



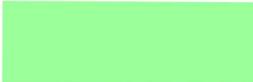
U.S. Citizenship
and Immigration
Services

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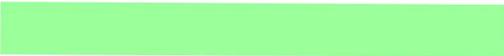


Date: **JAN 14 2015**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

APPLICANT: 

APPLICATION:

Application to Adjust Status (Form I-485) for an Alien in U Nonimmigrant Status Pursuant to Section 245(m)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1255(m)(1)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the Application to Register Permanent Residence or Adjust Status (Form I-485), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application will remain denied.

The applicant, who was granted U-3 nonimmigrant status, seeks to adjust his status under section 245(m)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(1).

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.

(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).

Facts and Procedural History

On January 12, 2010, the director granted U-3 nonimmigrant status to the applicant based upon an approved Petition for Qualifying Family Member of a U-1 Recipient (Form I-918 Supplement A) that his mother filed on his behalf. The applicant's U-3 status was valid from December 15, 2005, when he was granted interim relief, until December 7, 2010. The applicant filed the instant Form I-485 on July 22, 2010, and the director denied the applicant's adjustment of status application because the adverse factors in the applicant's case outweighed the positive factors, and he failed to submit sufficient evidence of his rehabilitation. In denying the Form I-485, the director relied on arrest reports and court dispositions which indicated that the applicant had recently pled guilty to a felony and misdemeanor.¹ The applicant timely appealed the denial of his Form I-485. On appeal, the applicant claimed that because he was admitted into the Deferred Prosecution Program (DPP) for his felony and misdemeanor charges in 2010, he was not convicted of those crimes. However, the applicant did not submit any evidence that he had complied with the conditions in the DPP.

On October 22, 2014, we issued a Request for Evidence (RFE) to the applicant for evidence of his compliance with the DPP, and evidence of any other arrests and/or convictions since March 20, 2010. On December 23, 2014, the applicant submitted an additional statement, letters of support regarding his rehabilitation, and a print-out from the Clerk of the Superior Court, State of North Carolina, showing all of the applicant's criminal charges were dismissed by the district attorney.

Analysis

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, we find no error in the director's decision to deny the applicant's adjustment of status application.

¹ The petitioner was charged with felony breaking or entering a motor vehicle and misdemeanor larceny.

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 *Pinentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Meija 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 applicant claims that because he was admitted into the DPP, he was not convicted of felony breaking or entering a motor vehicle and larceny in 2010 and he has not been convicted of any other crimes since March 20, 2010. In response to the RFE, the applicant submitted evidence that his criminal charges were dismissed by the district attorney on January 3, 2012. Although the applicant's charges were dismissed by the district attorney after he successfully completed the DPP, the record does not contain sufficient evidence establishing that he has not been convicted of a crime for immigration purposes. Section 101(a)(48) of the Act states that where adjudication of guilt has been withheld, when an alien enters a plea of guilty or has admitted sufficient facts to warrant a finding of guilt, and a judge has ordered some form of punishment, penalty, or restraint on the alien's liberty, there has been a conviction for immigration purposes. In order to participate in DPP in North Carolina, the applicant has to enter a plea of guilty and complete the punishment proscribed by the district attorney. See *North Carolina General Statutes* §§ 15A-1341(a1), 1342. Here, the petitioner pled guilty to the crimes, was ordered to complete community service, and was sentenced to one year of probation. As such, although the petitioner completed the DPP, he was convicted of felony breaking or entering a motor vehicle and larceny for immigration purposes under section 101(a)(48) of the Act.

The applicant claims that his presence in the United States is in the public interest, he has been rehabilitated, and his family will suffer if he is removed from the United States. In his statement submitted in response to the RFE, the applicant states he has been in the United States since he was six years old, he is gainfully employed, he has no family in Mexico, and he is afraid to return to Mexico. He also states that his son was born with a cleft lip which has made the applicant "stronger, emotionally and mentally." Medical documentation in the record shows that the applicant's son has a cleft lip.

The favorable and mitigating factors in the present case are the applicant's family in the United States and his recent history of employment. The unfavorable factors are the applicant's criminal convictions, his entry into the United States without inspection and his unlawful presence in the United States. We find that 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 application on discretionary grounds.

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, that burden has not been met as to the applicant's eligibility to adjust status under section 245(m)(1) of the Act and the appeal shall be dismissed.

ORDER: The appeal is dismissed. The application remains denied.