



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

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

MATTER OF B-A-G-B-

DATE: APR. 28, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Applicant seeks to become a lawful permanent resident based on his "U" nonimmigrant status. *See* Immigration and Nationality Act (the Act) section 245(m), 8 U.S.C. § 1255(m). The U classification affords nonimmigrant status to crime victims, who assist authorities investigating or prosecuting the criminal activity, and their qualifying family members. The U nonimmigrant may later apply for lawful permanent residency.

The Director, Vermont Service Center, denied the application. The Director concluded that a balancing of the mitigating and adverse factors in the Applicant's case did not establish that it was in the public interest to exercise favorable discretion and approve his application.

The matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence. The Applicant claims that the Director erred in giving too much significance to the Applicant's arrests as a juvenile and that a closer inquiry into the evidence of mitigating factors establishes that he is deserving of a favorable exercise of discretion on his application.

Upon *de novo* review, we will dismiss the appeal.

**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

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(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.

## II. RELEVANT FACTS AND PROCEDURAL HISTORY

On December 14, 2010, the Director approved the Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient, filed on behalf of the Applicant by his mother, who was the principal U-1 nonimmigrant. The Applicant was thereafter admitted into the United States on February 17, 2011, as a U-3 nonimmigrant, when he was [REDACTED] years of age. The Applicant's U-3

nonimmigrant status was valid until December 13, 2014. He filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on July 28, 2014. On February 25, 2015, the Director issued a request for evidence (RFE), including arrest reports and conviction records for the Applicant's juvenile arrests, and for evidence establishing that favorable discretion was warranted on his Form I-485. The Applicant responded with additional evidence, which the Director found insufficient to establish the Applicant's eligibility. Accordingly, the Director denied the Form I-485, and the Applicant filed a timely appeal.

### III. ANALYSIS

Upon a full review of the record, as supplemented on appeal, the Applicant has not overcome the Director's grounds for denial. The appeal will be dismissed for the following reasons.

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 alien's adverse factors, such a showing might still be insufficient. *Id.*; see *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 Board has 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." *Matter of Miguel Devison-Charles*, 22 I&N Dec. 1362, 1365-66 (BIA 2000); 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). 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, 138-39 (2d Cir. 2006); see 8 C.F.R. § 245.24(d)(11).

Additionally, arrest reports for incidents that did not lead to criminal charges or a conviction may still be considered negative discretionary factors. The U.S. Court of Appeals for the First Circuit,

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under which this matter falls, has held that “in reviewing requests for discretionary relief, immigration courts may consider police reports” as long as the “trier first determines that the report is reliable and that its use would not be fundamentally unfair. *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015). Here, our review does not show that the underlying police reports relating to the Applicant’s arrests are unreliable or that the use of the reports would be fundamentally unfair, particularly as the Applicant was afforded an opportunity below and on appeal to address the allegations set forth in the police reports. Therefore, although we do not give substantial weight to arrest reports that did not lead to conviction, we may consider them in our discretionary determination.

The record here shows that after the Applicant’s 2011 admission to the United States as a U-3 nonimmigrant, he was arrested on several occasions as set forth below:

1. [REDACTED], 2013, dismissal following a continuance without a finding (CWOFF)<sup>1</sup> on two counts of carrying a dangerous weapon (knife) on school grounds in violation of Mass. Gen. Laws ch. 269, section 10.
2. [REDACTED] 2013, arrest and prosecution in juvenile court for: (1) assault and battery in violation of Mass. Gen. Laws ch. 265, section 13A(a); (2) malicious destruction of property over \$250 under Mass. Gen. Laws ch. 266, section 127; and (3) resisting arrest under Mass. Gen. Laws ch. 268, section 32B. Disposition: All charges dismissed on [REDACTED], 2015, after the completion of court ordered pretrial probation pursuant to Mass. Gen. Laws ch. 276, section 87.
3. [REDACTED] 2014, arrest and prosecution in juvenile court for: (1) aggravated assault and battery with a dangerous weapon in violation of Mass. Gen. Laws ch. 265, section 15A(c); (2) assault and battery with a dangerous weapon in violation of Mass. Gen. Laws ch. 265, section 15A(b); (3) assault and battery in violation of Mass. Gen. Laws ch. 265, section 13A(a); (4) carrying a dangerous weapon (knife) under Mass. Gen. Laws ch. 269, section 10(b); and two counts of larceny over \$250 in violation of Mass. Gen. Laws ch. 266, section 30(1). Final court disposition not in the record.
4. [REDACTED] 2015, arrest and prosecution in juvenile court for assault and battery in violation of Mass. Gen. Laws ch. 265, section 13A(a). Final court disposition not in the record.

