



MillsLegalClinic

StanfordLawSchool

Immigrants' Rights Clinic

TEMPLATE LEGAL ARGUMENT REGARDING MITIGATION OF THE EFFECT OF RACIAL BIAS WHEN SEEKING DISCRETIONARY RELIEF

This template legal argument is an addendum to the practice advisory, “Representing Immigrant Clients Affected by the Racial Bias of the Criminal Legal System.” It is designed to be a portion of a pre-hearing brief to be filed with the immigration court in support of your client’s application for discretionary relief. If you have raised the issues below before the immigration court, we encourage you to raise them again on appeal. This template is not intended for use in its current form in bond proceedings. As discussed in the practice advisory, similar arguments may be made in briefs in support of bond, but the analysis and framing are different.

The template argues that the immigration judge (IJ) should consider the existence of bias in the criminal legal system, as it affects a noncitizen applying for discretionary relief. The IJ should give certain criminal records less evidentiary weight, recognizing that their probative value is diminished by the racial bias of the system that produced them. In addition, the IJ should take into account the racial bias that pervades the criminal legal system when determining whether, in the totality of the circumstances, the noncitizen merits a favorable exercise of discretion.

DO NOT TREAT THIS TEMPLATE LANGUAGE AS LEGAL ADVICE. It does not substitute for independent legal advice supplied by a lawyer familiar with the specific facts of an individual’s case. It is not intended as, nor does it constitute legal advice. The template is based primarily on Board of Immigration Appeals precedent. Practitioners are advised to Shepardize the cited cases and conduct independent research in their respective circuits before using this template.

For purposes of this template, the facts are sample facts relating to Mr. M, the hypothetical respondent described in the practice advisory. Mr. M is an undocumented individual who is seeking adjustment of status. He has strong family ties in the United States and other positive equities, but has had numerous interactions with the criminal legal system. Your brief should be adjusted to reflect the specific facts of your client’s case and the jurisdiction(s) in which they had interaction with the criminal legal system.

Attorney & EOIR ID #
Address
Phone
Email

[DETAINED/NON-DETAINED]

Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[CITY, STATE]

In the Matter of:

[MR. M]

Respondent,

In Removal Proceedings.

A [XXX-XXX-XXX]

Hearing Date (ICH): [MONTH DAY YEAR]

Hearing Time: [XXXX]

Before: Hon. [NAME]

**RESPONDENT'S PRE-HEARING BRIEF IN SUPPORT OF APPLICATION FOR
[ADJUSTMENT OF STATUS]**

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[SAMPLE LEGAL ARGUMENT]

5. This Court Should Consider the Evidence of Bias in County/City X's Criminal Legal System When Evaluating Mr. M's Criminal Record and Exercising Discretion.

Mr. M respectfully requests that this Court consider the evidence of racial bias present in County/City X's criminal legal system when determining whether Mr. M merits a grant of his application of status in the exercise of discretion.

First, as an evidentiary matter, the Court should give less weight to the criminal records because they are not necessarily probative of Mr. M's lack of rehabilitation. This Court must decide whether to admit each piece of evidence offered by the parties, and how much weight to give each piece of evidence that is admitted to the record. *See Matter of J-G-T-*, 28 I&N Dec. 97, 101 (BIA 2020) (citing to Rule 401 to “consider how much weight [expert witness testimony] should receive”); *Matter of Thomas*, 21 I&N Dec. 20, 24 (BIA 1995) (“[T]he probative value of and corresponding weight, if any, assigned to evidence of criminality will vary according to the facts and circumstances of each case and the nature and strength of the evidence presented.”). The criminal records, if admitted, deserve minimal weight because they are the product of a biased criminal legal system.

