U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20596794

Date: APR. 20, 2022

Appeal of Nebraska Service Center Decision

Form I-485, Application for Adjustment of Status of U Nonimmigrant

The Applicant seeks to become a lawful permanent resident (LPR) under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m), based on his derivative "U" nonimmigrant status. The Director of the Nebraska Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), and the matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence and asserts his eligibility. The Administrative Appeals Office reviews the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if they meet all other eligibility requirements and, "in the opinion" of USCIS, their "continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest." Section 245(m) of the Act. The applicant bears the burden of establishing their eligibility, section 291 of the Act, 8 U.S.C. § 1361, and must do so by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This burden includes establishing that discretion should be exercised in their favor, and USCIS may take into account all relevant factors in making its discretionary determination. 8 C.F.R. §§ 245.24(b)(6), (d)(11).

A favorable exercise of discretion to grant an applicant adjustment of status to that of an LPR is generally warranted in the absence of adverse factors and presence of favorable factors. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Favorable factors include, but are not limited to, family unity, length of residence in the United States, employment, community involvement, and good moral character. *Id.*; *see also* 7 *USCIS Policy Manual* A.10(B)(2), https://www.uscis.gov/policy-manual (providing guidance regarding adjudicative factors to consider in discretionary adjustment of status determinations). However, where adverse factors are present, the applicant may submit evidence establishing mitigating equities. *See* 8 C.F.R. § 245.24(d)(11) (providing that, "[w]here adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate").

Depending on the nature of any 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, but such a showing might still be insufficient if the adverse factors are particularly grave. *Id.* For example, USCIS will generally not exercise its discretion favorably 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. *Id.*

II. ANALYSIS

The Applicant is a 51-year-old citizen of El Salvador, who last entered the United States without inspection, admission, or parole in approximately 1996. In March 2016, the Director granted the Applicant derivative U nonimmigrant status, based on his family member's victimization and assistance to law enforcement, through September 2019. The Applicant filed his U adjustment application in August 2019 while he was still in U status.

In January 2021, the Director denied the Applicant's U adjustment application. The Director acknowledged the positive and mitigating equities present in the Applicant's case: his long-term residence in the United States; his ownership of a business and several properties in the United States; his family ties, including the presence of a disabled son in the United States; and his role as the primary source of financial support for his family. However, the Director determined that the positive and mitigating equities were outweighed by the adverse factor of the Applicant's criminal history. As detailed by the Director, the Applicant was arrested on two separate occasions including in 2009 (child molestation) and 2015 (patronizing a prostitute). The Director acknowledged that both the 2009 and 2015 criminal charges were dismissed. However, the Director noted that the 2015 charge for patronizing a prostitute was dismissed because the Applicant had completed a stipulated order of continuance and cited law enforcement documents in the record reflecting that the Applicant actually engaged in the underlying criminal conduct. Likewise, the Director noted that although the information in the record indicated that the Applicant had been acquitted of the 2009 child molestation charge, arrest reports indicate that during interviews with investigators, the Applicant admitted to having "touched the [minor victim] for sexual reasons . . . two times" on different occasions. The Director also noted that the Applicant's written statements in these proceedings did not provide a description of his behavior and circumstances that led to these two arrests. Accordingly, the Director concluded that the record did not establish that the Applicant's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest such that he merits a favorable exercise of discretion to adjust his status to that of an LPR.

On appeal, the Applicant contends that the favorable factors outweigh the unfavorable factors in his case and that his adjustment application merits a favorable exercise of discretion. The Applicant asserts that he was never convicted of any crime and his arrests are not recent and occurred prior to applying for U status.[1] With respect to his 2009 arrest, the Applicant explains that he was arrested

[1] Although the Applicant stated that his application for U status was filed in November 2015, the documentation in the

