and children in the United States are minimized by the fact that those

individuals received their lawful permanent resident status through the Applicant's approved Form I-918, on which he did not provide complete, truthful information. Finally, the Applicant has two very recent criminal convictions for serious, drug-related offenses. We cannot find that the Applicant's adjustment of status is justified on humanitarian grounds, to ensure family unity, or is in the public interest. Therefore, the Applicant has not demonstrated eligibility for adjustment of status in the exercise of discretion.

IV. 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.

Cite as *Matter of R-A-M-M-*, ID# 14763 (AAO Oct. 21, 2015)