



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

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

MATTER OF N-S-

DATE: SEPT. 3, 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 her status. *See* section 245(m) of the Immigration and Nationality Act (the Act), 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 her case outweighed her criminal history, and therefore she could not show that her adjustment of status would be justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

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. 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, valid from August 20, 2009 to August 19, 2013. The Applicant filed her Form I-485 on August 20, 2013. The Director issued requests for evidence (RFE) of, among other things, the Applicant's conviction record and that her adjustment of status would be justified on humanitarian grounds or to ensure family unity, or is otherwise in the public interest. The Applicant responded to the RFEs with a statement, court records, and additional evidence. The Director found that the Applicant provided inconsistent statements regarding her criminal history, did not demonstrate efforts to rehabilitate, did not take responsibility for her actions, and engaged in a pattern of criminal activity. Therefore, the Director found that the negative factors outweighed the

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positive and that the Applicant did not show that she was eligible for adjustment of status 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 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 her 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).

The record demonstrates that the Applicant's criminal history is as follows:

- On [REDACTED] 2003, the Applicant was convicted of petit larceny in violation of Va. Code Ann. § 18.2-96. She was sentenced to 90 days in jail, with 83 days suspended, 12 months of unsupervised probation, and fees.
- On [REDACTED] 2012, the Applicant was charged with two counts of petit larceny in violation of Va. Code Ann. § 18.2-96, in relation to two separate incidents relating to thefts of cellular telephones that occurred on [REDACTED] 2012 and [REDACTED] 2012. The charge relating to the July 17, 2012 incident was amended to unlawful interference with a telephonic device in violation of Va. Code Ann. § 18.2-164, and the Applicant was convicted of that charge on [REDACTED] 2012. She was sentenced to 30 days in jail, with 26 days suspended. The court ordered a nolle prosequi of the petit larceny charge relating to the [REDACTED] 2012 incident.
- On [REDACTED] 2013, the Applicant was convicted of petit larceny in violation of Va. Code Ann. § 18.2-96. Her conviction was classified as a felony pursuant to Va. Code Ann. § 18.2-104 because it was her third larceny offense. She was sentenced to 90 days in jail, with 80 days suspended.

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In her brief on appeal, the Applicant argues that the positive equities in her case outweigh her criminal history. She notes that she has resided in the United States since 2001, is married to a lawful permanent resident (LPR), and has seven children, of whom four are U.S. citizens and two are LPRs. She alleges that she is hardworking, religious, and devoted to her family, and that she overcame being the victim of a crime in the United States as well as physical and emotional abuse by her own mother. The Applicant asserts that her criminal history resulted from a mental health condition, kleptomania, and that she “is committed to becoming healthy, seeking treatment, and greatly regrets the mistakes she has made in the past.” She states that she has no criminal history since her 2013 conviction and has never committed a violent crime. Furthermore, she contends that she and her family would suffer exceptional and extremely unusual hardship if the Petitioner were removed because her “presence is critical to the financial and emotional well being” of her spouse and children.

The Applicant stated in her 2014 declaration, submitted in response to the RFE, that she received U nonimmigrant status on the basis of having been the victim of a robbery, and that she suffered fear and anxiety as a result of that crime. She stated that she worked to establish a life in the United States and that her children and husband would suffer hardship if she had to return to Ecuador. The Applicant claimed that her children would not be able to adjust to the lifestyle and culture in Ecuador and that she would be unable to provide for them there, but that they would also be traumatized if separated from the Applicant. The Applicant also indicated that she is close to her siblings. According to the Applicant, she “befriended people that were no good,” which “led to the mistakes [she] made” The Applicant further stated that her actions were due to problems controlling her emotions, for which she consulted therapists.

As support for her claim, the Applicant submits on appeal several declarations from family members and friends. The Applicant’s husband states that the family is very close, and that the Applicant works hard to help support their seven children. He claims that he and two of their children would lose their LPR status if they were to accompany the Applicant to Ecuador. Additionally, he asserts that many of their children are only familiar with life in the United States and would have to abandon their employment and educational goals if they relocated. The Applicant’s husband also declares that being separated from the Applicant would be emotionally and financially unbearable for him. He contends that the Applicant is a good person and has endured abuse by her parents, an assault during a break-in while living in the United States, and caring for seven children on a small income. He states that the Applicant regrets her mistakes, which he alleges were due to kleptomania.