Second, in making its discretionary determination, the Court should consider evidence of racial bias in County/City X's criminal legal system as part of the totality of Mr. M's circumstances. The factors relevant to an exercise of discretion include, but are not limited to: length of residency in the United States; family ties; work history; community ties; proof of rehabilitation; and criminal history. *See, e.g., Matter of Edwards*, 20 I&N Dec. 191, 197 (BIA 1990); *Matter of Arai*, 13 I&N Dec. 494, 495-96 (BIA 1970); *see also Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978); *In re Mendez-Moralez*, 21 I&N Dec. 296, 304-05 (BIA 1996). Considering all of these factors, the Court must engage in a balancing/totality of the circumstances test to determine whether a favorable exercise of discretion is appropriate. *See Matter of C-V-T-*, 22 I&N Dec. 7, 14 (BIA 1998). Evidence of racial bias

in County/City X's criminal legal system is part of the totality of the circumstances surrounding Mr. M's criminal history and should be part of the Court's discretionary analysis.

a. This Court Should Afford the Criminal Records Less Evidentiary Weight Because They Were Generated by a Racially Biased Legal System and Are Not Necessarily Probative of Failure to Rehabilitate.

Mr. M respectfully asks that this Court give the criminal records in his case, including the FBI rap sheet, police report, criminal complaint, pre-sentence report, and plea agreement, less evidentiary weight because the records are not necessarily reliable indicators of recidivism. This is because the legal system and entities that generated the records are all impacted by racial bias.

When the Court admits evidence offered by a party, it must decide how much weight the evidence should be afforded, based on its reliability and usefulness in substantiating the party's position. Generally, evidence is admissible in removal proceedings so long as it is probative and its use is fundamentally fair. *Matter of Barvenas*, 19 I.&N. Dec. 609, 611 (BIA 1988). Immigration judges nonetheless must determine how much *weight* to assign each piece of evidence. *See* INA § 240(c)(4)(B) ("In determining whether [an] applicant has met [their] burden, the immigration judge shall weigh the credible testimony along with other evidence of record."); *see also* EOIR IJ Benchbook at 4 ("Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted."). Where there are indicia that a piece of evidence is unreliable or has limited bearing on the matter asserted, the Court must accord the evidence "little weight." *In Re Arreguin De Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995).

The records relating to Mr. M's criminal history should carry little weight in these proceedings. These records may be probative of the *fact* that Mr. M has been arrested, convicted, or otherwise had some contact with the criminal legal system. But they are not necessarily probative of

Mr. M's dangerousness, recidivism, or failure to rehabilitate because, as detailed below, noncitizens of color are disproportionately criminalized by the criminal legal system.

Mr. M is a Latinx Uber driver and lives in an area that over polices men of color. *See* Exh. L.1 (Stanford Report); Exh. L.2 (Police Scorecard for County/City X); Exh. L.3 (Investigative Report re: County/City X); Exh. L.4 (Other localized evidence). As is described in Exh. L.1, “research overwhelmingly suggests that racial bias- both implicit and explicit- infects every stage of the criminal process and Black and Latinx are subject to more policing and arrests, including pre-trial detention and harsher sentences than similarly situated white individuals.” *Id.* at p. 1. This racial bias manifests in County/City X, as documented in numerous local reports. [Discuss local data and statistics that are relevant to your client’s case.] *See* Exhs. L.2-L.4. These statistics demonstrate that Mr. M’s frequent arrests for moving violations do not prove that he is a particularly worse driver than his white neighbor who also drives for Uber. Instead, the arrests are consistent with the FBI’s own acknowledgment that Black and Latinx people are “overrepresented among persons arrested for nonfatal violent crimes” relative to their representation in the general population while white people are underrepresented. Exh. L.1. Similarly, the fact that Mr. M received longer probation and jail sentences than one might anticipate for a moving violation is not indicative that his offenses were more egregious or dangerous. Instead, it is consistent with the U.S. Department of Justice’s own statistics that Black and Latinx male defendants received sentences that were on average 19% longer than those of white defendants who were arrested for the same crimes. *Id.* Mr. M’s declaration describes the disparate treatment he has received as a Latinx male in his neighborhood and surrounding neighborhoods. *See* Exh. B. Mr. M explains that “the police regularly patrolled certain areas where I lived. They were the areas that were most heavily populated by Latinx families.... I remember noticing that when I traveled to different parts of the county, parts that were more affluent or had fancier shopping- sightings of police were much less frequent.” *Id.* He states

that one time he asked about the reason for the stop and the officer told him it was because he had tinted windows and had a 49ers vanity license plate. *Id.* The officers also usually expressed surprise and shock that he spoke English fluently. *Id.*

In light of this evidence of racial bias in the criminal legal system and its impact on Mr. M, the criminal records in Mr. M's case are not necessarily probative of recidivism or lack of rehabilitation. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (noting that “egregious violations” of civil liberties may in some circumstances “undermine the probative value” of evidence). This Court should therefore give the criminal records limited evidentiary weight when determining whether to grant Mr. M's application for adjustment of status as a matter of discretion.

b. When Assessing Whether Discretion is Warranted in the Totality of the Circumstances, this Court Should Consider that Mr. M's Encounters with the Criminal Legal System May Have Resulted, at Least in Part, from Racial Bias.

