U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-J-A-B-

DATE: JULY 25, 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, approved a Form I-918A, Petition for Qualifying Family Member of U-1 Recipient, filed on behalf of the Applicant. The Applicant entered the United States in U-3 status. The Applicant subsequently filed the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application).

The Director denied the U adjustment application. The Director concluded that the Applicant's arrest on serious criminal charges was a serious adverse factor that was not outweighed by the positive equities. The Applicant filed a subsequent motion to reopen and motion to reconsider. The Applicant stated that the court dismissed the criminal charges in exchange for his plea of guilty to a violation for disorderly conduct, and that the Director erred in finding that his arrest on criminal charges was a serious adverse factor. The Director 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 gave too much weight to the dismissed criminal charges, and that the arrest report requested by the Director was prejudicial and inherently unreliable. He claims that the Director's denial was an abuse of discretion, and that removal would constitute an exceptional and unusual hardship because of his diagnosis with HIV/AIDS.

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 –
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> . . . .
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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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> . . . .
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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

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.

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 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).

A. Adverse Factors

The record reflects that the Applicant was arrested on 2013, and was subsequently charged with the following crimes: second degree strangulation, causing stupor, unconsciousness, or physical injury, in violation of N.Y. Penal Law section 121.12, a felony;[1] third degree assault with physical injury, in violation of N.Y. Penal Law section 120.00, subdiv. 1, a Class A misdemeanor; second degree menacing by displaying a dangerous weapon, in violation of N.Y. Penal Law section 120.14, subdiv. 1, a Class A misdemeanor; and second degree harassment, in violation of N.Y. Penal Law section 240.26, subdiv. 3, a violation. The Criminal Court of New York, convicted the Applicant, pursuant to his guilty plea, of disorderly conduct, in violation of N.Y. Penal Law section 240.20, and entered an order of conditional discharge of one year and an order of protection of two years.[2]

The Director questioned the Applicant's description of the incident leading to the arrest, which was inconsistent with the criminal charges. The Applicant stated:

> While I was texting on my phone, [my ex-girlfriend] told me that I must be texting another woman. When I did not immediately respond to her, she suddenly grabbed my phone out of my hands. I tried to get my phone back from her, but she didn't return it. I gave up and left her apartment without my phone.

In light of the discrepancy between the criminal charges and the Applicant's version of the events, the Director sent a request for evidence (RFE) requesting the Applicant to produce a copy of the arrest report. The Applicant did not submit a copy of the arrest report as requested.

In the denial decision, the Director stated that the current record of proceedings contained a single page noting the disposition of the criminal charges, and no explanation of the discrepancy between the Applicant's version of the events and the criminal charges. She determined that the criminal

[1] The certificate of disposition indicated that this charge was amended to criminal obstruction of breathing or blood circulation under N.Y. Penal Law section 121.11, a class A misdemeanor.

[2] Under N.Y. Penal Law section 65.05, the court may impose a sentence of conditional discharge if the court determines that neither imprisonment nor supervised probation is appropriate. Under N.Y. Penal Law section 530.13, subdiv. 4, a criminal court may, as part of sentencing, issue an order of protection in favor of the victim or a witness. The certificate of disposition does not indicate for whom the order of protection was imposed.

charges, and the Applicant's unwillingness to produce the arrest report, were serious adverse factors. The Director found as additional adverse factors the criminal court's imposition of a two-year order of protection, the applicant's untruthfulness about his arrest on the U adjustment application at Part C., question 1.b., and the lack of evidence that he had paid taxes. The Director concluded that the Applicant's behavior leading to his arrest and conviction remained unclear, and that it was not in the public interest to exercise discretion in his favor.

On a subsequent motion to reopen, the Applicant asserted that the Director erroneously relied on the dismissed criminal charges rather than the certified disposition which showed he had "a non-criminal violation for disorderly conduct."[3] The Applicant contended that the Director erred in considering the criminal charges rather than the evidence in the instant record of proceedings. The Director denied the motion, finding that the evidence was cumulative and previously discoverable. The Director determined that under *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996), the content of arrest reports would be relevant to a discretionary determination.

