U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-H-O-

DATE: MAY 9, 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) § 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 and additional evidence. The Applicant claims that the Director erred in not considering whether the Applicant established exceptional and unusual hardship such that he merits favorable 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 –
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> > (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. RELEVANT FACTS AND PROCEDURAL HISTORY

The Applicant, a native and citizen of Mexico, claims to have last entered the United States as a minor on March 21, 2001, without admission, inspection, or parole. On May 4, 2010, the Director approved the Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient, filed on behalf of the Applicant by his sibling, the principal U-1 nonimmigrant. The Applicant's U-5 nonimmigrant status was valid until May 3, 2014. He filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on April 30, 2014. On January 16, 2015, the Director issued a request for evidence (RFE), including arrest reports and conviction records for the

Applicant's arrests and evidence establishing that favorable discretion was warranted on his Form I-485. The Applicant responded with additional evidence, which the Director found insufficient to establish the Applicant's eligibility. Accordingly, the Director denied the Form I-485, and the Applicant filed a timely appeal.

III. ANALYSIS

Upon a full review of the record, as supplemented on appeal, the Applicant has not overcome the Director's grounds for denial. The appeal will be dismissed for the following reasons.

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). While 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 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 record here indicates that after the Applicant was granted U-5 nonimmigrant status in 2010, the Applicant was arrested and convicted as an adult on at least three occasions as follows:

1. 2014, arrest leading to 2014, conviction for fourth degree driving while impaired (DWI) in violation of Minn. Stat. section 169A.27.1, for which he was sentenced to 30 days confinement (28 days stayed and two days of sentence to service), two years supervised probation until 2016, and other conditions, including a one day DWI program.

2. 2014, arrest leading to 2014, conviction for disorderly conduct under Minn. Stat. section 609.72.1, for which he was sentenced to 30 days confinement (stayed for one year) and one year probation until 2015.[1]

3. 2015, arrest leading to 2015, conviction for driving while impaired in violation of Minn. Stat. section 169A.20.1(1), for which he was sentenced to 364 days confinement (334 days stayed for four years), four years of probation, fines, and other conditions.[2]

Upon *de novo* review, the Director properly determined that the record below had not established that the Applicant's Form I-485 warranted a favorable exercise of discretion. The record indicates that while in U-5 nonimmigrant status and pursing immigration benefits from the United States government, the Applicant was arrested on DWI and alcohol related offenses on three occasions, two of which occurred after he filed the instant Form I-485. The Applicant's third arrest occurred after he received the Director's RFE, requesting criminal arrest reports and conviction records for his prior two arrests and additional evidence showing he merited favorable discretion in light of his criminal history.

The Applicant's April 24, 2014, statement below described the hardships his family faced, including the shooting of his older brother, the U-1 nonimmigrant, when the latter was 14 years old and the Applicant 12 years old. He indicated that his brother is now a paraplegic. The Applicant stated that he has been living in the United States since he was a minor, knew nothing about Mexico, and had not even been aware that he did not have legal status in the United States until approximately the age of 10 or 11. The Applicant also stated that he has a son and shares joint custody with his son's mother. He indicated that he pays monthly child support for his son, who depends on him financially and emotionally. The Applicant also indicated that he resides with his mother and disabled brother, and that he is close with his other relatives in the United States. The Applicant did not, however, address his criminal and DWI arrests, which were pending at the time of his statement, or his remorse and rehabilitation for his criminal conduct. He also did not submit an updated statement in response to the Director's RFE, despite the fact that he was arrested for a third time on DWI charges just prior to the due date of his RFE response.

The record below also contains a statement from the Applicant's mother, a lawful permanent resident (LPR), who indicated that the Applicant is suffering from serious problems and had been hospitalized three times in the last year for attempted suicide. However, the Applicant himself did not address his mental health conditions or his hospitalizations. also stated her belief that the Applicant was seriously harmed when the family's focus and attention was on the Applicant's brother after the latter was shot and became paraplegic. indicated that she struggles financially and would not be able to assist the

[1] The underlying citation indicates that this offense involved alcohol use by the Applicant as it refers to his blood/alcohol reading.

[2] The Applicant has not submitted a certified disposition for this conviction.

Applicant if he had to return to Mexico, and that she relies on the Applicant's financial assistance as he contributes to the household expenses. Apart from generally noting the Applicant's criminal history and that she and the family would support the Applicant's recovery, did not, however, address the Applicant's remorse for his criminal conduct or his rehabilitation.

The Applicant also submitted several letters below in support of his Form I-485. indicated that the Applicant has been a long term volunteer at his church youth group since he was a teenager and that he continues to volunteer. The Applicant's son's mother, confirmed that the Applicant and she share custody of their son and that the Applicant provides child support, helps her care for their son, and has a loving relationship with him. The Applicant's niece's mother, stated that the Applicant is a hard worker and a good father, has had multiple jobs to support his family, and has worked to overcome the impact his brother's tragedy has had on him. His friend, similarly indicated that the Applicant is a good father, brother, and friend and that he has volunteered and helped their church's youth group. However, none of these statements addressed the Applicant's criminal history, his remorse, or his rehabilitation since his arrests.