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<sup>1</sup> A CWOFF requires the tender of a guilty plea or admission of facts sufficient for finding of guilt under Massachusetts law. Mass. Gen. Laws ch. 278, § 18; see *Commonwealth v. Tim T.*, 773 N.E.2d 968, 970 (Mass. 2002). Consequently, the Applicant’s tender of facts sufficient to warrant a finding of guilt, in conjunction with the imposition of a penalty and restraint on the Applicant’s liberty in the form probation, would typically establish that for immigration purposes, he had been convicted of carrying a dangerous weapon on school grounds, as contemplated by section 101(a)(48)(A) of the Act. However, as noted, juvenile convictions are not convictions for immigration purposes. See *Devison-Charles*, 22 I&N Dec. at 1365.

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5. [REDACTED] 2015, arrest for carrying a dangerous weapon or knife over 4x1 inches in violation of section 2-9(b) of the General Code of the [REDACTED] Massachusetts. No arrest records or court disposition provided.
6. [REDACTED] 2015, arrest for disorderly conduct in violation of Mass. Gen. Laws ch. 272, section 53. No arrest records or court disposition provided.
7. [REDACTED] 2015, arrest on a default warrant.
8. [REDACTED] 2015, arrest on a pending felony warrant.

Our review indicates that the Applicant did not disclose his first two arrests on his July 2014 Form I-485, which specifically inquired about whether he had ever been arrested. After the filing of the Form I-485, he was arrested on six more occasions, the last four of which occurred after his 18th birthday. In the Applicant's May 14, 2015, statement responding to the Director's RFE for the Applicant's criminal records, the Applicant again did not disclose three new arrests in [REDACTED] and [REDACTED] 2015 after the Director's RFE was issued.

In his first written statement, dated July 24, 2014, the Applicant addressed only his first arrest in [REDACTED] 2013 for carrying a knife to school. The relevant court records indicate that he admitted facts sufficient for a finding of guilt, although ultimately the matter was dismissed upon his completion of probation.<sup>2</sup> In his written statement, he denied that the knife belonged to him, claimed that he was forced to carry the knife under threat from a gang member, and requested that his conduct be excused because it resulted from his fear. His statement makes no reference to his second arrest on [REDACTED] 2013, on charges of assault and battery, malicious destruction of property, and resisting arrest. The charges were ultimately dismissed without a finding of guilt after completion of pretrial probation.

The Applicant, in his May 14, 2015, statement responding to the Director's RFE, discussed his criminal history, which he had not fully addressed previously. He indicated that he made a mistake in marking the box for "no" in response to the question inquiring about his arrests on the Form I-485. The Applicant noted that he had addressed his first arrest in his written statement, but admitted that he "forgot" about the [REDACTED] 2013, arrest involving his stepfather. He explained that his stepfather and he got into an argument after the former accused him of being drunk and on drugs. The Applicant stated that he had picked up a knife to defend himself, believing that his stepfather was going to fight him when the latter started towards him. The Applicant asserted that "[n]othing happened" between them but that his stepfather called the police anyway. He claimed that when the police arrived, they tried to "tase" him so he pushed an officer away, causing the officer's badge to come off. The Applicant did not address the police report, which indicated that his stepfather had several cuts and scratches on his head and neck and that the

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<sup>2</sup> See *supra*.

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Applicant was restrained only after he had become aggressive towards the police officers who had arrived on the scene.

The Applicant also addressed his arrests on [REDACTED] 2014, and [REDACTED] 2015. The Applicant asserted that the [REDACTED] 2014 arrest was a case of mistaken identity. He claimed that he was mistakenly arrested for beating up a friend, [REDACTED], and stealing his bike, when in fact, he had been bringing the bike as a favor at the request of their mutual friend at the time the police stopped him. The Applicant did not explain why the arrest report indicates that he told the police he had just come from a place where “he had a problem with some people who had knives,” and why he did not explain to the police that he had not stolen the bike. The Applicant indicated in his statement that he was also arrested because there was a knife on the bike, but does not address whether or not it was his knife.<sup>3</sup> The Applicant maintained that [REDACTED] will be testifying on his behalf and submitted the prosecution’s notice to the court of exculpatory evidence, namely [REDACTED] statement that the Applicant was not the individual who assaulted him. However, the Applicant, on appeal, has not asserted, or proffered any evidence, that the prosecution withdrew the criminal charges or that the court granted the Applicant’s motion to dismiss, which was also submitted with his RFE response.

