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

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

MATTER OF V-I-L-

DATE: AUG. 2, 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 (U adjustment application). The Director concluded that the mitigating factors did not overcome the negative equities, including in part, the Applicant's criminal history and association with the [REDACTED] gang, and accordingly, the Applicant did not establish that it was in the public interest to exercise favorable discretion on humanitarian grounds or to ensure family unity.

The matter is now before us on appeal. On appeal, the Applicant submits a brief. The Applicant claims that U.S. Citizenship and Immigration Services (USCIS) ignored evidence submitted into the record, and in so doing, has made unsupported conclusions of fact and "is making policy and law . . . contrary to the Constitution of the United States."

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

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 –

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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:

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- (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

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). 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 an applicant to offset these factors by showing sufficient mitigating factors. *Id.* An applicant may submit information regarding any mitigating factors he or she would like USCIS to consider when determining whether a favorable exercise of discretion is appropriate. *Id.* Depending on the nature of the 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. *Id.*; see *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 an 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).

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A. Adverse Factors

1. The Applicant's Juvenile Offenses

The record reflects that the [REDACTED] arrested the Applicant in [REDACTED] 2005 for petty theft under section 484(a) of the California Penal Code. At the time of the arrest, the Applicant was a juvenile. The record also reflects that in [REDACTED] 2005, a juvenile court issued a warrant for the Applicant's arrest because he did not appear for proceedings before the court "without sufficient excuse."¹

Regarding the circumstances around this arrest, in his personal statements, the Applicant explained that his mother was unable to buy necessary items such as school shoes. The Applicant asserts on appeal that juvenile proceedings "result in civil findings of delinquency," and thereby, are not criminal convictions for immigration purposes. In support of this assertion, the Applicant refers to the decision by the Board of Immigration Appeals (the Board) in *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) in which the Board stated:

We have 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 We have also held that the standards established by Congress, as embodied in the [Federal Juvenile Delinquency Act (FJDA)], govern whether an offense is to be considered an act of delinquency or a crime.

Devison-Charles, 22 I&N Dec. at 1365.

In *Matter of Ramirez-Rivero*, the Board discussed the definitions of "juvenile" and "juvenile delinquency," stating:

The FJDA defines a 'juvenile' as 'a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday,' and 'juvenile delinquency' as 'the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.' 18 U.S.C. § 5031 (footnote omitted).

18 I&N Dec. 135, 137 (BIA 1981).

However, although an act of juvenile delinquency is not considered a criminal conviction on which to base removal or bar relief from removal, a juvenile offense may still be considered when

¹ The record further reflects that the juvenile court recalled the warrant in [REDACTED] 2009.

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reviewing an application for a discretionary benefit, such as adjustment of status. *See Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006); *see also* 8 C.F.R. § 245.24(d)(11).

2. The Applicant's Additional Criminal History

The Applicant does not contest that his criminal history, including probation violations, prior to and during his U-3 nonimmigrant status, includes the following in violation of the California Penal Code:

- [REDACTED] 2009, arrested and charged under the forgery and counterfeiting provisions in section 470b; a plea of *nolo contendere* and sentence inclusive of summary probation for 36 months and 5 days incarceration (3 days credited).²
- [REDACTED] 2010, 2 negotiated pleas of *nolo contendere* under the robbery provision in section 211; consecutive sentences inclusive of imprisonment for 3 years (391 days credited) and 1 year.

As it relates to his 2009 arrest, the Applicant indicated that he contributed to his family's finances by obtaining employment with the use of an identity card and social security number that did not belong to him. Further, regarding the robbery offenses, the Petitioner stated that he was intoxicated and had fallen asleep in the backseat of a motor vehicle. He further indicated that when he awoke to the sound of cars honking, he "took it upon himself to move the vehicle he was in [and] when [his friends] stepped back into the vehicle [he] realized they had just committed a robbery." He stated that he "ended up taking a plea" because he felt badly for the victims as he witnessed his mother undergo domestic violence by his stepfathers. The Applicant continues to maintain on appeal that he was not involved with the planning or commission of the robberies, the victims did not identify him as a perpetrator, and a codefendant "ultimately confessed" to committing the robberies. He further asserts on appeal that USCIS "regurgitates boilerplate language" and did not consider evidence submitted in his response to the Director's Notice of Intent to Deny (NOID) as "[t]here is nothing in the record to show [he] acted with great violence."³

² On appeal, the Applicant states the Director erroneously concluded that his criminal history "includ[ed] an adult conviction for forgery[.]" and in so doing, ignored documentation to rebut a finding that he had been convicted of "Adult Forgery." The Applicant misinterprets the Director's finding. The statement referenced by the Applicant is included in the section of the Director's decision that quotes information contained in a "Probation Officer's (Pre-Plea) Report[.]" Later in the decision, the Director makes a finding consistent with the Applicant's assertion that he was convicted of possession of a forged document as the Director noted the Applicant was "convicted as an adult for possessing a forged instrument (Driver's License)."

