



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

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

MATTER OF R-S-C-

DATE: AUG. 1, 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 Form I-485, Application to Register Permanent Residence or Adjust Status (adjustment application). The Director concluded that a balancing of the mitigating and adverse factors in the Applicant's case did not establish that approval of his adjustment application and his continued presence in the United States was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest.

The matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence. The Applicant claims that the record below and on appeal establishes that his adjustment application merits a favorable exercise of discretion.

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 –

....

(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:

....

(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. ANALYSIS

The Applicant filed the instant adjustment application on December 12, 2014. Upon a full review of the record, as supplemented on appeal, the Applicant has not overcome the Director's ground for denial.

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). 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.* The applicant may 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).

(b)(6)

Matter of R-S-C-

The record indicates that the Applicant was arrested on several occasions as set forth below:

1. [REDACTED] 2003, arrest for criminal conversion in violation of Indiana Code section 35-43-4-3. The charge was dismissed on [REDACTED] 2004.
2. [REDACTED] 2003, arrest and subsequent conviction on [REDACTED] 2004, for possession of a controlled substance (marihuana) with intent to deliver, a class D felony, in violation of section 124.401(1)(d) of the Iowa Code Annotated. The Applicant was sentenced to a five year suspended term of imprisonment, two years of probation, fines, and 180 day revocation of his driver's license.
3. [REDACTED] 2012, arrest and subsequent conviction on [REDACTED] 2013, for operating a vehicle under the influence of alcohol (OWI), 1st offense, in violation of section 321J.2 of the Iowa Code Annotated. He was sentenced to one year term of imprisonment (all suspended but for three days), one year of probation, fines, and court mandated OWI 1st offense program.
4. [REDACTED] 2012, arrest and subsequent conviction on [REDACTED] 2013, for driving with a revoked license in violation Iowa Code Annotated section 321J.21, for which he was fined.
5. [REDACTED] 2015, arrest for OWI, 2nd offense, an aggravated misdemeanor, in violation of Iowa Code Annotated section 321J.2, and for driving without a license. The record does not contain a final disposition for this charge.

In addressing the equities in his case, the Applicant indicated in his initial 2014 statements that he was employed as a chef and that he financially supported his elderly parents and several younger siblings in Mexico. He addressed his [REDACTED] 2012 arrest and acknowledged that he drove his friend home after having had two beers because the latter was drunk and not able to drive. The Applicant stated that after being stopped for passing a red light, he was arrested for OWI although he told the officer that he was not drunk. According to the underlying police report, the Applicant's blood alcohol level tested at over 0.08% on the preliminary breath test (P.B.T.), and he showed several signs of being intoxicated, including bloodshot/watery eyes, impaired balance, alcohol odor on his breath, and failing both the "Walk and Turn" and the "One Leg Stand" tests. The Applicant, who was ultimately convicted of OWI-first offense, indicated that he complied with all the court orders, including completion of an OWI program. He stated that he recognized that he made a "big mistake" and expressed remorse for his actions, asserting that he learned to make better decisions because of this incident, particularly as his parents were dependent on him. Significantly, the Applicant had made similar expressions of remorse and rehabilitation in earlier 2011 proceedings before USCIS in relation to his Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), to waive his inadmissibility arising in part from his [REDACTED] 2004 controlled substance conviction. Moreover, less than one month after his [REDACTED] 2012 arrest, the Applicant was arrested in [REDACTED] 2012 for driving with a license that was revoked due to his previous OWI violation. Further, despite the renewed assertions of remorse and rehabilitation in

Matter of R-S-C-

these adjustment proceedings, the Applicant was again arrested for OWI on [REDACTED] 2015, just after the Director issued a request for evidence (RFE) specifically addressing his criminal history.

