



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

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

MATTER OF E-A-G-

DATE: JUNE 29, 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 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 his application.

The matter is now before us on appeal. On appeal, the Applicant submits a brief statement. The Applicant claims that he should have been afforded an opportunity to rebut the derogatory information upon which the denial of his application was based and contends that the record establishes that his application merits a favorable exercise of discretion.

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 –

(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.

II. ANALYSIS

The Applicant filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on December 29, 2014. Upon a full review of the record, as supplemented on appeal, the Applicant has not overcome the Director's ground for denial. The appeal will be dismissed for the following reasons.

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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). 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.* 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).

The Board has 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." *Matter of Miguel Devison-Charles*, 22 I&N Dec. 1362, 1365-66 (BIA 2000); see also *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). Although an act of juvenile delinquency is not a criminal conviction on which to base removal or bar relief from removal, a juvenile offense can be considered in reviewing an application for a discretionary benefit, such as adjustment of status. *Wallace v. Gonzales*, 463 F.3d 135, 138-39 (2d Cir. 2006); see 8 C.F.R. § 245.24(d)(11).

Additionally, arrest reports for incidents that did not lead to criminal charges or a conviction may still be considered negative discretionary factors. In "reviewing requests for discretionary relief, immigration courts may consider police reports" as long as the "trier first determines that the report is reliable and that its use would not be fundamentally unfair. *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015); see also *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996); *Matter of Grijalva*, 19 I&N Dec. 713, 721-22 (BIA 1988). Here, our review does not show that the underlying police reports relating to the Applicant's arrests are unreliable or that the use of the reports would be fundamentally unfair, particularly as the Applicant was afforded an opportunity below and on appeal to address the allegations set forth in the police reports. Therefore, although we do not give substantial weight to arrest reports that did not lead to conviction, we may consider them in our discretionary determination.

The record indicates that the Applicant has two convictions. At the age of [REDACTED] he was arrested on [REDACTED] 2008, for burglary in the third degree and two counts of fleeing a police officer by means other than a motor vehicle. On [REDACTED] 2009, the Applicant was convicted as a juvenile of one count of fleeing a police officer, a misdemeanor, pursuant to a stay of adjudication following the

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Applicant's admission to the charge. The juvenile court sentenced the Applicant to 90 days of supervised probation, 32 hours of community service, and fines and other conditions. The remaining charges were dismissed and the Applicant was discharged from probation on [REDACTED] 2009. Thereafter, when the Applicant was [REDACTED] years old, he was issued a citation for intentional damage to property in the fourth degree in violation of section 609.595.3 of the Minnesota Statutes. On [REDACTED] 2012, he was convicted on the misdemeanor charge pursuant to a guilty plea and was sentenced to 30 days jail (stayed for one year) and one year of supervised probation until [REDACTED] 2013. The record indicates that the Applicant was discharged from probation on [REDACTED] 2013. On appeal, the Petitioner asserts that the related court imposed fines were paid but publicly available court records indicate that they remain outstanding.

Upon *de novo* review, the Director properly determined that the record below had not established that the Applicant's adjustment application warranted a favorable exercise of discretion. The underlying police report for the Applicant's 2008 juvenile arrest indicates that he informed officers that he was a member of the [REDACTED] and that he had a tattoo of [REDACTED] on his back. In addition, while in U nonimmigrant status and pursuing immigration benefits from the U.S. government, the Applicant was convicted of intentionally damaging property.

In his written statement submitted in response to the Director's request for evidence (RFE) below, the Petitioner explained the circumstances of his two convictions. He stated that in 2008, he made a foolish decision to go along with a friend's suggestion to break into a videogame store. The Applicant indicated that his friend smashed a brick through the store window but the two left when they saw a police car. The underlying police report that the Applicant submitted indicated that the Applicant had a [REDACTED] tattoo on his back and admitted to being a member of the [REDACTED] while he was in custody. Although the Applicant submitted the police report in response to the RFE, neither he nor any of his family members who had also provided statements, addressed the derogatory information contained in the police report regarding the Applicant's [REDACTED] membership.