³ As relates to the Applicant's robbery convictions, initially there were two charges for attempted murder, in addition to the robbery charges. The Applicant asserts that it is legal error for USCIS to consider an arrest and charges as adverse factors because neither are evidence of a conviction. However, although our analysis on appeal focuses only on the robbery convictions, we may consider arrest reports, criminal complaints, and charging documents that did not actually lead to a conviction as part of our discretionary determination. *See Carcamo v. U.S. Department of Justice*, 498 F.3d 94, 98 (BIA 2007) (stating "police reports and complaints, even if containing hearsay and not a part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief."); *see also*

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Although the Applicant attempts to diminish his culpability for the circumstances leading to two convictions for robbery, the fact remains that he was convicted of an offense for which the Ninth Circuit Court of Appeals has determined to categorically be a crime involving moral turpitude and a crime of violence. *U.S. v. Teng Jiao Zhou*, 815 F.3d 639, 644 (9th Cir. 2016) (citing *Mendoza v. Holder*, 623 F.3d 1299, 1303 (9th Cir. 2010) (holding that a conviction under the robbery provisions of the California Penal Code is categorically a CIMT)); *U.S. v. McDougherty*, 920 F.2d 569, 573 (9th Cir. 1990) (concluding robbery in California is a crime of violence as defined in 18 U.S.C. § 16(b) as “the typical crime of violence does not have to result in violence, the mere threat of physical force or the risk of physical force is sufficient.”)(footnote omitted); *Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 601 (BIA 2015) (holding the proper inquiry for “determining whether a conviction is for an aggravated felony crime of violence under 18 U.S.C. § 16(b) . . . is whether the conduct encompassed by the elements of the offense presents a substantial risk that physical force may be used in the course of committing the offense in the ‘ordinary case.’”). Moreover, as the Applicant was convicted of a crime of violence, he was removed from the United States in [REDACTED] 2016 pursuant to the aggravated felony provision contained in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F).⁴

3. The Applicant’s Behavior at a Detention Facility

The record reflects that during his confinement at a detention facility while awaiting removal from the United States, the Applicant was involved with the following:

- [REDACTED] 2013, possession of contraband items and sentenced to 10 days of disciplinary segregation (5 days credited).
- [REDACTED] 2014, a fight between several detainees resulting in a “write-up.”

In regard to the 2013 incident, the Applicant explained in his statements that he likes to draw and had “extra pens” and bought “an instrument” to sharpen his color pencils, not realizing that these items were prohibited at the facility. He also indicated that although he was initially sentenced to 10 days, he only served 5 days for “good behavior.” However, the information relayed by the Applicant is not consistent with the Institution Disciplinary Panel Report (the Disciplinary Report) referenced in the NOID and the Director’s denial. In the detainee’s statement section of the Disciplinary Report, the Applicant “claimed he **found** [emphasis added] the contraband items (2 razor blades and 3 ink pens) hidden in the workout equipment area[,]” and although, the Disciplinary Report confirmed that the Applicant received “10-days in disciplinary segregation” and “will serve

Matter of Grijalva, 19 I&N Dec. 713, 722 (BIA 1998) (stating the admission of police reports into the record was “especially appropriate in cases involving discretionary relief from deportation, where all relevant factors concerning an arrest and conviction should be considered to determine whether an alien warrants a favorable exercise of discretion.”); *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (discussing the proper weight to give to an arrest report, absent a conviction or corroborating evidence of the allegations).

⁴ The Applicant’s robbery convictions also fall within the aggravated felony provision contained in section 101(a)(43)(G) of the Act, as a theft offense for which the Applicant received a term of imprisonment for at least 1 year. 8 U.S.C. § 1101(a)(43)(G).

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5-days[.]” there is no indication that the reduction in time was based on “good behavior” but for “time served.”

The Applicant’s rendition of the 2014 incident also is not consistent with information contained in the [REDACTED] Detention Center Report (the DC Report). In his statements, the Applicant explained that after a fight at the detention center, individuals, like himself, “who had nothing to do with [the] incident[.]” were questioned but he did not know how to respond as he “was real scared and got paranoid[.]” However, the DC Report stated “[u]pon further review of recorded video footage . . . the following detainee[s] were also identified as aggressors in this incident[.]” and listed the Applicant as one of those aggressors.