The Applicant’s daughter, [REDACTED] declares that she came to the United States from Ecuador as a young child and is now an LPR. She states that her LPR status has created new opportunities for her, and that she hopes to attend college or enlist in the Army. [REDACTED] indicates that it would be difficult for her to be separated from the Applicant because they are very close. She also claims that her siblings depend on the Applicant and would suffer emotionally if separated from the Applicant, but would not be able to accompany her to Ecuador. Additionally, [REDACTED] asserts that she would have to become the “mother” of the family if the Applicant were to go to Ecuador. She states that the Applicant made some mistakes, but told [REDACTED] that she is ashamed of what she did and wants to set a good example for her children.

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Similarly, the Applicant's son, [REDACTED] discusses his recent adjustment of status and the opportunities he now has as an LPR. [REDACTED] states that he and his father and sister would not be able to relocate to Ecuador with the Applicant because they would lose their LPR status. Additionally, he declares that he and the other older children in the family would be forced to help care for their younger siblings in the Applicant's absence. [REDACTED] claims that the Applicant instilled good morals in him and his siblings, and he believes the Applicant's mistakes are "due to a sickness that is uncharacteristic of other aspects of her life."

In a psychological report, first submitted with the Applicant's Form I-485 and provided again on appeal, [REDACTED] Ph.D., stated that he conducted one evaluation with the Applicant on July 12, 2013, upon her request for a report to be submitted for immigration purposes. Dr. [REDACTED] indicated that the Applicant was "experiencing anxiety and impulse control issues which resulted in legal problems for her." He explained that the Applicant reported to him that she had been arrested and charged for shoplifting on three occasions. Dr. [REDACTED] stated that, according to the Applicant's statements, her first arrest occurred when she was shopping at [REDACTED] with a friend, who placed clothing in the Applicant's bag without the Applicant's knowledge. The Applicant reported that, although both she and her friend were charged with shoplifting, her friend did not appear for the court hearing, so the Applicant was charged and sentenced to one weekend in jail. Dr. [REDACTED] further stated that, according to the Applicant, her second arrest occurred when she became frustrated at a co-worker for sending text messages instead of working. The Applicant told Dr. [REDACTED] that, because her co-worker was creating extra work for her and the other employees, the Applicant put her co-worker's cellular telephone in her purse and took it home. Dr. [REDACTED] reported that, according to the Applicant's statements, her third arrest occurred when she was arguing with a friend while standing at the cash register in [REDACTED]. The Applicant told Dr. [REDACTED] that, because she was distracted by the argument, she paid for everything except for one pair of shoes, which she accidentally carried out of the store.

Based on the Applicant's reports of the circumstances of her arrests, as well as her descriptions of the abuse, criminal activity, and other hardships she suffered, Dr. [REDACTED] diagnosed the Applicant with an adjustment disorder with anxiety and kleptomania. He stated, "[T]here seems to be strong psychological evidence supporting the notion that [the Applicant] was not competent to fully comprehend the legal responsibilities she was incurring into [sic] at the time she engaged in, or was implicated by, illegal behaviors such as shoplifting." According to Dr. [REDACTED] the Applicant's actions were based on the trauma she suffered, that she was remorseful, and that she is a responsible and caring person who wants to be rehabilitated.

The favorable factors in this case do not outweigh the negative factors, which are the Applicant's arrests and convictions. The Applicant has been charged with petit larceny four times and convicted on three of those charges. Her arrests and convictions demonstrate a pattern of similar criminal activity. The most recent of her convictions occurred in May 2013, approximately two months before she filed her Form I-485, and was a felony due to her prior convictions. Although the Applicant expresses remorse for her actions, the record does not indicate that she has taken responsibility for her criminal activity or made efforts at rehabilitation. The Applicant correctly notes in her appeal brief that a showing of rehabilitation is not specifically required for a favorable

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discretionary finding; however, rehabilitation is a relevant factor in our determination of whether the Applicant has demonstrated sufficient mitigating factors to outweigh her criminal activity. Although the Applicant stated in her 2014 declaration that she regretted her past mistakes, she also attributed those mistakes to the bad influence of others.

