



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

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

MATTER OF J-V-R-L-

DATE: JULY 13, 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 the negative factors, including his multiple convictions, lack of compliance with court orders, and probationary status outweighed the mitigating factors, and that his 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 and additional evidence. The Applicant claims that the mitigating factors outweigh the negatives, and that his adjustment of status should be approved. He claims that denial of his adjustment application would result in exceptional and extremely unusual hardship to him and to his spouse and children.

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

(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).

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II. FACTS AND PROCEDURAL HISTORY

The Director, Vermont Service Center, granted U-1 nonimmigrant status based upon an approved Form I-918, Petition for U Nonimmigrant Status (U petition). The Applicant subsequently filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application).

The Applicant has the following criminal history on the criminal docket of the Superior Court of California, [REDACTED] (court):

- On [REDACTED] 2012, the court convicted the Applicant of violating California Vehicle Code (Cal. Veh. Code) section 14601.2(a), driving with suspended or revoked license, a misdemeanor, and dismissed the charge for resisting arrest. The court granted a conditional sentence of 24 months,¹ and sentenced the Applicant to 35 days in jail and payment of fines and fees. Case no. [REDACTED]
- On [REDACTED] 2011, the court convicted the Applicant of violating Cal. Veh. Code 23152(a), driving under the influence of alcohol (DUI), a misdemeanor, with enhancement for two priors² and subsequently sentenced the Applicant to 120 days in jail, formal probation for 60 months, participation in DUI court, participation in Multiple Offender Drinking Driver Program (MODDP), designation as a habitual traffic offender (third or subsequent offense), attendance at counseling and AA meetings, random drug and alcohol testing, wearing a monitor bracelet for 30 days, payment of fines and fees, and other conditions. The court later revoked the Applicant's probation for his plea in [REDACTED] then reinstated probation. The court revoked the Applicant's probation for a second time in this case, and subsequently reinstated it, for not attending the MODDP program.³ The court verified his enrollment in the MODDP on [REDACTED] 2014. Case no. [REDACTED]
- On [REDACTED] 2009, the court convicted the Applicant of violating Cal. Veh. Code section 23103.5, reckless driving under the influence of alcohol, a misdemeanor, and dismissed the charges of driving under the influence and driving with a suspended or revoked license. The court granted a conditional sentence of 24 months, and sentenced the Applicant to 10 days in jail, education, counseling, AA meetings, payment of fines and fees, and other conditions. The court revoked probation after [REDACTED] was calendared, and subsequently reinstated probation. Case no. [REDACTED]
- On [REDACTED] 2008, the court convicted the Applicant of violating VC 12500(a), driving without a license, an infraction. The court granted a conditional sentence of 12 months, and sentenced him to 10 days in jail or work release, and payment of fines and fees. The court subsequently revoked Applicant's probation following his plea in [REDACTED] then

¹ Under California Penal Code section 1203, a conditional sentence suspends the imposition of the sentence, subject to the conditions established by the court, without the supervision of a probation officer.

² The Applicant admitted to two prior convictions for driving while under the influence of alcohol.

³ The Director erroneously stated that the record showed that the Applicant completed the MODDP program in 2014.

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reinstated probation. The docket reflects that the Applicant's probation was terminated unsuccessfully. Case no. [REDACTED]

- On [REDACTED] 2008, the court convicted the Applicant of violating Cal. Veh. Code section 14601.5(a), driving with a suspended or revoked license, a misdemeanor. The court granted a conditional sentence of 24 months, and sentenced the Applicant to four days in jail or four days work release, and payment of fines and fees. The court revoked probation when the Applicant was convicted of driving without a license in [REDACTED] then subsequently reinstated probation. Case no. [REDACTED]
- On [REDACTED] 2007, the court convicted the Applicant of violating Cal. Veh. Code 12500(a), driving without a license, an infraction. The court granted 12 months' conditional sentence and payment of fines and fees. Case no. [REDACTED]
- On [REDACTED] 2006, the court convicted the Applicant of violating VC 23103.5, reckless driving under the influence of alcohol, a misdemeanor, and dismissed the charges of driving under the influence (two counts), driving without a license, and presenting car identification not belonging to the car. The court granted the Applicant a conditional sentence of 24 months, and ordered him to pay fines and fees. Case no. [REDACTED]
- On [REDACTED] 2005, the court convicted the Applicant of violating VC 12500(a), driving without a license, an infraction. The court granted the Applicant a conditional sentence of 18 months, and sentenced him to four days in jail or work release, and payment fines and fees. The court ordered probation revoked when he failed to register for jail or work release. The court then reinstated probation. Case no. [REDACTED]