As to the [REDACTED] 2015 arrest, the Applicant indicated that he got into a verbal and physical altercation with his mother after the latter argued with his girlfriend, who was the mother of his child. He asserted that contrary to the police report, he pushed his mother on the bed when she grabbed him and that she scratched him on his neck, shoulders, and back. He also stated that he never made a fist at his mother as his stepfather claimed to police officers. The Applicant indicated that his mother called the police on him and that he was wrong to have pushed his mother. The Applicant contended in his May 2015 statement that he was a good person who had gotten off to a bad start and that he was trying to turn his life around now that he has a son, who he sees as often as he can since the child was in the temporary custody of his maternal grandmother. The Applicant indicated that he has had several jobs over the past few years and sends money when he can to his son’s grandmother and to his own grandparents in Guatemala who raised him. He also stated that he hoped that his [REDACTED] 2015 arrest was his last one, but does not express remorse for his past criminal conduct. Significantly, at the time of this May 2015 statement, the Applicant had been arrested an additional three times between [REDACTED] and [REDACTED] 2015, a fact that the Applicant once again did not disclose in his written statement.

The record below also contains a statement from the Applicant’s mother, [REDACTED] who stated that the Applicant was a good person, even though he did not see things clearly sometimes and lost his temper. She asserted that the Applicant was becoming more responsible now that he had a son and wanted to do right by him. [REDACTED] maintained that her son was innocent of some of the charges on which he was arrested, including his [REDACTED] arrest, which she too asserted was a case of mistaken identity. Apart from the Applicant’s [REDACTED] 2013 and [REDACTED] 2014 arrests, however, [REDACTED] statement did not further address her son’s criminal history,

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<sup>3</sup> The police report, as well as the Applicant’s memorandum of law in support of his motion to dismiss in the corresponding criminal case, indicates that the Applicant dropped the knife, not that it was on the bike.

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most notably his arrests in [REDACTED] 2013 and [REDACTED] 2015, following incidents in which the Applicant's stepfather and [REDACTED] were identified as the victims.

On appeal, the Applicant proffers a brief statement, as well as an updated statement from his mother and two brief letters from his friends, [REDACTED] and [REDACTED]. Although the Applicant's statement on appeal expresses remorse in very general terms as to his past "mistakes," he does not speak to his rehabilitation and he still does not address his three arrests in [REDACTED] and [REDACTED] 2015. The two brief letters of support from the Applicant's friends describe the Applicant generally as a good person, but make no indication that they are aware of his criminal history.

The Applicant's mother's statement on appeal, dated July 2015, indicated that her family had suffered at the hands of guerillas in Guatemala in the past and that she feared for her son if he returned there, a fear that the Applicant has not expressed. [REDACTED] again asserts that the Applicant has become an adult, has his own "children,"<sup>4</sup> and is more responsible. She does not address the fact, however, that the Applicant was arrested six times after he filed the instant Form I-485, one of which was shortly before the Director's decision in June 2015. Her statement discussed the Applicant's [REDACTED] 2013 arrest, indicating that she blamed her husband, the Applicant's stepfather, for calling the police. She explained that the Applicant was drunk and she and her husband forcibly tried to pull off the Applicant's shirt to put him in the shower. [REDACTED] stated that the Applicant resisted and scratched her inadvertently during this process, but claimed there was never any knife involved. However, [REDACTED] account contradicts the Applicant's May 2015 statement, in which he specifically admitted to picking up a knife to defend himself. [REDACTED] also did not address the police report, which indicated that the Applicant's stepfather reported that the Applicant had started striking him and that police officers observed cuts and scratches on his neck and head area. Similarly, both the police report and [REDACTED] statement that the Applicant "resisted" and scratched her is inconsistent with the Applicant's statement in which he indicated that "nothing happened" apart from a verbal altercation with his stepfather. Although [REDACTED] also briefly addressed the Applicant's [REDACTED] 2015 arrest in which she called the police on the Applicant, she noted only that the Applicant was upset when the ambulance arrived at the home, that he immediately called to make sure she was alright, and that he was sincerely apologetic for hurting her. The police report indicates that the Applicant tossed his mother to the ground, injuring her arm, but [REDACTED] herself did not further describe the incident or the injuries she sustained, leading her to call the police and ambulance. Again, [REDACTED] account differs from the Applicant's, in which he made no reference to his mother's injuries or any remorse he felt at the time, but rather, expressed the anger he felt when he heard that his mother had called the police. Finally, [REDACTED] also makes a brief reference to the fact that the Applicant is detained and has been accused of "knifing" someone. She does not further address the circumstances of the Applicant's detention or any criminal charges against him, apart from stating that she believes his assertion to her that he is innocent of the charge.