Additionally, although the Applicant declared that she consulted two therapists to resolve the mental health issues that allegedly contributed to her criminal activity, the record does not support that claim. Instead, the record contains one report from Dr. [REDACTED] who indicated that he met with the Applicant one time for immigration purposes. Dr. [REDACTED] stated that the Applicant's criminal activity was due to kleptomania, but his accounts of the incidents leading to the Applicant's arrests and convictions placed blame on others and differed significantly from the conviction records. In particular, Dr. [REDACTED] indicated that, according to the Applicant, her first arrest was the fault of a friend, who placed items in the Applicant's bag without the Applicant's knowledge and then did not appear for the court hearing. This does not indicate that the Applicant has taken responsibility for her criminal activity. Additionally, Dr. [REDACTED] described only one incident involving theft of a cellular telephone, but the Applicant was charged with two counts of petit larceny on [REDACTED] 2012 relating to two separate thefts of cellular telephones on [REDACTED] 2012 and [REDACTED] 2012. Finally, Dr. [REDACTED] report of the Applicant's final arrest, for which the Applicant told Dr. [REDACTED] that she accidentally took one pair of shoes due to being distracted at the cash register, is inconsistent with the conviction records. The conviction records indicate that the Applicant was convicted of felony petit larceny for stealing six pairs of shoes. Therefore, although Dr. [REDACTED] expertise is valuable, his report does not indicate that he based his conclusions on full and correct information, as relayed to him by the Applicant.

Favorable factors in this case include the fact that the Applicant was the victim of a violent crime in furtherance of a breaking and entering at her home, for which she was granted U nonimmigrant status, and she experienced abuse as a child at the hands of her mother. Additional favorable factors are the Applicant's long history of residence in the United States, her close relationships with her LPR husband and children, U.S. citizen children, and other family members, and her responsibility for raising seven children. The Applicant and her family claim that her husband and children would not be able to accompany her to Ecuador, but that it would be very difficult for them to be separated because they have a close relationship and the Applicant's financial contributions to the household are essential. Although the declarations of the Applicant, her husband, and two of her children establish that the Applicant's role within her family is valuable, the evidence does not show that this outweighs the Applicant's pattern of criminal activity, for which she has not taken full responsibility or made rehabilitative efforts. Additionally, although the medical records show that the Applicant's husband was briefly hospitalized in February 2015, they do not demonstrate that he is unable to support the family financially at this time. The record demonstrates that the Applicant's husband underwent surgery in February 2015 for "recurrent perirectal abscess," resulting in a four-day stay in the hospital. Counsel for the Applicant states in her brief on appeal that the Applicant's husband's medical condition has "affected his ability to work and perform daily activities," but medical records do not show that he cannot work and the Applicant's husband does not discuss his medical condition in his own declaration. Similarly, the Applicant herself did not mention her husband's medical problems in her 2014 declaration, despite indications in the medical records that her husband previously experienced a perirectal abscess in approximately 2012.

The Applicant claims on appeal that even if the favorable factors in her case do not outweigh the negative factors, she can still demonstrate eligibility for adjustment of status by showing that she and her family would suffer exceptional and extremely unusual hardship if she were removed. However, the Applicant misinterprets the law. The regulations provide that, where the adverse factors are particularly serious, USCIS may require an Applicant to demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. 8 C.F.R. § 245.24(d)(11). This is not an alternative method of demonstrating eligibility, but one of the many factors that USCIS may consider in its discretionary determination. We have considered all favorable factors in the Applicant's case, including the hardship she claims she and her family would suffer if she were removed. The evidence of record does not support a finding that the Applicant merits adjustment of status in the exercise of discretion.

The Applicant's criminal history outweighs the favorable factors in her case. Therefore, the Applicant has not demonstrated that her adjustment of status would be justified on humanitarian grounds or to ensure family unity, or is otherwise in the public interest. Section 245(m) of the Act.

IV. CONCLUSION

In these proceedings, the Applicant bears the burden of proving 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.

Cite as *Matter of N-S-*, ID# 13649 (AAO Sept. 3, 2015)