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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX

Date:

AUG 28 2008

IN RE:

[REDACTED]

APPLICATION: Application for Adjust Status to Permanent Residence under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255.

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Phoenix, Arizona, and the applicant filed a motion to reopen and reconsider. The field office director reopened the matter, issued a new decision denying the application and certified the decision for review to the Administrative Appeals Office (AAO). The field office director's decision will be affirmed.

The applicant is a native and citizen of Morocco who is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse and seeks to adjust his status to permanent residence pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255.

The record reflects that the applicant was admitted to the United States in B-2 visitor status on March 30, 1996 and granted a period of authorized stay through September 29, 1996. The applicant remained in the United States beyond the period of his authorized stay. On June 30, 2005, the applicant married his spouse, in the United States. The applicant's spouse, a native of the United States, filed the I-130 petition on or about June 22, 2007. The petition was approved on November 11, 2007. The applicant filed his Application to Register Permanent Residence or Adjust Status (Form I-485) on June 22, 2007.

On March 10, 2008, the field office director found the applicant statutorily eligible for adjustment of status but denied the application as a matter of discretion. On April 4, 2008, the applicant filed a motion to reopen and reconsider the decision. On June 4, 2008, the field office director reopened the matter, issued a new decision denying the application and certified the decision for review to the AAO.

In her June 4, 2008 decision, the field office director determined that certain adverse factors warranted that she deny the application as an exercise of discretion. Specifically, the field office director noted that the applicant had been living illegally in the United States since 1996, was charged with possession of marijuana and had the charges dismissed only after completing a one year diversion program, provided a false social security number to the police upon his arrest, and failed to register as required under the National Security Entry Exit Registration System (NSEERS). The field office director determined that these factors outweighed any "positive equities" demonstrated by letters from the applicant's wife, children, friends, and co-workers attesting to the applicant's good character.

In her submission to the AAO, counsel states that the evidence presented by the applicant shows that he is a person of high moral character "who deeply regrets his time spent out of status." Counsel contends that the evidence shows that if the applicant is removed, his wife and three minor children will suffer extreme hardship. Counsel also addresses the negative factors cited by the field office director. Counsel contends that the criminal charge of marijuana possession made against the applicant was dismissed because the applicant was falsely accused of the crime, not as a consequence of the court's leniency toward the applicant after he successfully completed a diversion program. Counsel asserts that there is no evidence that the applicant was ever found guilty of the crime. Counsel further contends that the social security number given by the applicant to the police consisted of "a random series of numbers blurted out by [the applicant] in the panic of the moment," and was not an actual social security number that the applicant had ever used for employment purposes. Finally, counsel asserts that the applicant's failure to register under NSEERS was not willful, and that the field office director's assertion to the contrary is based on a misunderstanding of the applicant's

sworn testimony. Regardless, counsel contends that the applicant has now registered as a pre-condition to being scheduled for an adjustment interview.

The record contains, among other documents, tax records, letters from the applicant, a letter from the applicant's spouse, letters from the applicant's stepchildren, a letter from the applicant's employer, letters from the applicant's associates, and family photographs. The entire record has been reviewing in rendering this decision.

Section 245 of the Act provides in pertinent part:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) . . . may be adjusted by the Attorney General, *in his discretion* and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

(Emphasis added).

Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. *Matter of [REDACTED]* 16 I. & N. Dec. 314, 315 (BIA 1977). The applicant has the burden of demonstrating that discretion should be exercised in his favor. *Matter of Patel*, 17 I. & N. Dec. 597, 601 (BIA 1980); *see also Matter of Leung*, 16 I. & N. Dec. 12 (BIA 1976), *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970). Where adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities. *Matter of Arai*, 13 I. & N. Dec. at 496. Favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion. *Id.*

The AAO turns first to the adverse factors cited by the field office director in her decision. A Federal Bureau of Investigation (FBI) report based on the applicant's fingerprints supports the field office director's finding that the charge against the applicant for marijuana possession in the Municipal Court of East Brunswick, New Jersey was dismissed only after the applicant was conditionally discharged and successfully completed a one year diversion program. Although the record does not contain a final court disposition of the charge, there is sufficient evidence to consider it an adverse factor weighing against the exercise of discretion in the applicant's favor.

Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), states that "conviction" means:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Although the record does not show that the applicant made a formal plea of guilty to the charge of marijuana possession, the fact that the applicant was assigned to a diversion program is evidence that the judge ordered some form of punishment, penalty, or restraint on the applicant's liberty. The applicant has asserted that the marijuana he allegedly possessed actually belonged to another occupant of the car he was driving and that this person, unbeknownst to the applicant, placed the marijuana under the driver's seat of the car. Counsel asserts that the charge against the applicant was dismissed because he was falsely accused. The Board of Immigration Appeals (BIA) has held that the Service cannot go behind the judicial record to determine the guilt or innocence of an alien. *See In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996); *see also Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

Furthermore, the applicant has failed to submit any documentary proof, such as a final court disposition or other court documents, to substantiate the claim that he was falsely charged with possession of marijuana and that the charge was dismissed for this reason instead of the reason shown in the FBI report. As stated above, the burden is on the applicant to demonstrate that discretion should be exercised in his favor. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without documentary evidence to support a claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is sufficient evidence in the record to consider the applicant's criminal record an adverse factor.

The applicant's failure to register under NSEERS and his use of a false social security number are also adverse factors. The applicant has asserted in one of his letters that he failed to register under NSEERS because he did not know that he was required to do so and because he feared the government would detain him and seek his removal, as it had with one of his friends. However, in a sworn statement taken from the applicant at an interview on November 5, 2007, the applicant indicated that he learned of the registration sometime in 2003 or 2004, near the end of the period of registration. Thus, in spite of counsel's contention, the evidence demonstrates that the applicant knew he was required to comply with NSEERS registration, but did not do so because he did not have legal status and was afraid to be removed from the United States. The applicant's desire to remain undetected by immigration authorities so that he could continue residing illegally in the United States cannot excuse his failure to comply with the law. It is likely that the applicant provided a false social security number upon being arrested for the same reason, and such an act is an adverse factor even if the number was not a valid social security number and the applicant never used it for any other purpose.

A review of the record reveals another adverse factor not listed by the field office director in her decision. The applicant submitted a letter dated March 27, 2008 from his purported employer, ██████████ of Mamma Mia Pizza in Phoenix, in which ██████████ states that the applicant has worked at the restaurant for “going on 3 years now.” However, the applicant also submitted an unsigned copy of a 2006 joint tax return for the applicant and his spouse in which the applicant’s occupation is listed as “unemployed” and no W-2 forms accounting for the applicant’s earnings are attached. This evidence suggests that if the applicant has been employed by ██████████ as claimed, he has been employed without authorization and has failed to report his earnings or pay any required taxes. Although the applicant’s long residence in the United States may be considered a positive factor, the evidence shows that the applicant has resided in the United States in violation of the immigration laws and has shown a disregard for these and other laws of the United States.

The AAO concurs with the field office director that the applicant has not demonstrated “unusual or even outstanding equities” that outweigh the adverse factors present in this case. The applicant’s spouse has asserted that she would suffer hardship without the financial support of the applicant. However, as discussed above, there are inconsistencies in the evidence concerning the applicant’s employment. There is no evidence in the record showing the amount the applicant earns and contributes to his spouse and stepchildren. The applicant has not addressed whether his spouse and stepchildren would suffer hardship if they relocated to Morocco with him. The AAO acknowledges the evidence in the record showing the positive impact the applicant has had on his spouse and stepchildren over the three years that the applicant and his spouse have been married. However, it is also noted that one of these stepchildren, ██████████ is not listed as a dependent on the applicant’s joint tax return or as one of the applicant’s spouse’s children in the court documents for her divorce from her ex-husband. The applicant has no other family ties to the United States. The AAO acknowledges the other evidence attesting to the applicant’s “good character,” but finds that the equities demonstrated by the applicant do not outweigh the adverse factors present in this case.

In proceedings for adjustment of status under section 245 of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the field office director’s decision denying the application will be affirmed.

ORDER: The field office director’s decision is affirmed.