The Applicant also submitted documentary evidence, including a certificate of completion for a one day DWI program relating to his 2014 conviction. The certificate was awarded 2015, but the Applicant was arrested again on DWI charges less than one month later. The Applicant also proffered a medical center record indicating that he had been examined after an attempted suicide. However, the medical record offers no further information about the incident and as noted, the Applicant himself did not address this incident or any mental health concerns in his statement below. The record also includes photographs of the Applicant and his family, the Applicant's tax records, his child support records, and his school records.

On appeal, the Applicant proffers an updated personal statement, as well as an updated statement from his mother and statements from his older brother and pastor. In his statement, the Applicant describes his close relationship with his son and indicates that he wants to change his life. Although the Applicant's statement on appeal acknowledges in general terms that he has a problems with alcohol and drugs and his intention to attend psychotherapy focusing on alcohol and drug addictions, he once again does not address his criminal history, his remorse for his actions, or provide evidence that he is attending psychotherapy sessions or any other evidence of his rehabilitation.

The Applicant's brother, an LPR, in his statement on appeal, discusses the impact of the 2005 shooting resulting in his paraplegia, on himself, the Applicant, and their family. describes the challenges he faced during the three years of physical rehabilitation that followed the shooting and his ongoing need to rely on others, including the Applicant, for transfers, bathing, toileting, and transportation. He indicates that he believed that the Applicant "hit rock bottom" and suffered from depression for many years on account of the hardships at home, but asserts that he believes that the Applicant recognizes that he has a problem and is in the beginning stages of getting help. states that the Applicant has started attending a new church, and that he, his mother, and the Applicant's son will be devastated if the Applicant returns to Mexico, as they rely on him both financially and emotionally. In

updated statement, she states that she sees a positive change in the Applicant. She too indicates that the Applicant suffers from depression and has now begun to address his condition. states that she is providing him with support, driving him to and from church and work. She asserts that if the Applicant is forced to return to Mexico, the Applicant's son will suffer and that she herself will suffer physically, emotionally, and financially. She notes that she is struggling financially and has debt, and would find it difficult to pay the debt back without the Applicant's assistance. indicates that if the Applicant returns to Mexico, he would not have a place to live, would not have access to health care and the support he needs to overcome his depression, and that she would have to work additional hours to support the Applicant financially. Moreover, she suffers from hyperthyroidism and feels that her health will deteriorate from stress and worry over the Applicant out of fear for his safety and his emotional wellbeing in Mexico. The Applicant also submits a letter from who acknowledges that the Applicant needs a lot of help and has problems related to alcohol and serious depression, but asserts that the Applicant wants to change and become the father, son, and man that he has the potential to be.

On appeal, the Applicant asserts that the record established that he suffered serious harm and impairment to his psychological health as a result of his brother's paralysis, such that he became depressed and overused alcohol. However, although the Applicant's brother and mother discussed in general terms the serious impact his brother's paralysis had on the Applicant, the Applicant himself did not address the emotional impact on himself and how it led to his criminal history and alcohol abuse. The burden of showing that discretion should be exercised in his favor is on the Applicant. 8 C.F.R. § 245.24(d)(11); section 291 of the Act (The Applicant bears the burden of proof to establish to establish eligibility for the benefit sought). Here, as discussed, the record shows that the Applicant has three recent convictions, two of which occurred after he filed the Form I-485. Two of his convictions are for DWI and the Applicant admits on appeal that he has alcohol and drug problems. The Applicant has not addressed his remorse or submitted any evidence of rehabilitation, although he has indicated his intention to seek treatment for his alcohol and drug use. Moreover, the Petitioner has not established rehabilitation as the record indicates that he violated the terms of his probation for his 2014 conviction and remains on probation for one or more of his convictions.

The Applicant also contends on appeal that the Director erred in only apply a strict balancing test in determining whether or not to exercise favorable discretion. Specifically, the Applicant contends that pursuant to 8 C.F.R. § 245.24(d)(11), where an applicant has not presented sufficient documentation of mitigating factors, USCIS should request the applicant to establish exceptional and extremely unusual hardship. He contends that the record as a whole establishes such hardship to himself as well as his LPR mother and brother. The Applicant misinterprets the regulation at 8 C.F.R. § 245.24(d)(11), which indicates that an applicant may be required to clearly demonstrate that denial of the Form I-485 would result in exceptional and extremely unusual, depending on the nature of the adverse factors present. A showing of exceptional and extremely unusual hardship is more restrictive than the balancing test we typically apply and may still be insufficient, depending on the seriousness of the negative factors. *Id.* In such instances, only the most compelling positive factors would justify favorable exercise of discretion. *Id.* Here, given our finding herein that the favorable

factors, including evidence of hardship, did not outweigh the adverse factors, they are necessarily also insufficient in establishing exceptional and extremely unusual hardship.

The favorable and mitigating factors in the present case are the Applicant's son and family in the United States; the lack of family support in his native Mexico; his LPR brother's permanent physical disability; his long term residence in the United States; his employment and tax history in the United States; letters of support from family and friends; and evidence that he suffers from depression. The unfavorable factors are the Applicant's three recent arrest convictions, including two for DWI and two of which took place during these proceedings; the fact that he remains on probation for his conviction(s); his alcohol and drug problems; and the lack of evidence in the record of the Applicant's remorse and demonstrable rehabilitation. When taken together, we find that the adverse factors in the present case outweigh the favorable factors. Accordingly, we concur with the Director's negative discretionary finding and deny the Applicant's Form I-485 on discretionary grounds.

IV. 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 A-H-H-O-*, ID# 16470 (AAO May 9, 2016)