In addressing his 2012 conviction for intentional property damage, the Applicant explained in his RFE statement that he and his sister got into a verbal altercation at a party after the latter mistakenly thought somebody had stolen the keys she had misplaced. The Applicant explained that he was drunk and almost got into a fight with three men who started making hostile statements, but ultimately ended up hitting and breaking a glass door in frustration. The record indicates that the Applicant, who suffered injury to his hand, paid for the damage to the property. The Applicant acknowledged his mistakes and expressed remorse for his criminal conduct, asserting that he had no intention to and did not hurt anyone. He further stated that it would be difficult for him if he had to leave the United States and return to Mexico, where he was born, because he has been in the United States since he was a small child (approximately [REDACTED] years old), speaks very little Spanish, and all of his family reside in the United States. In addition, he stated that he suffers from Type 1 Diabetes and is fearful of whether he would be able to manage the condition in Mexico. He provided documentary evidence indicating that he was receiving diabetes treatment.

The Applicant's RFE response below also included statements from his parents, sister, and brother, generally attesting to the Applicant's good character and asserting that it would be difficult for him

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to adjust if he had to return to Mexico after having resided in the United States with his family for most of his life. The Applicant's mother asserted that she fears for her son because of the violence in Mexico and that she would suffer greatly from being separated from her son. She also doubted the Applicant's ability to find employment and survive in Mexico given that he does not speak Spanish fluently and suffers from diabetes. The Applicant's father and siblings expressed similar concerns about employment prospects in Mexico and the Applicant's likelihood of surviving there. However, although his family members acknowledged that the Applicant has made some mistakes in the past due to his youth and immaturity, none of the statements specifically discussed his criminal history and the evidence in the record that he was a [REDACTED] member and had a [REDACTED] tattoo. Notably, the Applicant's sister did not address at all the Applicant's 2012 conviction although she had been involved in the incident that led to the criminal charges against him. Given the lack of any probative testimony from the Applicant and his family members on these issues, the evidence of record, (to include: evidence of probation completion, the Applicant's General Educational Development Diploma (GED) and school records, records evidencing the Applicant's diabetes, and his Internal Revenue Service Form W-2, Wage and Tax Statement, for 2012 and 2013), was insufficient in demonstrating that the Applicant's U adjustment application merited favorable exercise of discretion.

On appeal, the Applicant asserts that he was never a member of the [REDACTED] and that USCIS did not establish that he was ever a [REDACTED] member. In his updated statement on appeal, he explains that a [REDACTED] member with whom his sister had a child, used to hang around the Applicant's home often when he was approximately [REDACTED] years old and offered to give him a tattoo. The Applicant states that he "stupidly" agreed and indicates that he only knew what the tattoo was after it was already completed. He claims that he knew about the [REDACTED] and their initiation process and states that he never underwent such initiation or took part in any criminal or violent [REDACTED] activities. The Applicant also indicates that he has had laser treatment to remove the [REDACTED] tattoo. The Applicant explains that following his 2008 juvenile arrest, he told police that he was a [REDACTED] member because he did not think they would believe that he was not a member because of his tattoo. Although we recognize the Applicant's minor age at the time and the stressful circumstances of his juvenile arrest, we do not find reasonable his explanation for affirmatively telling officers that he was a [REDACTED] member if in fact he was not one. Moreover, the record lacks supporting evidence of the Applicant's assertions, including evidence of his tattoo removal and updated statements from the Applicant's family members, addressing his criminal history and the evidence in the record of his [REDACTED] membership. In particular, the record contains no corroboration from his sister regarding the circumstances of how the Applicant came to obtain his tattoo from a [REDACTED] member with whom she previously had a relationship and a child.

Contrary to the Applicant's assertion on appeal, USCIS is not required to establish that the Applicant was a former [REDACTED] member to support its denial of his U adjustment application. Rather, it is the Applicant who bears the burden to establish that he merits favorable discretion. 8 C.F.R. § 245.24(d)(11). Here, the Applicant's own evidence indicates his [REDACTED] membership, a serious adverse factor that he must overcome to satisfy his burden. On appeal, he proffers a letter from the Minnesota Bureau of Criminal Apprehensions (BCA) indicating that confidential data does not exist about the Applicant in their records. The Applicant asserts that the letter from the BCA, which is

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required to maintain a [REDACTED] database under section 299C.091 of the Minnesota Statutes, is evidence that he is not a [REDACTED] member. However, it is unclear from the letter whether the results are from a search of the criminal [REDACTED] investigative database that is maintained pursuant to that statutory provision. Further, section 299C.091(5) requires the BCA to remove the derogatory information from the database after three years have lapsed, which in this case would have been in 2011. The BCA letter does not address whether or not the Applicant had ever been placed in their database in the past. Lastly, pursuant to section 299C.091(b)(2), only individuals who have been convicted of a gross misdemeanor or a felony are included in the database. The Applicant here has never been convicted of either, and consequently, his name would not have been submitted for inclusion in the database even if the Applicant was a confirmed [REDACTED] member.