On appeal, the Applicant asserts that we must rely on the disposition of the charges and not on the false allegations of his ex-girlfriend. However, it is not only the fact of the disorderly conduct conviction, but the Applicant's behavior leading to the criminal charges, that are weighed against the positive factors in the discretionary determination of the U adjustment application. All relevant factors regarding an alien's arrest and conviction may be considered in cases involving discretionary relief, and a police report describing the circumstances of the Applicant's would be appropriately considered in this case. *See Matter of Teixeira*, at 321. In *Carcamo v. U.S. Dep't of Justice,* 498 F.3d 94, 98 (2d Cir. 2007), the jurisdiction in which this case arises, the court noted that "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."

The Applicant cites to *United States v. Johnson*, 710 F.3d 784 (8th Cir. 2013) in support of his claim that arrest records are not reliable evidence of the truth. *United States v. Johnson* involved the consideration of a police report involving a criminal defendant's right to cross-examine an adverse witness in a revocation of probation hearing, and is not relevant to the facts of this case. The Applicant cites to *In Re Arreguin De Rodriguez,* 21 I&N Dec. 38, 42 (BIA 1995), *In Re Sotelo-Sotelo*, 23 I&N Dec. 201, 205 (BIA 2001) and *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) to support his argument that it would be legally erroneous and fundamentally unfair to give significant weight to uncorroborated arrest records, in the absence of a conviction. In each of these cases, the government declined to prosecute, which distinguishes the cases from the facts in these proceedings involving a plea agreement resulting in a conviction. The cases do not support the Applicant's claim that in the absence of a conviction, we may not consider an arrest report.

[3] Throughout these proceedings, the Applicant inaccurately refers to his conviction as non-criminal. Under N.Y. Penal law section 70.15, subdiv. 4, the maximum penalty for the crime of disorderly conduct is 15 days imprisonment. While the court did not impose a jail term, the court ordered the maximum periods allowed for a criminal violation when it imposed one year of conditional discharge under N.Y. Penal law section 65.05, subdiv. 3(b), and a two-year order of protection under N.Y. Penal law section 530.13, subdiv. 4.

We find as an adverse factor the fact that the Applicant was arrested and charged with three Class A misdemeanor offenses while he was in lawful U-3 nonimmigrant status. The Applicant pled guilty to disorderly conduct, a criminal violation, and the court entered a conditional discharge of one year and a protection order for two years. Other than the disposition page, the record does not contain any document from the record of conviction, e.g., the indictment, plea, judgment, and sentence, or any transcript of proceedings, minute entries, etc. *See Matter of Short* 20 I&N Dec. 136, 137-138 (BIA 1989) (the "record of conviction" includes the indictment, plea, verdict, and sentence). *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979) (considers as part of "record of conviction" the transcript from proceedings in which the criminal defendant accepted guilty plea). The Applicant does not state that he successfully completed the one-year conditional discharge and the two-year order of protection, and does not submit any court document indicating that the criminal proceedings have been terminated. As the Applicant has not submitted evidence of the status of the criminal proceedings, we cannot determine whether he complied with the conditions of the court order.

We also agree with the Director that the Applicant's refusal to submit the arrest report is a serious adverse factor. The Applicant has not submitted any documentation from the court proceeding indicating its reasoning for dismissing the charges. The instant record does not explain why the court sentenced the Applicant to one year of conditional discharge and also issued a two-year order of protection against him. Further, the disposition page does not indicate, as stated by the Applicant, that the court found the criminal charges to be without merit. We thus cannot determine the extent of the Applicant's objectionable behavior, if any, in the events leading up to the criminal charges. We further agree with the Director that the Applicant's untruthfulness about his arrest on the U adjustment application and the lack of evidence that he has paid taxes, are additional adverse factors.