The Applicant, in response to the Director's RFE, addressed his most recent two arrests. He expressed remorse for his actions in [REDACTED] 2012 for driving without a license, explaining that he felt obligated to drive himself to work, as he did not want to "bother" others. With respect to his 2015 OWI arrest, the Applicant stated that after drinking with his friends at his former place of work on that occasion, he became "tipsy." Although he had originally paid the security person there to drive him home, the Applicant stated that he accepted another offer of a ride home that night. However, he indicated that he ended up driving the car instead because the other individual was even more intoxicated than the Applicant. The Applicant was arrested for OWI after being stopped for speeding. The Applicant apologized once more for his mistakes, asserting again that he learned that he must make better decisions because his parents were dependent on him. He stated that because his mother suffers from diabetes and a "bent spine" and his father has high blood pressure, they rely on him to afford the expensive medicine they need in Mexico. The Applicant also indicated that he engages in community service at a shelter where he cooks and cleans, and that he is a church volunteer. In addition, he stated that he was attending weekly Alcoholics Anonymous classes, attended a substance abuse evaluation, and obtained an evaluation from a social worker to show that he was not a danger to society.

As evidence of his rehabilitation, the Applicant submitted an evaluation by [REDACTED] a Licensed Independent Social Worker, who indicated that the Applicant reported drinking once a week with friends at home and claimed to not drive afterwards. According to the report, he sold his car and arranged to carpool to work each day instead. [REDACTED] expressed her opinion that the Applicant's prior OWI violations were a "careless mistake of judgment," which he now recognized. Neither the evaluation nor the Applicant's statements below addressed the Applicant's admission during his earlier waiver application proceedings that he had once been addicted to marihuana around the time he was arrested in 2003 for a controlled substance violation.

The record below also includes several letters of support and character references from the Applicant's employers and colleagues, family, friends, community members, and church in the United States, as well as from the [REDACTED] and the shelter at which he volunteers. In addition, he proffered statements from his parents and other family members in Mexico, as well as documentary evidence, including a certificate of completion for his court-mandated OWI program; the Applicant's tax and employment records; money transfer receipts to the Applicant's mother; and certificates of title for his mobile home and vehicle. The reference letters in the record generally asserted the Applicant's good character and the letters from his parents and family members also addressed the Applicant's financial support and assistance to them, but indicated they had not seen him in over a decade since he left for the United States (approximately 2001). None of the supporting letters discussed whether the Applicant's family members and friends were aware of his past marihuana addiction and his criminal history.

On appeal, the Applicant submits a supplemental statement discussing again his parents' and his family's reliance on his financial and emotional support in Mexico. He also states that he is seeking

Matter of R-S-C-

to reestablish his relationship with his [REDACTED] son, who he had recently located after the child's mother had taken him away many years earlier. The Applicant further indicates that he is engaged to a U.S. citizen who has a young son with Down Syndrome who has also been diagnosed with cancer. He states that he provides financial and emotional support to his fiancée and her son and is involved in the latter's care. The Applicant also again expresses remorse for the circumstances of his 2015 OWI arrest and asserts that he is attending AA classes, has been sober for three months, and is attending therapy sessions with his social worker. He notes that his fiancée was upset about his OWI arrest and that he is committed to being a better partner and example for her son. He states that he now keeps himself busy volunteering at the shelter, providing community service, attending church, and avoiding people who drink. The Applicant further proffers a statement from his fiancée, who indicates that the Applicant provides financial and emotional support for her and her son. She indicates that the Applicant apologized for his 2015 OWI arrest and has not had a drink since. She asserts that she and her son would be devastated if they were separated from the Applicant. The Applicant also includes on appeal medical records for his fiancée's son, including a pediatric psychological evaluation confirming the outpatient services he receives. The evaluation identifies the Applicant's fiancée as the primary caregiver and an active participant in her son's treatment plan, but does not reference the Applicant or his role in the child's care.

The Applicant also proffers on appeal a supplemental letter from his social worker, [REDACTED] who indicates that the Applicant has now maintained his sobriety, has continued his carpool arrangements to get to work so that he no longer drives without a license, and is regularly attending weekly AA meetings. She indicates that the Applicant has taken all the necessary steps to avoid future mistakes and expresses her professional opinion that the Applicant was sincere in his expressions of remorse for his prior bad decisions and in his commitment to abstain from drinking and driving. The Applicant also submits evidence of his AA involvement and progress, as well as a court ordered substance abuse evaluation, recommending that he continue with a 12-step recovery program but finding that he had not met the criteria for recommendation for substance abuse treatment.

The record on appeal also includes letters from the [REDACTED] referencing the Applicant's ongoing community service. He also submits additional letters of support from his fiancée's adult daughter, friends, and community members in the United States, who again address the Applicant's good character without indicating whether they are aware of his criminal history relating to OWI and controlled substance violations.