and charged with child molestation and went to trial, but a jury of his peers acquitted him. He acknowledges that he made a statement confessing to the crime of child molestation, but he claims that statement was coerced and that he recanted his confession at his trial where the jury later acquitted him of the charge. The Applicant maintains his innocence as to this 2009 charge. The Applicant also acknowledged that he was later arrested for patronizing a prostitute in 2015 but notes that the case was dismissed after he entered into a stipulated order of continuance (a deferred adjudication agreement). The Applicant further contends that the Director erred in relying on the police reports regarding his arrests since he was acquitted in one case and neither arrest was corroborated by a conviction. The Applicant contends that the mere existence of a criminal record did not warrant a discretionary denial of his adjustment application, especially in light of the positive factors in his case such as his lengthy residence in the United States; his significant and long-standing family connections to the United States; his financial assistance to his family; and, his steady employment and ownership of a business. The Applicant also indicated factors of extreme hardship if he were to return to his home country such as his inability to support his family financially and help with the full-time care of his disabled son who is on a feeding tube and ventilator. The Applicant also notes his fear of returning to El Salvador, which he states is a dangerous country, and his limited ties to that country. He further states that he is not subject to any grounds of inadmissibility. In support of his appeal, he submits on appeal supplemental letters from his 16-year-old daughter and his spouse; an affidavit from his son; an updated affidavit by the Applicant; an affidavit from an attorney on his defense team for his trial; a copy of the clerk's minutes of his trial; an article regarding police induced confessions; medical documents for his spouse and son; letters of support; and, documents related to the country conditions of El Salvador.

The arguments advanced on appeal are not sufficient to overcome the discretionary denial of the Applicant's U adjustment application. As stated, the Applicant bears the burden of establishing his eligibility for adjustment of status to that of an LPR, including that his continued presence is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest and, as such, that he warrants the relief as a matter of discretion, and USCIS may take into account all relevant factors in making its discretionary determination. Sections 245(m) and 291 of the Act; 8 C.F.R. § 245.24(d)(11). Here, he has not met that burden. We acknowledge and have considered the favorable factors in this case, including the Applicant's long-term residence in the United States, close family ties, the hardship to himself and his family if he is forced to leave the United States and return to El Salvador, his payment of U.S. taxes, and his ownership of a business, home and rental properties. In addition, the Applicant is the financial provider of his family, and a care-giver to his wife and children. The Applicant stated he plays an active and crucial role in the upbringing of his four children, including a young daughter that is still in high-school, a son that was a victim of an attack that left him traumatized, and another son who is on a ventilator and requires a feeding tube and constant care following a car accident that left him with a traumatic brain injury. While we recognize these positive factors, including the personal and medical hardships to himself and his family, the Applicant has not demonstrated that he merits a favorable exercise of discretion to adjust his status to that of an LPR given his criminal history.

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record indicated that the Applicant filed for U status in 2013. The submitted Form I-797A, Notice of Action for the I-918A Petition for U Nonimmigrant Status, listed the Applicant's receipt as November 6, 2013. Thus, the Applicant's second arrest occurred after he filed for U status.

As stated, the record indicates that the Applicant was arrested on two occasions. In 2009, the Applicant was arrested for child molestation in the first degree. According to the [redacted] Police Department Case Report in the record, the police were dispatched to an apartment complex on a report of a sex offense in which the Applicant, a maintenance worker at the complex, was accused of touching a 12-year-old young girl inappropriately. The report indicated that the mother of the child stated that the Applicant came to fix their toilet and when her daughter entered the bathroom to retrieve their cat, the Applicant touched the child's bottom and chest. The report indicated that the child was interviewed and confirmed that the Applicant had touched her bottom and her chest, rubbed her bottom for several seconds, and stooped down while holding her such that she able to feel the Applicant's front private part. According to the report, the child also disclosed during an interview with a child interview specialist that the Applicant had touched her inappropriately on one other previous occasion. The report indicated that the child recalled the Applicant was working in the laundry room during the prior incident and had picked her up and put his hands on her bottom and her front private part. The child indicated that she told the Applicant to put her down and he did.

The police case report for the 2009 arrest further indicates that during his initial interview relating to the bathroom incident, the Applicant denied touching the child's bottom or chest, and in describing that incident, explained that the child leaned backwards on the bathtub edge and yelled for help and that he grabbed her to keep her from falling. In a subsequent Recorded Suspect Statement, which was transcribed and attached to the police case report, the Applicant admitted to touching the girl on two occasions. He explained that during the first incident, he had been servicing a washer machine at the child's residence, and the child sat up on the machine and she asked for help to get down and later get back up. In his statement, he said that he helped the child get down and get back up and that the child's bottom was rubbing his front private part, which became "excited." When the officer asked the Applicant if he purposely tried to put his front privates on her bottom, he replied yes. The Applicant also admitted to touching and rubbing her chest in circular movements during the second incident in the bathroom of the child's apartment. In his recorded suspect statement, the Applicant stated that "I've only touched her two times sexually for sexual reasons," referring to the two incidents in the laundry room and bathroom.