In addition to giving the criminal records limited weight, this Court must also consider bias in the criminal legal system when deciding whether to grant adjustment of status in the exercise of discretion. The Board has explained that the standard for evaluating applications for discretionary relief is flexible and “each case must be judged on its own merits.” *Matter of C-V-T*, 22 I&N Dec. at 11; *see also Matter of Arai*, 13 I&N Dec. at 495 (“It is difficult and probably inadvisable to set up restrictive guidelines for the exercise of discretion.”). Specifically with regard to criminal history, binding precedent requires the Court to consider the unique facts and circumstances surrounding an applicant's encounters with the criminal legal system. *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978) (holding that IJs must consider not only the existence of a criminal record, but also its “nature, recency, and seriousness,” in the discretionary determination); *see also Matter of Roberts*, 20 I&N Dec. 294, 301 (BIA 1991) (holding that while “it is impermissible to go behind a record of conviction to reassess [a noncitizen's] ultimate guilt or innocence,” an “inquiry may be had into the circumstances surrounding the commission of the crime in order to determine whether a favorable

exercise of discretion is warranted.”); *In re Mendez-Morales*, 21 I&N Dec. at 303 n.1 (same). The Board has considered circumstances such as a noncitizen’s apparently “minor role” in an offense, *In re Arreguin De Rodriguez*, 21 I&N Dec. at 42, the “amateur” nature of a noncitizen’s involvement with an offense, *Matter of C-V-T-*, 22 I&N Dec. at 13, and a noncitizen’s lack of ill motive in committing an offense, *Matter of T-*, 6 I&N Dec. 410, 413 (BIA 1954), in favorably exercising discretion in spite of a noncitizen’s criminal history. *Cf. Matter of B-Z-R-*, 28 I&N Dec. 563, 567 (2022) (holding that “immigration adjudicators may consider a respondent’s mental health” in making particularly serious crime determinations).

Consideration of the bias in **County/City X**’s criminal legal system is in line with the Board’s precedent and practice of taking into account the relevant context in its totality of the circumstances analysis. The underlying circumstances surrounding **Mr. M**’s criminal history demonstrate that his arrests, convictions, and sentences were very likely related to the bias in **County/City X**’s criminal legal system. As described above, racial bias pervades the criminal legal system, with Black and Latinx individuals receiving harsher treatment at every step of the criminal process from arrest through sentencing. *See* Exh. L.1.¹ Evidence specific to **Mr. M**’s community, including the Police Scorecard for **County/City X**, an investigative report regarding **County/City X**, and other local sources, demonstrates that **County/City X** is no exception. *See* **Exhs. L.2-L4**. **Mr. M**’s declaration reflects numerous personal experiences with racial profiling. Exh. B. In summary, **Mr. M**’s criminal history must be viewed in the context of a system whose racial bias is well documented. The Board

¹ The Board has acknowledged and relied on statistical data and reports when considering the circumstances of a particular conviction. *See Matter of Castillo-Perez*, 27 I&N Dec. 664, 670 n.2 (2019) (considering “uncontroverted, publicly available data” submitted by DHS “showing that DUI arrests account for only a small fraction of all driving-while-impaired episodes, and that the average DUI arrestee drives impaired dozens of times before ever being arrested,” and further noting that “[o]ther studies further support the conclusion that a typical person with multiple DUI convictions drinks to excess with regularity”).

routinely takes note when the context surrounding a noncitizen's criminal history mitigates this negative equity, and the Court should do so here.

In light of the extensive evidence demonstrating the pervasive and pernicious racial bias present in [County/City X]'s criminal legal system, Mr. M respectfully requests that this Court give the criminal records in his case less evidentiary weight. Mr. M additionally requests that the Court take into account evidence of racial bias when engaged in the totality of circumstances test for discretionary relief.