



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

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

MATTER OF M-A-R-B-

DATE: JUNE 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 Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application). The Director concluded that a balancing of the mitigating and adverse factors in the Applicant's case did not establish that it was in the public interest to exercise favorable discretion and approve the Applicant's U adjustment application.

The matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence. The Applicant claims that he warrants a favorable exercise of discretion on his U adjustment application because he may be harmed on account of his sexual orientation if he were to return to Mexico, and although he was convicted of a single incident for committing a robbery, the underlying facts are "less severe" than the circumstances cited in the Director's decision concerning crimes of moral turpitude.

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 C.F.R. § 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.

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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 or her 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 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).

A. Favorable Factors

In his personal statements, the Applicant indicates that he has assisted with his [redacted] year-old brother's daily and medical care and provides for the brother's basic necessities because of "limitations" as a result of a stroke and partial facial paralysis. He also states that their mother only works part-time as a house cleaner, and he watches his brother so she can rest. The Applicant expresses fears of returning to Mexico because as a homosexual, he would be "attacked, threatened, abused, and persecuted[.]" along with the general drug-related violence in [redacted] his home State. He relays instances of homosexual friends who are targeted by drug dealers in Mexico and forced into prostitution and selling drugs.¹ He discusses his church-related activities, including tithing and attending classes to become a leader at the church, complying with his mandatory court-ordered probation, remaining "clean and sober," and maintaining a steady job as a prep cook along with aspiring to pursue an education in culinary arts.

¹ Information from the U.S. Department of State is consistent with the Applicant's claims concerning the treatment of homosexuals in Mexico and indicates that although the law prohibits discrimination against lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals, there were reports that the government did not always investigate and punish those complicit in abuses. The report further indicates that discrimination based on sexual orientation and gender identity was prevalent, despite a gradual public acceptance of LGBTI individuals. See Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2015: Mexico*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm> (last visited May 2016).

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In letters of support, the Applicant's mother and brother expressed general worry and concern for the Applicant if he were to return to Mexico because of the overall violence there and because of the emotional and economic support he provides to them. Also, personnel with the Applicant's recovery program discussed the Applicant's successful completion of the residential treatment and transitional program for individuals "striving to recover from addiction to alcohol and other drugs[]" and the "Wet and Reckless 12 hours DUI Program."

The record demonstrates that the Applicant has resided in the United States for almost 13 years, where he has made efforts to address his addiction to methamphetamines and lives with his mother and brother, along with serving as their primary source of income. Regarding the care of his brother, the record is unclear concerning the Applicant's brother's current medical conditions and the necessity of any ongoing care. Although the Applicant's brother's medical history includes a stroke and "management of migraines," the most recent medical documentation in the record is dated about 4 years and 6 months prior to the filing of the Applicant's appeal.

B. Adverse Factors

On his U adjustment application, the Applicant only acknowledged the following arrest and conviction following the approval of his U-1 nonimmigrant status:

Robbery-Second Degree, in violation of section 212.5(c) of the California Penal Code – sentence included incarceration in county jail for one year, supervised probation for three years, requisite participation in treatment programs, and making restitution.²

The Applicant explained that the repercussions of his drug addiction included an arrest for "robbery and possession," the loss of his domestic partnership, a "good job" at a bank, and his automobile. However, the record indicated that the Applicant did not disclose his additional involvement with law enforcement for violating sections 23152 (driving under the influence)³ and 14601.5 (driving with suspended or restricted license) of the California Vehicle Code on [REDACTED] and [REDACTED] 2012, respectively. Accordingly, the Director issued a request for evidence (RFE), to which the Applicant provided a response and clarified his arrests for the vehicular-related offenses. Although not addressed in the RFE, the Applicant also acknowledged bench warrants issued for his arrest

² The California robbery statute prohibits the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Fear is defined as either: (1) the fear of an unlawful injury to the person or property of the person robbed . . . or, (2) the fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery. Cal. Penal Code §§ 211-12 (West 2013). Under section 212.5(c) of the California Penal Code, "[a]ll kinds of robbery other than those listed in subdivisions (a) [special categories of vehicle operators and their passengers as well as inhabited dwellings, vessels, and buildings] and (b) [use of automated teller machines] are of the second degree.

³ The record reflects that although the Applicant was initially charged with this offense, he was ultimately convicted of the offense of reckless driving where he was given a suspended sentence, incarceration for four days, and probation for two years.

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between [REDACTED] 2012 and [REDACTED] 2013, when he did not appear before the courts to address offenses under the California Vehicle Code.

In her denial, the Director concluded that the Applicant did not provide sufficient evidence of the circumstances concerning his conviction for robbery-second degree, a crime involving moral turpitude (CIMT). *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)). The Director also concluded that the Applicant did not address his arrest on [REDACTED] 2013, for not paying a taxi cab fare and subsequent flight from the vehicle.

Although the Applicant does not dispute on appeal that he has been convicted of a CIMT, he asserts that his circumstances are distinguishable from those involving the cases cited by the Director in her denial because he has been convicted of only one CIMT, he was sentenced to confinement in a jail and not a prison, and he did not use any weapons or make physical threats during the robbery. In support of this last assertion, he submits with the appeal a personal statement and photocopies of newspaper articles, describing the circumstances of the robbery.

Although the Applicant may have been convicted of only one CIMT, his conviction for robbery-second degree in California also is an aggravated felony under sections 101(a)(43)(F) and (G) of the Act as it is a crime of violence and a theft offense for which he received a term of incarceration for one year. *See* § 101(a)(43)(F)-(G), 8 U.S.C. § 1101(a)(43)(F)-(G); *see also U.S. v. McDougherty*, 920 F.2d 569, 573-74 (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, 598. In addition, the venue in which he has served his term of incarceration (i.e., a jail), is inconsequential as the relevant factor is that he received a sentence to confinement for a requisite period of time because of his culpable conduct. Moreover, the record reflects that his mandatory probationary period has not been completed.

Also on appeal, the Applicant generally indicates that he is unaware of any criminal charges for not paying the taxi cab fare referred to in the Director’s denial. The record includes a letter from the [REDACTED] which stated that officers were dispatched “regarding a disturbance between a cab drive and fare[.]” and took the Applicant into custody for an outstanding warrant. The letter does not provide any further information about the incident, and the Applicant does not provide on appeal any further discussion of his attempts to obtain documentation from local law enforcement to provide clarification of any pending charges.

The favorable and mitigating factors in the present case are the Applicant’s length of residence in the United States, his close family ties and the emotional and financial contributions he provides to his mother and sibling, the general hardships they would endure if he were to return to Mexico, his employment, and his efforts at rehabilitation from drug addiction along with his expressions of remorse.

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The adverse factors are the Applicant's numerous arrests, his conviction for an inherently violent crime and aggravated felony, the recency of that conviction, the pendency of his probation, and the lack of candor and a complete record concerning his criminal charges.

When viewed in their totality, the adverse factors in the present case outweigh the favorable and mitigating factors. Accordingly, based upon our discretion, the Applicant has not demonstrated that he is rehabilitated or 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 M-A-R-B-*, ID# 16647 (AAO June 13, 2016)