Upon review, the Applicant's statements below and on appeal, the psychological evaluations, supporting statements and letters, and the documentary evidence in the record are insufficient to establish the Applicant's remorse and rehabilitation and overcome his criminal history. The Applicant's most recent arrest in 2015 for OWI occurred while he was waiting to pursue permanent resident status in the United States and after he had twice previously claimed remorse and rehabilitation for his criminal history, both in his earlier waiver application proceedings and in these adjustment proceedings. Moreover, the record does not indicate that there is a final disposition for the 2015 OWI arrest, which occurred just after the issuance of the Director's August 2015 RFE specifically instructing the Applicant to address his adverse criminal history.

Although the Applicant concedes on appeal that his conviction for OWI and his other driving misdemeanors are a serious adverse factor, he asserts that this “single adverse factor” is outweighed by extensive equities in the record. He contends that the Director improperly “enhanced the negative effect” of his OWI violation and other driving arrests by referencing his prior 2004 controlled substance conviction to conclude that his more recent arrests and convictions demonstrated that he had not learned from or rehabilitated, since his earlier 2004 conviction. Specifically, he asserts that such enhancement was an abuse of discretion and an “*ultra vires* misapplication of the law” where the controlled substance conviction was fully disclosed and the Applicant’s inadmissibility based on such conviction was waived in prior proceedings. The Applicant further asserts the Director also abused his discretionary authority by not considering the evidence of rehabilitation in the record and “by not giving the full mitigating weight to the humanitarian, family unity, and public interest grounds,” especially considering that the offenses for which he was arrested would not render him inadmissible.

Our review does not demonstrate that the Director abused his discretion or that the denial of the adjustment application was *ultra vires*. The Director properly considered the Applicant’s arrests and convictions as a serious adverse discretionary factor, as the Applicant himself concedes. We find no basis for the Applicant’s assertion that the negative effect of his OWI violations was improperly enhanced by the Director’s consideration of his 2004 controlled substance conviction. Although the Applicant’s inadmissibility based on the 2004 conviction was waived in prior waiver application proceedings, the conviction remains a consideration in the exercise of discretion, particularly in determining the Applicant’s genuine remorse and rehabilitation where he previously claimed similar remorse and rehabilitation for his earlier criminal conduct.

Our review of the record also shows that the Director properly considered all the relevant evidence, including evidence of rehabilitation. Although the Applicant provided evidence of favorable equities, including his participation in rehabilitation programs and community service, they were insufficient to establish the Applicant’s remorse and rehabilitation and that he was not a significant risk to the public. The Applicant was arrested on five occasions, three of which resulted in convictions. The three most recent arrests, including two for OWI, occurred after he was granted U nonimmigrant status and after he had expressed remorse and rehabilitation for his prior conviction for controlled substance violation for which he had specifically sought and obtained a waiver of inadmissibility. Although he contends that he is rehabilitated and is motivated by his family and fiancée and her son and their dependence on him, the record indicates that he previously claimed similar motivations prior to his most recent arrests. In addition, the record does not contain evidence of a final disposition for his most recent OWI arrest in 2015.

The burden of showing that discretion should be exercised in his favor is on the Applicant. Section 291 of the Act; 8 C.F.R. § 245.24(d)(11). The favorable and mitigating factors in the present case are the Applicant’s long-term presence in the United States; his employment and tax history; his assistance to law enforcement in the investigation of qualifying criminal activity against him; his support of his family in Mexico; his community service and volunteerism; his support of his U.S. citizen fiancée and her son; his social and economic ties in the United States; and his participation in

AA classes and other rehabilitation programs. As discussed, the adverse factors in this case are the Applicant's admitted prior marihuana addiction, his criminal arrests and convictions while pursuing an immigration benefit from the U.S. government, the lack of final disposition for his recent 2015 arrest, and his demonstrable disregard for U.S. immigration and criminal laws. When viewed in their totality, based upon our discretion, the adverse factors in the present case outweigh the favorable and mitigating factors. Accordingly, the Applicant has not demonstrated that he is rehabilitated and that his adjustment of status is warranted for humanitarian reasons, for family unity, or is otherwise in the public interest.

III. 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 R-S-C-*, ID# 17382 (AAO Aug. 1, 2016)