In his written statements in these proceedings, the Applicant acknowledged that he was arrested in 2009 for child molestation in the first degree. He explained he went to trial on two counts of child molestation and two counts of assault in the fourth degree but notes the jury acquitted him of all charges. He did not provide any further details regarding the underlying circumstance of his arrest and stated only that the "acquittal speaks for itself." In his statement on appeal, the Applicant states that the arrest took place more than ten years ago and he was innocent and did not do anything wrong. He explains that the interview with the police was an intimidating experience, particularly because he recalled hearing stories in El Salvador about how people were killed or disappeared who did not do as the police said. He further asserts that the police told him what to say in the recorded statement. He also contends that he was able to explain in his court case that he was pressured to confess to the charge of child molestation and the jury found him not guilty. The Applicant states that the jury acquittal was in part because of inconsistencies in the various accounts of the child and parents and because of previous instances of misconduct by the officers who interviewed him.

Apart from the 2009 arrest, as noted, the Applicant was also arrested for patronizing a prostitute in 2015. According to the submitted Case Docket Inquiry, the Applicant agreed to a stipulated order of continuance for 24 months with a 10 month early release, and upon compliance with the terms of the stipulation, the charge was dismissed. In his statements before the Director, the Applicant again did not address the underlying circumstances of this arrest. However, he submitted the [redacted] Police Department Police Report which indicated that the Applicant was arrested in an undercover investigation after he responded to a fake advertisement on a website where people post advertisements to solicit prostitution under the guise of escort services. The report indicated that the Applicant called the telephone number provided and that during the phone call, he requested "full-service," which was noted as the vernacular for sexual intercourse in the prostitution trade, and agreed to pay the stated rate for that service. He subsequently arrived at the address where the service was to be provided and confirmed to the undercover officer that he still wanted "full service" for the stated rate. The report indicated the Applicant entered the apartment and was arrested.

In response to the Director's request for evidence, the Applicant stated that he is "deeply embarrassed" by this arrest and apologized but noted that the charge had been dismissed without prejudice. He did not otherwise address the underlying circumstances of his arrest in his statement. In his statement on appeal, the Applicant states that he was arrested for allegedly patronizing a prostitute and that he had wanted to "continue protesting my innocence" but instead took the advice of his lawyer (to obtain a stipulated order of continuance). Here again, the Applicant did not further address the circumstances that led up to this arrest in 2015 or address the factual allegations set forth in the arrest report.

In considering an applicant's criminal history in the exercise of discretion, we look to the "nature, recency, and seriousness" of the relevant offense(s). *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). As discussed by the Director, the Applicant has two arrests dealing with sexually based offenses, including one arrest involving a child. As the Applicant asserts, he was not convicted of any criminal offenses following those arrests. However, although the Applicant was not convicted on the 2009 charge of child molestation, which we consider to be especially serious, as discussed, the arrest reports and probable cause determination reflect that during the course of the criminal investigation, the Applicant admitted to touching a 12-year-old girl "for sexual reasons" on at least two occasions.[2] We acknowledge the Applicant's claim on appeal that his confession to the police was coerced and subsequently recanted by him and that he was acquitted of the charge by a jury following a trial. In support of this claim, the Applicant also submits an affidavit from an attorney on his defense team for his trial who stated that due to the Applicant's credible testimony, the defense presented arguments to the jury that his confession had been coerced and based on intimidation and fear of law enforcement. He further stated that it was his professional belief that the verdict of not guilty in the Applicant's trial was due to the jury's belief that the Applicant's confession was coerced. However, the evidence in the record is not sufficient to establish that the Applicant was acquitted due to his claimed coerced confession, rather than because of other technical, legal, or evidentiary deficiencies, as the record lacks corroborating evidence, including trial transcripts or other court records or law enforcement that show the jury's basis for acquitting the Applicant or support the Applicant's assertion that police officers obtained his confession through coercion.

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[2] Applicable regulations state that we will generally not exercise our discretion in a U adjustment applicant's favor where the applicant has committed or been convicted of a crime involving sexual abuse committed upon a child. 8 C.F.R. § 245.24(d)(11). Although the record reflects that the Applicant was not convicted of such an offense, the regulatory language is indicative of USCIS' extremely serious regard for offenses that are sexual in nature and involve children.