III. ANALYSIS

The Director reviewed the Applicant's close family ties, stable employment history, and rehabilitation efforts as positive equities in the Applicant's favor. She concluded that the negative factors, including his multiple convictions, lack of compliance with court orders, and probationary status outweighed the mitigating factors, and that his adjustment of status was not warranted as a matter of discretion. The Director expressed concern about the Applicant's history of non-compliance with court orders, repeated violations of parole, and combative nature with law enforcement as evidenced in a letter of concern from the certifying official on the Form I-918 Supplement B, U Nonimmigrant Status Certification, and his 2010 and 2012 arrest records. 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.

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 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

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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

The Applicant asserted that he suffered post-traumatic stress disorder (PTSD) from the 2004 stabbing, the crime underlying the approved U petition, and that the PTSD led to his self-destructive behavior and drinking and driving convictions.⁴ In his personal statements, the Applicant stated that he had not consumed alcohol since 2010, and expressed remorse for resisting arrest in 2012. He explained that he was depressed in 2012, the reasons for which were substantiated in the record by his spouse, M-M-V-⁵ and ██████████ M.S., L.M.F.T. Ms. ██████████ described the circumstances in the Applicant's life in 2012 and indicated that his emotional pain, suicidal thoughts, and feelings of hopelessness and worthlessness were symptoms of a Major Depressive Disorder. She stated that his inappropriate reaction to the police officer in 2012 was consistent with this diagnosis and was not a sign of an aggressive personality. The Applicant stated that after his hospitalization in November 2012, his life turned around.⁶

The record reflects that M-M-V- and their two young sons, all U.S. citizens, rely on the Applicant for half of the family's income, and for the daily childcare tasks he provides, such as homework, soccer games, and dinner. He submitted employment and tax records showing that the Applicant filed taxes in 2011, 2012, 2013 and 2014, and that in 2014 he earned \$32,800. The Applicant described the emotional and financial stress his spouse will be subjected to if he has to return to Mexico. He submitted letters from M-M-V-, M-M-V-'s mother, sisters, and brother-in-law, and from his friends, all of whom attested to the Applicant's close relationship with M-M-V- and their sons. They further attested to his caring and respectful nature, and sense of responsibility. ██████████ one of the Applicant's employers, expressed praise for the Applicant's work ethic.

The evidence of the Applicant's rehabilitation included a certificate of completion and informational materials about DUI court. The materials described DUI court as an intensive, year-long, voluntary program with select admission criteria, whose graduates have a lower rate of recidivism than those who have not completed the DUI court program. The Applicant submitted a copy of his California

⁴ While we sympathize with the Applicant's PTSD, his emotional suffering does not excuse his criminal behavior.

⁵ Name withheld to protect the individual's privacy.

⁶ The Applicant submitted medical records from ██████████ indicating that he voluntarily placed himself in a psychiatric facility for a 72 hour period in November 2012. The Applicant stated that the hospital prescribed anti-depressant medication.

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driver's license,⁷ and a drug and alcohol evaluation performed by Dr. [REDACTED] Family Physician, Designated Civil Surgeon, Senior Aviation Medical Examiner, who determined that the Applicant did not meet the criteria for alcohol abuse, and posed little risk of harmful behavior.

The Applicant submitted a second letter from Ms. [REDACTED] who examined M-M-V- and diagnosed her with an "adjustment disorder with mixed anxiety and depressed mood." Ms. [REDACTED] determined that this was caused by stressors including M-M-V-'s uncertainty about a future without the Applicant, and the prospect of supporting her two children without their father. Ms. [REDACTED] stated that M-M-V- "could suffer from a major depressive disorder," if she were to be separated from the Applicant.

On appeal, the Applicant submits a letter from M-M-V- who states that she has been with the Applicant for 11 years, that he quit drinking in 2010, and that following the Applicant's hospitalization he became a different person. M-M-V- states that he completed the DMV multiple offender program in 2012.⁸ She describes the Applicant as a devoted father and husband and a good provider who has remorse for his crimes.