4. The Applicant’s Association with Gang Members

The record contains inconsistencies concerning the Applicant’s gang association and membership. During the criminal proceedings related to the Applicant’s robbery convictions, in a Pre-Conviction Report, a probation officer reported the Applicant’s membership with the [REDACTED] gang. The Director referred to this report in the NOID and denial, noting that the Applicant was a gang member with the moniker, [REDACTED]. The Director also noted that during removal proceedings, the Applicant acknowledged his association with gang members but denied membership. During his removal proceedings, the Applicant testified that he obtained the tattoo, [REDACTED] while in prison because although he had never actually attended a game, he was a lifetime fan of the L.A. Dodgers baseball team. He also testified that he had a tattoo of the initials, [REDACTED] but indicated they referred to [REDACTED] his last name, and his ex-girlfriend. On his asylum application and in a supporting statement concerning his fear of gangs if he were to return to Mexico, the Applicant attested to not being a member of any gang but having friends who were members of [REDACTED] and [REDACTED] gangs. He indicated that he “decided to tatto[o] the name of [REDACTED] on [his] body[.] the name of the gang that use[d] to be in [his] town” He further attested that he obtained the tattoo [REDACTED] “because in jail you need to be part of a gang group for protection or else you can get beat up.”

In his response to the NOID, the Applicant did not address his association or membership with the gang, and on appeal, states generally that he grew-up in a “poor neighborhood” with gangs, but knowing and associating with gang members, like he did, does not make him an actual member. Without specifying any particular laws, the Applicant also states that his convictions do not include any “gang statutes.”

B. Favorable and Mitigating Factors

In his personal statements, the Applicant described coming to the United States over 12 years ago as a minor and generally discussed assisting his mother financially and with the care of siblings “who suffer from special needs.” He also expressed remorse for associating with friends and peers “who are a bad influence on [his] life,” along with his intention to remove all “visible tattoos.” The Applicant further indicated his intentions to complete his education and to find “a good job.”

In letters of support, the Applicant's mother and eldest sister described the Applicant as "a good boy" and supportive, "like a dad for his siblings," and "willing to help those who need the most." The Applicant's mother also discussed the domestic violence the Applicant witnessed as a child and the financial, emotional, and physical support he provided to their household and in the care of his siblings. She generally discussed the deterioration of her health, inclusive of experiencing "strong depression" in the Applicant's absence, along with the loss of their home and the custody of her minor children.

C. Weighing of the Factors as an Exercise of Discretion

On appeal, the Applicant asserts he submitted "[3] pounds and 12 ounces of evidence," demonstrating mitigating circumstances for which USCIS "declined to look at" in response to the NOID. The regulation at 8 C.F.R. § 245.24(d)(11) affords USCIS the sole authority in determining which factors it deems necessary for exercising its discretion favorably, and when there are adverse factors, it may be necessary that the Applicant submit supporting documentation of mitigating circumstances. Therefore, an adjudicator needs to reasonably consider all evidence in the record that has probative value, and in so doing, render a decision substantially supported by such evidence. Although the Applicant focuses on the number of documents submitted, the determination regarding the sufficiency of the evidence is determined not by the quantity of evidence alone, but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Although the Director did not provide a separate discussion of each document submitted by the Applicant, our review of the Director's decision indicates that the Director considered the Applicant's personal statements, along with statements submitted on his behalf, documents concerning his juvenile offense and criminal history, and his expressions of remorse. The Director also considered the Applicant's family ties and his mother's emotional and psychological wellbeing, along with his three siblings' diagnoses of autism, Down syndrome, and "Mild Mental Retardation." After assessing and discussing the evidence, the Director concluded that the Applicant did not sufficiently establish it was in the public interest to favorably exercise discretion on humanitarian grounds or to ensure family unity.

The favorable and mitigating factors in the present case are the Applicant's prior length of residence⁵ and close family ties in the United States, the emotional, financial, and physical support he provided his lawful permanent resident mother and younger, U.S. citizen siblings when they were in their mother's custody, and the general hardship his family has endured.

The adverse factors are the Applicant's arrest for a juvenile offense and three criminal convictions, two of which involved an inherently violent crime that occurred while the Applicant was in U

⁵ To be eligible for adjustment of status, a U nonimmigrant visa holder, like the Petitioner, must demonstrate continuous physical presence in the United States from admission through the date of the conclusion of adjudication of the application for adjustment of status. See 8 C.F.R. § 245.24(a)(1),(b)(3). The Applicant has been outside of the United States for more than 90 days since his removal in April 2016. This factor is an additional ground for denial.

nonimmigrant status, and one involving possession of identity documents that did not belong to him and were used to obtain unauthorized employment. The Applicant also violated his probation and has provided inconsistent information regarding his affiliation with gangs, and his involvement with two incidents during immigration detention, one of which included the physical assault of another inmate. In addition, the Applicant was removed from the United States less than four months ago for his aggravated felony convictions, and accordingly, the record is unclear concerning any ongoing efforts at rehabilitation.

When viewed in their totality, based on our discretionary determination, the adverse factors in the present case outweigh the favorable and mitigating factors. Accordingly, the Applicant has not demonstrated compelling positive factors, his rehabilitation, 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 V-I-L-*, ID# 17548 (AAO Aug. 2, 2016)