



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

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

MATTER OF E-E-M-P-

DATE: JULY 7, 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, granted U-3 nonimmigrant status to the Applicant based upon an approved Form I-918A, Petition for Qualifying Family Member of U-1 Recipient. The Applicant entered the United States in U-3 status, which he maintained from October 9, 2010, through June 15, 2014. The Applicant subsequently filed the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application).

The Director denied the application. The Director concluded that the positive equities in the Applicant's favor did not outweigh the negative factors, and that his adjustment of status was not in the public interest. The Applicant filed a subsequent motion to reopen and motion to reconsider. The Applicant claimed that the Director erred by not considering whether the Applicant's adjustment was justified on humanitarian grounds or to ensure family unity. The Director reviewed the evidence and denied the motion, concluding that the Applicant's adjustment of status was not warranted as a matter of discretion.

The matter is now before us on appeal. On appeal, the Applicant submits a brief. The Applicant claims that the Director erred in that she: did not consider whether the Applicant's adjustment was justified on humanitarian grounds or to ensure family unity; denied the motion to reopen; and did not properly weigh the positive equities, including the Applicant's rehabilitation, against the negative factors in the record prior to her discretionary denial of the application.

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 --

(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

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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.

(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. ANALYSIS

Based on the evidence in the record as supplemented on appeal, we find no error in the Director's discretionary determination to deny the Applicant's U adjustment application.

The Applicant was convicted of three offenses in [REDACTED] Virginia while in U nonimmigrant status:

- On [REDACTED] 2012, the court convicted the Applicant of petit larceny (less than \$5) from a person, in violation of Va. Code Ann. section 18.2-96, a misdemeanor, and sentenced him to 56 days imprisonment (26 days suspended).
- On [REDACTED] 2013, the court convicted the Applicant of disorderly conduct, in violation of Va. Code Ann. section 18.2-415, a misdemeanor.¹ The court sentenced him to 175 days imprisonment (85 days suspended), and 12 months of supervised probation.
- The Applicant violated probation, and on [REDACTED] 2015, the court reinstated probation, ordering 12 months of supervised probation and 12 months of unsupervised probation, with "gang probation" as a condition of probation.²

Upon consideration of the Applicant's personal statements, letters submitted on his behalf, his criminal history, rehabilitative efforts, and family ties in the United States, the Director concluded that the Applicant did not sufficiently establish that the "positive equities" outweighed the negatives, including the fact that the Applicant remained on probation with a condition for street gang involvement. The Director determined that it was not in the public interest to exercise discretion favorably.

The Applicant filed a subsequent motion to reopen and motion to reconsider, with additional evidence including another personal statement, a letter from his probation officer, and additional letters of support. The Applicant claimed that the Director erred by not considering whether the Applicant's adjustment was justified on humanitarian grounds or to ensure family unity. The Director denied the motion, finding that the evidence was cumulative and previously discoverable.

¹ Pursuant to plea agreement, the charges for injury to a vehicle and criminal activity while participating in a street gang were not prosecuted.

² The court records for the violation of probation are not in the record of proceedings. The Applicant states on appeal that he violated probation by missing an appointment with his probation officer. In an earlier statement, the Applicant stated that the Court reinstated probation on [REDACTED] 2015, for 24 months, because he failed to register for probation even though he had already seen his probation officer once a week for two months.

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The Director reviewed the Applicant's close family ties in the United States and positive impact on the community through his church and volunteer activities, and concluded that these favorable factors did not overcome the negative factors of his criminal convictions, and that his adjustment of status was not justified on humanitarian grounds, to ensure family unity, or in the public interest.

The evidence in the record before the Director included the Applicant's personal statements, letters of support, and employment, tax, and criminal records. In his personal statements, the Applicant described the pain of being separated from his mother since the age of 10, living with an abusive aunt and uncle in El Salvador, and the difficulty he had learning English and adjusting to his new life in the United States. The Applicant stated that he left high school after a year in the United States to support himself and to help his mother and sister financially.

The Applicant described his first encounter with the police as a bad judgment call he made when he found a cell phone in a locker at the laundromat, and took it home with him temporarily out of curiosity. With respect to his second arrest, he stated that his friends, whom he suspected of gang membership, texted to ask if he wanted to go to the beach. They picked him up in a van, and when the van was stopped by the police, the Applicant found out that the van was stolen.³ He expressed his remorse for his criminal acts, declared that he was never a member of a criminal gang, and no longer associated with any of these friends. The Applicant submitted a letter from [REDACTED] his probation officer, who stated that on [REDACTED] 2015, the Applicant was placed on 12 months' supervised probation and 12 months' unsupervised probation. [REDACTED] stated that the only condition specified in the Applicant's probation is "gang probation" which prohibits the Applicant from associating with known gang members. [REDACTED] further stated that a risk assessment had been performed, that the Applicant had been determined to be a low risk offender,⁴ and that the Applicant was motivated to improve his life.