The Applicant's 13-year residence in the United States, close ties to and support of his U.S. family members, filing of taxes, stable employment, efforts to rehabilitate himself, including completion of the voluntary DUI court, sobriety since 2010, remorse for the 2012 incident, low risk for harmful behavior, and the strong support of his extended family and friends are all positive factors to be considered.

B. Unfavorable Factors

On appeal, the Applicant states that the 2006 and 2009 convictions were for "wet reckless" under Ca. Veh. Code sections 23101.5 and 23103.5, and that he was only convicted once of DUI under Ca. Veh. Code section 23152(a).⁹ The Applicant thus argues that his wet reckless convictions should not be given the same negative weight as the 2010 offense. California jurisprudence does not ascribe less weight to wet reckless than to DUI. The court in *People v. Claire*, 280 Cal. Rptr. 269, 270-271 (Ca. Ct. App. 1991), rev. denied (August 1, 1991) states:

[Ca. Veh. Code] section 23103.5, enacted in 1981 as part of a comprehensive strengthening of the penalties for drunk driving, closes a former loophole which had allowed repeat drunk drivers to avoid the increased penalties for recidivism by pleading guilty to reckless driving rather than drunk driving. When a drunk driving charge is reduced to a "wet reckless"

⁷ The record indicates that the Applicant received a California driver's license in August 2014, marked with the restriction "89." The record does not indicate what the restriction is.

⁸ The record reflects that the Applicant completed DUI court in 2012, not the multiple offender program.

⁹ "Wet reckless" refers to misdemeanor reckless driving with a prosecutorial statement that alcohol was involved under Ca. Veh. Code sections 23103 and 23103.5. *Coffey v. Shiimoto*, 345 P.3d 896, 900 (Cal. 2015), reh'g denied (May 20, 2015).

driving charge under [Ca. Veh. Code] section 23103.5, the resulting conviction is the same as one of drunk driving for purposes of the penalties imposed upon recidivism.

The record reflects that the Applicant pled to wet reckless in 2006 and 2009 after initially being charged with DUI, and that he admitted to the two prior offenses for sentence enhancement purposes as shown in the criminal docket for the 2010 DUI. We will not ascribe lesser weight to the two priors than did the court in 2010 when it pronounced the required sentence for a third DUI conviction.

The Applicant also asserts that he was not convicted of any violent crime. While the Applicant's repeated convictions have not resulted in injury, he has not demonstrated that he is fully rehabilitated from excessive alcohol use and/or from drinking and driving. The record does not contain documents describing current recovery efforts, whether or not the Applicant continues to attend AA or other support group meetings, and/or whether he is drinking again. While M-M-V- states that the Applicant is fully rehabilitated, the Applicant himself does not describe his recovery from criminal behavior and alcohol abuse with any detail. The certificate of completion for the MODDP is not in the record, and the record does not show the conditions of probation associated with his 2010 DUI conviction have been terminated.

The Applicant was arrested and convicted of five misdemeanor offenses from 2005 – 2012. Three of them involved driving under the influence of alcohol, and two for driving with a revoked or suspended license. He committed two of the crimes after he had either applied for or been approved for a U nonimmigrant visa.¹⁰ While on probation, the court revoked probation six times. He admits to inappropriate behavior toward law enforcement during his 2012 arrest. Other than for the 2012 offense, the Applicant has not expressed remorse for his criminal behavior. The Applicant's disregard for the law, the repeated offenses, lack of remorse, and the lack of time in rehabilitated status are serious negative factors weighing against approval of the U adjustment application.

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 and M-M-V- assert that M-M-V- will be devastated and their sons will be harmed if the Applicant is returned to Mexico. The Applicant submits various articles generally discussing the harm to a child who grows up without a father, the trauma of victimization, and the violence in Mexico. We recognize that the Applicant and his family will suffer emotionally and financially if the Applicant is returned to Mexico. The Applicant has not, however, presented details of specific hardships that he and/or his U.S. family members will suffer, or that they would suffer exceptional and extremely unusual hardship if the Applicant were removed.

¹⁰ The Applicant was arrested for the 2010 DUI after filing his U petition.

IV. CONCLUSION

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.

In these application 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 J-V-R-L-*, ID# 16957 (AAO July 13, 2016)