In addition, the Applicant was arrested for patronizing a prostitute, and the underlying arrest report indicates that he was arrested as part of an undercover investigation in which he solicited sex acts from an undercover officer and agreed to pay the stated rates for that service. Contrary to the Applicant's assertions on appeal that this arrest occurred before his petition for derivative U status was filed, the record indicates he was arrested in 2015, after the derivative U petition was filed on his behalf in 2013. Additionally, although he was not convicted, the record reflects that this charge was dismissed only because he had entered into and complied with the terms of a stipulated order of continuance under which the prosecution had agreed to dismiss the charge upon the Applicant's completion of probation and other requirements. The order specified that if had there been a breach by the Applicant for noncompliance, the judge would have determined his guilt without a trial based on the record at the time. The record therefore reflects that the court dismissed the charge of patronizing a prostitute solely because the Applicant satisfied the terms of the stipulated order and not because a judge or jury had evaluated and determined the underlying evidence insufficient to establish guilt.

On appeal, the Applicant also contends that the Director improperly relied on arrest reports to assess his guilt again where he was not convicted of the charges in either of his arrests and was acquitted of the 2009 child molestation charge after trial. However, although the charges levied against the Applicant were ultimately dismissed, the fact that the Applicant was not *convicted of* the underlying charges does not equate with a finding that the underlying conduct or behavior leading to those charges did not *occur*. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all factors in making its discretionary determination and that it "will generally not exercise its discretion favorably in cases where the applicant has *committed* or been convicted of" certain classes of crimes) (emphasis added). Here, regardless of whether or not the Applicant was found guilty of the specific criminal charges brought against him, USCIS may still consider the information contained in his arrest reports in exercising discretion, particularly where, as here, the Applicant has not otherwise shown that the police reports describing his underlying conduct are unreliable. *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988) (stating that it is "especially appropriate" to consider the factual information contained in police reports, as all relevant factors concerning an arrest and conviction should be taken into account in exercising our discretion); *see also Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (stating that evidence of unfavorable conduct, including criminal conduct which has not resulted in a final conviction for purposes of the Acts, may be considered as a matter of discretion); *Pareds-Urrestarzu v. INS*, 36 F.3d 801 (9th Cir. 1994) (holding that even though the drug arrest in that case did not result in a conviction and the underlying charges were dismissed, the arrest could be considered as a discretionary factor in adjudicating a discretionary waiver under section 212(c) of the Act). As discussed, the arrest report for the 2009 child molestation charge reflects that the Applicant admitted to touching a minor child for sexual reasons and the record does not sufficiently support his assertion that his admission was coerced and should therefore not be considered. The transcription of the Applicant's recorded suspect statement reflects that he was provided a fluent Spanish speaking interpreter, affirmed that the statement was voluntarily given, and was informed he was free to leave the interview at any time. Additionally, with respect to his 2015 arrest for patronizing a prostitute, we note that the stipulated order dismissing the charge indicates that had there been a breach of the agreement by the Applicant, a judge would have relied upon record at the time to determine the Applicant's without a trial. This evidentiary record presumably includes the 2015 arrest report before us which identified the Applicant as having solicited an undercover officer for sex acts in exchange for payment. As such, we find no error in the Director's decision to afford significant adverse weight to the Applicant's arrest reports.

Lastly, while the Applicant contends that he is not inadmissible based on his criminal history record and that his arrests did not involve violent crimes, there is no prohibition that prevents his arrests from being considered when adjudicating a discretionary immigration benefit, regardless of whether his criminal conduct or conviction renders him inadmissible. *See* 8 C.F.R. § 245.24(d)(11) (stating that USCIS may take into account all factors in making its discretionary determination).

As noted above, the Applicant was arrested on two separate occasions for serious and troubling conduct involving sexual offenses. Notwithstanding the Applicant's assertions that his arrests did not lead to convictions, we find the Applicant's criminal history to be of a sufficiently serious nature and evidencing conduct that poses a risk to public safety for the reasons discussed.

The arguments advanced on appeal are not sufficient to overcome the discretionary denial of the Applicant's U adjustment application. To summarize, the Applicant's favorable factors, including, among others, family ties; employment and community ties; hardships to himself and his family, while favorable, are not sufficient to establish that his continued presence is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest, given the nature, severity, and recency of the actions that lead to his three arrests and insufficient evidence of his remorse and rehabilitation for his recent criminal history. Consequently, the Applicant has not demonstrated that he merits a favorable exercise of discretion to adjust status under section 245(m) of the Act.

ORDER: The appeal is dismissed.