B. Mitigating Factors

In the Applicant's personal statement, he takes responsibility for the disorderly conduct leading to his arrest, and expresses remorse for his behavior. He also states that he is sorry for being untruthful on his U adjustment application. He describes his close relationship with his mother and brother, both U.S. lawful permanent residents, and with his U.S. citizen aunt, uncle, cousins, and nephew. He indicates that he has a passion for music, and loves to play a variety of musical styles with his band, and salsa with his brother. He explains that he loves sharing his passion with young people by teaching music lessons for free. He submits statements from his mother and brother, who indicate how much they love and count on the Applicant for support, and how devastating it would be to lose him. The Applicant's uncle states that the Applicant is calm, easy-going, loving, and a good musician. His former girlfriend, [redacted] states that the Applicant is a generous and talented person who gives freely to his community, and supports his mother financially and emotionally. [redacted] a minister with the [redacted] describes the Applicant as respectful, loving, and kind. [redacted] and [redacted] fellow musicians, describe the Applicant as a passionate musician who is dedicated to his craft and to his family members. [redacted] MD and [redacted] MD each indicate that the Applicant is under his medical care for a diagnosis of AIDS, that the Applicant will require an indefinite course of medical therapy, and that his prognosis, with continued access to medicine, is

good. The Applicant also submits certificates of participation in English classes and medical records indicating that his mother had recent surgery on her left hand.

We consider as positive equities the Applicant's close ties to his mother, brother, and extended family. We recognize that the Applicant, his mother, and his brother will suffer emotionally if the Applicant is returned to Peru. We view favorably the Applicant's expression of remorse for the crime of disorderly conduct, financial assistance to his family, English language classes, participation in church, the performing arts, teaching free guitar lessons, and the support of his family, friends, music colleagues, and church minister. We acknowledge the positive contributions that the Applicant is making to the arts, and that his departure would be a loss to the community.

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 claims that because he gets free medication in New York for the treatment of his HIV/AIDS, he has a chance to live a long life in the United States. He asserts that if he were removed to Peru, he would not have the same access to medication and would die an early death. The Applicant submits evidence that he is in a program in New York that distributes medications for HIV/AIDS. The Applicant does not, however, submit evidence to establish that he would lack access to affordable and effective health care in Peru. Nor does the Applicant describe other specific instances of exceptional and extremely unusual hardship if he were removed from the United States to Peru. The Applicant has not demonstrated that the denial of adjustment of status would result in exceptional and extremely unusual hardship.

D. Weighing the Factors as an Exercise of Discretion

The adverse factors are the Applicant's conviction for disorderly conduct, the lack of evidence indicating that the criminal proceedings have terminated, the Applicant's arrest for violent criminal behavior, his lack of candor on the U adjustment application, and failure to pay income taxes. Although the Director requested information regarding his arrest, the Applicant has not provided the requested evidence, nor has he explained the circumstances surrounding his arrest other than stating generally that he and his ex-girlfriend had a scuffle over his cell phone. The Applicant has not provided sufficient information regarding the facts surrounding the incident, and as such, we cannot determine to what extent his behavior may be a particularly adverse factor.

The favorable and mitigating factors in the present case are the Applicant's close family ties in the United States, financial and emotional support of his mother, expression of remorse, and his participation in English classes, volunteer work, and the performing arts. We have also considered his diagnosis of HIV/AIDS and the medical treatment he is receiving in New York as a favorable factor.

The Applicant bears the burden of showing that discretion should be exercised in his favor in these proceedings. 8 C.F.R. § 245.24(d)(11). After considering the evidence in its totality, based upon our discretion, we find that the lack of evidence that the Applicant has complied with the orders of the Court, the serious criminal charges levied against him, and the lack of documentation from the police or the court that might shed light on the Applicant's behavior, outweigh the favorable factors in his case. Therefore, the Applicant has not demonstrated that his adjustment of status would be justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Section 245(m) of the Act.

III. CONCLUSION

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 F-J-A-B-*, ID# 17530 (AAO July 25, 2016)