The Applicant explained that since getting out of jail and joining his church in 2013, he has not been arrested or committed any crimes, and that missing his probation appointment was an honest mistake. He stated that since January 2014 he has lived with some church members, and is taking steps to enroll in English classes. He stated that he would like to obtain a high school equivalency and eventually to become a police officer and serve others. He indicated that he has no family in El Salvador except his father, who is an alcoholic, and a sister, who is busy raising children. He described the violence in El Salvador as very bad now.

The Applicant submitted over 25 letters in support of his U adjustment application. The Applicant's mother observed the Applicant's emotional rejection of her when he first arrived in the United States, how much he had matured since getting out of jail in 2013, and how painful it would be if her son were removed to El Salvador, where he would be unsafe and without family support. The Applicant's sister described the abuse the Applicant suffered from his aunt and uncle in El Salvador,

³ The Applicant's sister indicated that she was also invited to the beach, and that neither she nor the Applicant knew the driver of the van, or that the van was stolen.

⁴ The risk assessment is not in the record.

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the pain of being separated from their mother, the Applicant's remorse for his criminal actions, and change for the better since he became involved in church. She stated that both she and her mother would be devastated if the Applicant were returned to El Salvador, and that El Salvador is dangerous. The Applicant's step-father and his girlfriend attested to the Applicant's good qualities and close relationship with the family. The Applicant's pastor, [REDACTED] and his co-pastor, [REDACTED] discussed the Applicant's dedication to serving the community, particularly troubled youth, and their regard for his good character. An employer, friends, and church associates described the good work and character of the Applicant. The Applicant also submitted letters indicating the extent of his mother's suffering as a victim of rape, the qualifying crime underlying the approval of her U nonimmigrant visa, her remorse at having left her children in El Salvador, and her anxiety about the Applicant's safety if he is returned to El Salvador.

Under Section 245(m) of the Act, adjustment of status is 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). 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 U adjustment 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 factors, such a showing might still be insufficient. *Id.*; *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).

A. Favorable Factors

Although the Applicant asserts that the Director did not consider whether the Applicant's adjustment would be justified on humanitarian and family unity grounds, the Director found that the Applicant's relationship with his mother and sister, both lawful U.S. permanent residents, and his participation in volunteer and church activities, were both positive equities in his favor. The Director also weighed as positive factors the Applicant's lawful status in the United States, his completion of one year of high school, remorse for his mistakes, relationship with his girlfriend, and positive employment experiences.

The Applicant's six-year residence in the United States, close ties to his U.S. family members, efforts to improve himself, volunteer activities, participation in church, filing of 2012 and 2014 taxes, stable employment, emotional maturity, and the strong support of his church leaders and members of the church, are all positive factors to be considered. We recognize that the Applicant, his mother, and his sister, will suffer emotionally if the Applicant is returned to El Salvador. We

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acknowledge the positive contributions that the Applicant is making to his community, and that his departure would be a loss to the community.

B. Unfavorable Factors

The Applicant was arrested and charged with two misdemeanor offenses while he was in lawful U-3 nonimmigrant status. The Applicant was sentenced to almost two months in prison for his petit larceny conviction, and almost six months in prison, and one year of probation, for the disorderly conduct conviction, with instructions not to associate with known gang members. While the reasons for the court's reinstatement of 24 months of additional probation in [REDACTED] 2015 are unclear, the Applicant remains on probation, with the same gang prohibition, until [REDACTED] 2017. The Applicant asserts on appeal that he is fully rehabilitated from his criminal past, as evidenced by the statements indicating that he is a productive member of the community. Nevertheless, the Applicant's probationary period, and thus his full rehabilitation, is not complete. The Applicant's legal status as a person on probation, resulting from criminal activity while associating with gang members, is a serious adverse factor that outweighs the strong positive equities in the Applicant's favor.⁵

C. Exceptional and Unusual Hardship

The regulations provide that, where the adverse factors are particularly serious, an Applicant may 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. The Applicant, his mother, and sister assert that the Applicant has no family in El Salvador, and his mother states that the Applicant will be especially susceptible to gang violence as a young man returning from the United States, if he is removed to El Salvador. The Applicant has not, however, presented details of specific hardships that he and/or his U.S. family members will suffer if he returns to El Salvador. The record does not show that the Applicant or his family members would suffer exceptional and extremely unusual hardship if the Applicant were removed.

III. CONCLUSION

The Director appropriately weighed the mitigating and negative factors before determining that the Applicant's adjustment of status should be denied as a matter of discretion. For the reasons discussed above, the Applicant has not demonstrated that his adjustment of status is warranted for humanitarian reasons, for family unity, or is otherwise in the public interest.

⁵ The Applicant states that he was never a gang member, and did not know the van was stolen. Nonetheless, we may not go behind a conviction to determine the Applicant's guilt or innocence. See *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999) (an administrative agency cannot go behind the judicial record to determine an alien's guilt or innocence).

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In these proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of E-E-M-P-*, ID# 16953 (AAO July 7, 2016)