U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-E-R-G-

DATE: MAY 23, 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 Applicant's adjustment of status was not warranted as a matter of discretion, as he did not provide a certified court disposition for a felony arrest, and did not demonstrate that the positive factors in his case outweighed the negative factors.

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 the certified court disposition which he had submitted to the Director, and that his adjustment of status to that of lawful permanent resident is warranted as a matter of discretion.

Upon *de novo* review, we will sustain 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).

II. RELEVANT FACTS AND PROCEDURAL HISTORY

On January 6, 2011, the Director granted U-3 nonimmigrant status to the Applicant based on an approved Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient. The Applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, on May 19, 2014. The Director issued a request for evidence (RFE) seeking to obtain, in part, court disposition records for a felony arrest. In response, the Applicant submitted a certified court record showing that the criminal charge was dismissed at the preliminary hearing on 2014. The Director denied the application, finding that the Applicant had not submitted the final outcome for the criminal charge, and that the evidence was insufficient to establish that the Applicant's adjustment of status was justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest. Therefore, the Director denied the Form I-485 as a matter of discretion.

III. 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 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 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 alien's [adverse factors], such a showing might still be insufficient." *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 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 shows that on 2014, the Applicant was arrested and the Virginia Juvenile and Domestic Relations District Court subsequently charged with a violation of Virginia Code Annotated section 18.2-48, a Class 5 felony.[1] On 2014, the court dismissed the charge at the preliminary hearing. The record does not reflect that the Applicant has any other criminal history.

[1]

The Director found as positive equities in the Applicant's favor, the fact that he resided in the United States since 2006, submitted evidence showing that he supports his single mother by caring for his young siblings, is considered trustworthy, and attended school in the United States through the 11th grade.

The Director determined that the negative factors, however, outweighed the positive, and denied the application. On his Form I-485, the Applicant answered "No" in response to a question in Part 3.C.1.b. regarding whether he had a criminal history. The Applicant indicated that he had never been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations. The Director stated that the Applicant's declaration made under penalty of perjury was false. The Director determined that the Applicant had not submitted the court's disposition of the criminal charge as requested, and did not address the criminal charge in his supplemental statement in response to the RFE. The Director concluded that the Applicant's lack of candor and the pending criminal charge were significant negative factors and were not outweighed by the positive equities. She determined as a matter of discretion that the Applicant's adjustment of status was not justified on humanitarian grounds, to ensure family unity, or was otherwise in the public interest.

On appeal, the Applicant submits a supplemental statement in which he describes the circumstances of his arrest and the court's dismissal of the criminal charge approximately one month later. He resubmits a copy of the court disposition previously submitted to the Director. He indicates remorse for his actions leading to the arrest, and his wish to remain in the United States to take care of his young siblings while his mother goes to work.

The Director erroneously found that the Applicant had not submitted the court disposition for the arrest. Further, the Applicant signed the Form I-485 on March 24, 2015, prior to his arrest, and did not make a false statement under penalty of perjury. We withdraw the Director's findings to the contrary.

The favorable and mitigating factors in the present case are the Applicant's close family ties to his mother, a U.S. lawful permanent resident, and siblings, U.S. citizens, sense of familial responsibility, residence in the United States since the age of five, and expression of remorse for his actions. We view as negative factors the Applicant's arrest, his entry into the United States without inspection and his unlawful presence in the United States. When viewed in their totality, the positive factors in the present case outweigh the adverse factors. Accordingly, the Applicant merits a favorable exercise of discretion. We withdraw the Director's decision and sustain the appeal.

IV. CONCLUSION

In visa application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Applicant has sustained that burden.

ORDER: The appeal is sustained.

Cite as *Matter of J-E-R-G-*, ID# 16469 (AAO May 23, 2016)