



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

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

MATTER OF H-D-

DATE: OCT. 22, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

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

I. 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 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 [Secretary], 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. FACTS AND PROCEDURAL HISTORY

On April 1, 2010, the Director granted U-1 nonimmigrant status to the Applicant based upon an approved Form I-918, Petition for U Nonimmigrant Status. The Applicant's U-1 status was valid from March 31, 2010, until March 30, 2014. The Applicant filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on March 10, 2014. The Director issued a request for evidence (RFE) to which the Applicant responded with additional evidence. The Director denied the application finding that the negative factors relating to the Applicant's criminal history outweighed any positive considerations and that the Applicant had not shown that he was eligible for adjustment of status as a matter of discretion. The Applicant timely appealed the denial of his Form I-485.

On appeal, the Applicant submits a brief and copies of documents already included in the record. The Applicant claims that his conviction is not a final conviction and should not disqualify him from adjusting to lawful permanent resident status, and that he did not attempt to misrepresent the outcome of his arrest.

(b)(6)

Matter of H-D-

III. ANALYSIS

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, including the documentation submitted on appeal, the Applicant has not overcome 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 [applicant'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 shows that the Applicant was convicted on [REDACTED] 2014, for two counts of lascivious acts with a child, a class C felony, in violation of Iowa Penal Code (IPC) § 709.8(1).¹ The Applicant was sentenced to a term not to exceed ten years for each count. The Applicant's record of conviction includes the Court's decision finding the Applicant guilty, and contains portions of the transcript from an interview with the Applicant in which he admitted to sexually touching his minor daughter on several occasions. The Applicant did not submit any affidavits or personal statements explaining his criminal conviction.

In response to the RFE, the Applicant submitted evidence that he paid his taxes from 2010 through 2013 and child support in 2014. He also submitted several letters from his employers, friends, and relatives describing him as a hard-worker, a loyal and trustworthy employee, a nice, caring, honest, generous, and thoughtful person, and a good father and uncle.

On appeal, the Applicant claims that because the appeal of his conviction is pending, his conviction is not final and does not disqualify him from adjusting to lawful permanent resident status.

¹ Case number: FECR108549.

(b)(6)

Matter of H-D-

However, the cases to which he cites, *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009), and *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015) are inapplicable to the present case as they do not deal with adjustment of status for U nonimmigrants, but rather with the finality of convictions for the purpose of removal proceedings.² Regardless, whether the Applicant's conviction is final is moot as any credible evidence may be considered in USCIS's discretionary analysis. 8 C.F.R. § 245.24(d)(11). We are not precluded from considering the Applicant's arrest and subsequent guilty finding as negative factors in our discretionary determination. See *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995); *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 . . .").

The Applicant further asserts that "there is no admission of guilt in [the Applicant's] criminal record" and thus he cannot be denied adjustment of status based on his guilty plea or sentencing thereafter. However, in adjudicating applications, USCIS cannot look behind the conviction in order to determine the Applicant's guilt or innocence. See *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999) (unless a judgment is void on its face, an administrative agency cannot go behind the judicial record to determine an individual's guilt or innocence); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1974) (same). Therefore, there does not need to be an admission of guilt for the Applicant's conviction to disqualify him from adjustment of status. Furthermore, in this case, the judge in the Applicant's criminal proceedings based his conviction, at least in part, on the Applicant's "statements and admissions." See *Judgement and Sentence of the Court*, State of Iowa v. H-D-, Case No: [REDACTED] at 7. The record of conviction includes the partial transcript of the Applicant's interview with police in which he admitted to touching his daughter in a sexually inappropriate way. *Id.* at 8-12. Again, even if there were no conviction in this case, USCIS may consider any credible evidence in its discretionary analysis. 8 C.F.R. § 245.24(d)(11).

Finally, the Applicant asserts generally that he may be entitled to a waiver and that he was entitled to receive a notice of intent to deny (NOID) prior to the denial, however, he does not further address either of these arguments in his appeal brief. Regardless, there are no waivers applicable to a discretionary denial of an adjustment of status application under section 245(m) of the Act, and the regulations do not require USCIS to issue RFEs or NOIDs before denying an application. See 8 C.F.R. §§103.2(b)(8) and 245.24(d)(11).

² In *Matter of Cardenas Abreu*, the Board found that a late-reinstated appeal did not undermine the finality of a conviction for immigration purposes. In *Matter of Montiel*, the Board administratively closed removal proceedings for "administrative efficiency" pending the adjudication of a direct appeal of a criminal conviction. Furthermore, although *Matter of Cardenas Abreu* was overturned by the Second Circuit, there is a circuit split as to whether, after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628, a conviction on direct appeal should be considered final for immigration purposes. See *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010); *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011); *Orabi v. Attorney Gen. of the U.S.*, 738 F.3d 535 (3d Cir. 2014).

We have considered the favorable factors in this case, but we do not find that they outweigh the negative factors. Although the Applicant submitted letters asserting that we should exercise discretion in his favor, the Applicant was arrested and found guilty of a serious crime involving, on several occasions, the sexual abuse of his daughter, a minor child. While the Applicant has family in the United States and has been here for many years, this is offset by the fact that his daughter was the victim of sexual abuse by the Applicant.

Regarding the Director's finding that the Applicant attempted to misrepresent the outcome of his 2013 arrest, although the Applicant originally indicated that no charges were filed against him in his initial response to the RFE, the Applicant later submitted a letter from counsel indicating that she misunderstood from the Applicant that there was no criminal record regarding the 2013 arrest, and that in fact, the criminal matter was still pending. This correction was received prior to the Director's denial decision. Regardless of whether the Applicant purposely attempted to misrepresent the outcome of his 2013 arrest, the Applicant has not submitted any personal statement explaining his arrest or guilty finding, nor has he expressed remorse for these incidents or shown that he has been rehabilitated. The Applicant has not demonstrated that he would suffer extreme and unusual hardship upon removal, and only the most compelling positive factors would justify a favorable exercise of discretion in cases such as this one, where the Applicant has committed or been convicted of a crime involving sexual abuse committed upon a child. 8 C.F.R. § 245.24(d)(11).

After considering the evidence in its totality, based upon our discretion, we find that the Applicant's serious criminal history outweighs 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.

IV. 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.

Cite as *Matter of H-D-*, ID# 14000 (AAO Oct. 22, 2015)