The Applicant also contends that USCIS erred in not following its own internal procedural guidelines¹ dictating that a notice of intent to deny (NOID) was required to allow the Applicant an opportunity to address issues about [REDACTED] membership that were only raised for the first time in the denial notice. To the contrary, although strongly recommended, issuance of a RFE or a NOID is typically within USCIS' discretion. *See* Yates Memorandum, *supra* note 1, at 3; *see also* 8 C.F.R. § 103.2(b)(8)(iii). Moreover, in this instance, the Applicant was already on notice of the derogatory evidence in the record indicating [REDACTED] membership because he submitted such evidence in response to the Director's RFE and had a full and fair opportunity to rebut such evidence at that time, as well as on appeal here.²

Lastly, the Applicant contends that the record below and on appeal establishes that he merits a favorable exercise of discretion and points to two of our decisions in which we exercised favorable discretion notwithstanding a lengthy history of criminal arrests, including some violent offenses. However, both of the cited decisions are non-precedential and are not binding on us in this case. Even if they were, they are distinguished from the matter here. In one case, the applicant's multiple arrests, several of which were sealed, resulted in either a dismissal or disorderly conduct plea. In the second, the applicant had three serious convictions, but demonstrated remorse and rehabilitation for her conduct and established mitigating factors that were sufficient to overcome her criminal history, including her care of her young son who suffered from urological abnormalities at birth and required ongoing intermittent care.

Here, the record indicates, and the Applicant admits, that he had a [REDACTED] tattoo and that, in 2008, he informed police that he was a [REDACTED] member while in police custody. His disavowal of [REDACTED] membership now and his explanation on appeal for his admission to [REDACTED] membership to the police are insufficient by themselves to overcome his prior admission of membership and to establish that he merits a favorable exercise of discretion. As noted, the statements of the Applicant's sister and other family members did not specifically address his criminal history and the evidence of the

¹ Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 70/2, *Requests for Evidence (RFE) and Notices of Intent to Deny(NOID)* 3-5 (Feb. 16, 2005), <https://www.uscis.gov/archive/archive-laws/archive-memos>.

² The regulation at 103.2(b)(16)(i) only requires notice of derogatory information in instances where an applicant is unaware of the derogatory information.

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Applicant's [REDACTED] membership, and the Applicant has not provided additional statements from them on this issue on appeal. Although he claims that he has since removed the [REDACTED] tattoo, the record contains no corroborating evidence of this assertion. Additionally, although the Applicant expresses remorse for his criminal conduct and the record does not disclose any further criminal history following his 2012 conviction while in U nonimmigrant status, the record also does not adequately and affirmatively establish the Applicant's activities, employment history, and any other favorable equities in the years since his 2014 filing of this application. Further, his statements and those of his family members, who indicate that he is a good person, do not provide probative testimony of the Applicant's character and conduct in the past several years to establish his remorse and rehabilitation and demonstrate that he merits a favorable exercise of discretion. The record also shows that the court mandated fine for his 2012 conviction remains outstanding. Although the Applicant contends on appeal that he paid the fine through a state withholding on his 2014 tax return, the record contains insufficient evidence to corroborate his assertion and as of June 28, 2016, publicly available court records indicate that the fine is still outstanding.

The burden of showing that discretion should be exercised in his favor is on the Applicant. Section 291 of the Act; 8 C.F.R. § 245.24(d)(11). As discussed, the record indicates that the Applicant admitted to being a [REDACTED] member at one time, which he now disavows entirely. In addition, he was arrested on two occasions, one of which occurred after he was granted U nonimmigrant status, and both of which resulted in conviction.

The favorable and mitigating factors in the present case are the Applicant's family in the United States, his long-term presence in the United States, his medical needs, and some evidence of his past employment and tax history. The unfavorable factors are the Applicant's two arrests, including one while he was pursuing a benefit from the U.S. government; admission to and evidence of [REDACTED] membership; and lack of probative testimony and evidence of positive equities and factors establishing his rehabilitation. When taken together, the adverse factors in the present case outweigh the favorable factors; therefore, we concur with the Director's negative discretionary finding and deny the Applicant's U adjustment application on discretionary grounds.

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 E-A-G-*, ID# 16950 (AAO June 29, 2016)