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<sup>4</sup> The Applicant does not address how many children he has and did not proffer any birth certificates for his children.

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The Applicant asserts on appeal that the Director erred in relying on police records relating to the Applicant's criminal history, without consideration of countervailing evidence of mitigating factors. He notes that four of his arrests occurred when he was a juvenile and none had proceeded to trial. He also contends that two of his cases resulted in dismissal, one resulted in probation, and a fourth would likely be dismissed due to exculpatory evidence showing the Applicant's arrest was a result of mistaken identity.<sup>5</sup> The Applicant disregards the fact that he was later arrested several more times. Moreover, as referenced herein, the Applicant's first arrest in [REDACTED] 2013 resulted in a dismissal only after the Applicant's admission of facts sufficient for a finding of guilt. Although the Applicant's [REDACTED] 2013 charges were dismissed, his account of that arrest is inconsistent with the police report and his mother's account. The record does not contain final dispositions as to any of his remaining arrests. Further, the Applicant was afforded an opportunity to address all of his criminal arrests and present any mitigating factors, both before the Director and on appeal. However, as noted, the Applicant did not disclose his three recent arrests in [REDACTED] and [REDACTED] 2015 in his [REDACTED] 2015 statement in response to the Director's RFE. In discussing those arrests that he did address, he did not explain the inconsistencies between his account and the corresponding police report or with his mother's account. On appeal, the Applicant's brief supplemental statement provides no further insight into his criminal history and/or any extenuating or mitigating factors, and it still did not address any of his arrests after his [REDACTED] 2015 arrest. This is notwithstanding the fact that, on appeal, the Applicant, through his counsel, reveals that he is currently incarcerated for "violating a curfew order and has been subsequently charged with Assault to Murder," for which he maintains his innocence. The Applicant himself, however, did not acknowledge this new arrest and criminal charge in his statement on appeal, and no arrest report or other criminal records relating to this new criminal matter were proffered.

The Applicant also asserts that the Director committed other errors in denying the Applicant's Form I-485. He contends that the Director improperly stated that he had a knife during his [REDACTED] 2013 altercation with his stepfather, when the police report did not reference the use of a knife and the Applicant's mother specifically stated that there was no knife present during the incident. However, the Applicant himself admitted to having a knife in his May 2015 statement.<sup>6</sup> The Applicant contends that the Director also erred in relying on a notation in police records indicating that he was "affiliated" with the [REDACTED] to conclude that the Applicant was a gang member when, in fact, he is not. The Applicant does not, however, provide the specific police record(s) he is referencing, and our review discloses that following the Applicant's [REDACTED] 2015, arrest, he himself admitted to being a [REDACTED] member.

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<sup>5</sup> The Applicant contends that the Director disregarded the prosecutor's December 2014 production of exculpatory evidence as to the [REDACTED] 2014 arrest. However, according to the record, notwithstanding the exculpatory evidence, the prosecution proceeded with the charges, which are still pending.

<sup>6</sup> Counsel for the Applicant admits that the Applicant did reference the knife as a recollection of the incident, but asserts it was not true. However, the unsupported assertions of counsel do not constitute evidence, and the Applicant himself admitted to having a knife and never retracted this admission. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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The burden of showing that discretion should be exercised in his favor is on the Applicant. 8 C.F.R. § 245.24(d)(11); section 291 of the Act (The applicant bears the burden of proof to establish to establish eligibility for the benefit sought). As discussed, the Applicant was arrested at least eight times, six of which occurred after he filed the instant Form I-485. The Applicant has not provided a disposition for, or addressed either below or on appeal, several of his arrests. By the Applicant's own admission to police officers, he is a [REDACTED] and on appeal, he has indicated that he is presently in criminal custody on charges of assault, murder, or possibly both, something that he has not discussed in his statement on appeal at all.

The favorable and mitigating factors in the present case are the Applicant's family in the United States. The unfavorable factors are the Applicant's numerous arrests, both as a juvenile and adult, during the proceedings below; his recent arrest and incarceration during the pendency of this appeal; his admitted membership in a criminal gang; and the lack of demonstrable rehabilitation or remorse. When taken together, the adverse factors in the present case outweigh the favorable factors; therefore, we concur with the Director's negative discretionary finding and deny the Applicant's Form I-485 on discretionary grounds.

#### 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, the Applicant has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of B-A-G-B-*, ID# 16256 (AAO Apr. 28, 2016)