U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: G[redacted] S[redacted], L[redacted]... **A [redacted]-751**

Date of this notice: 8/9/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Donovan, Teresa L.
Cole, Patricia A.
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]-751 – New York, NY Date: AUG 09 2019

In re: L[redacted] M[redacted] G[redacted] S[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gregory K. Sarantidis, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Ecuador, appeals from an Immigration Judge's January 29, 2018, decision denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b).[1] The appeal will be sustained and the record will be remanded.

This Board reviews the Immigration Judge's factual findings, including credibility findings and predictions as to the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent challenges the Immigration Judge's ruling that she did not demonstrate 10 years of continuous physical presence in the United States, as required under section 240A(b)(1)(A) of the Act, due to her presentation of incredible testimony and insufficient corroborating evidence (IJ at 6-9). The relevant standards for assessing credibility are codified at section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C). *See also Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 163-64 (2d Cir. 2008); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007).

The Immigration Judge found that the respondent demonstrated a propensity to lie to obtain immigration benefits by engaging in a sham marriage with Kleber Ortiz-Garcia upon the advice of some friends and a lawyer, who suggested that the marriage might help her obtain lawful permanent residence in the United States (IJ at 3, 7; Tr. at 77-78, 88-95). However, the respondent testified that the attorney misled her, she was unsure how the marriage would actually help her gain status, and she never applied for immigration benefits based on the marriage (IJ at 7; Tr. at 93). We therefore do not conclude that this provides support for an adverse credibility finding under section 240(c)(4)(C) of the Act.

Furthermore, the record supports the Immigration Judge's determination that the respondent's testimony that she arrived in the United States in July 1999 is inconsistent with her statement in Part 3 of her application for cancellation of removal that she first arrived in September 1999

[1] On February 1, 2019, we granted the respondent's motion to accept her untimely brief. We have not provided pinpoint citations to the respondent's brief because it is un-paginated.

(IJ at 7; Exh. 2). At the same time, the respondent's testimony is consistent with her statements in Parts 1 and 2 of the application that her arrival occurred in July 1999 (Exh. 2). Therefore, viewing the totality of the circumstances, we disagree with the Immigration Judge's conclusion that there is a discrepancy which supports an adverse credibility finding (IJ at 7). *See* section 240(c)(4)(C) of the Act. We likewise consider it a minor issue that the respondent did not list the precise day on which she entered this country or consistently testify whether she entered through Texas or Arizona (IJ at 7). *See id.*

Finally, the Immigration Judge based the adverse credibility finding on the respondent's omission from her application for relief of two family members with whom she has resided in the United States (her brother Julio and her sister Narcisa) (Tr. at 87-88), as well as the respondent's inconsistent testimony about a "Lafayette Street" address which is listed on her application as her residence from 2005 to 2006 (IJ at 7-8; Tr. at 79, 102-04; Exh. 2). We conclude that these discrepancies are minor and do not support an adverse credibility finding in the totality of the circumstances. *See* section 240(c)(4)(C) of the Act. Consequently, we reverse the adverse credibility finding as clearly erroneous.

In light of this ruling, the respondent credibly testified that she arrived in the United States in July of 1999 and has not left since then (IJ at 2-3; Tr. at 43, 48; Exh. 2). This testimony is further corroborated by the testimony of the respondent's cousins Justo Paredes and Betty Barzallo (IJ at 4-5, 8; Tr. at 14-16, 29-30, 32-33). The record also supports the Immigration Judge's determination that the respondent's Notice to Appear, Form I-862, is dated August 19, 2009 (IJ at 9; Exh. 1). The Certificate of Service further provides that the Notice to Appear was served on the respondent by ordinary mail on that date (Exh. 1). Viewing this evidence cumulatively, we reverse the Immigration Judge's ruling that the respondent has not met her burden of proving under section 240A(b)(1)(A) of the Act that she has been physically present in the United States for not less than 10 years immediately preceding her application for cancellation of removal (IJ at 8). *See* section 240A(d)(1) of the Act (stating that any period of continuous physical presence shall be deemed to end when the alien is served a notice to appear).

Consequently, we need not address the respondent's argument that she has suffered prejudice because her preliminary hearing on October 6, 2009, during which she claimed to have not received proper service of her Notice to Appear, was not transcribed. We also need not decide whether the Notice to Appear is insufficient to trigger the "stop-time" rule of section 240A(d)(1) of the Act under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), because it does not set forth the time and date of the respondent's initial hearing (although it does list the place). *But see Matter of Mendoza-Hernandez and Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019) (holding that a notice to appear lacking time and place information for the removal hearing can be perfected by a notice of hearing containing the information, as occurred here).[2]

[2] In *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), we held that a notice to appear that does not specify the time and place of an alien's initial hearing vests an Immigration Judge with jurisdiction over removal proceedings so long as a notice of hearing specifying this information is later sent to the alien. *See also Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019). The present respondent, like the respondent in *Matter of Bermudez-Cota*, was sent a notice of hearing at the

The Immigration Judge further ruled that the respondent did not establish that her removal would cause exceptional and extremely unusual hardship to her then sole qualifying relative: her United States citizen daughter born on February 26, 2000 (IJ at 10-11; Exh. 3, Tab B; Exh. 4, Tab D). *See* section 240A(b)(1)(D) of the Act; 8 C.F.R. § 1240.8(d); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). On appeal, the respondent observes that a significant amount of time elapsed between her final hearing on June 29, 2011, and the issuance of the Immigration Judge's decision on January 29, 2018. We agree with the respondent that this necessitates updated hardship findings with respect to her qualifying relative daughter (IJ at 10-11). Moreover, the respondent presents evidence that she gave birth to two additional United States citizen children on August 25, 2013, and November 18, 2014, who are qualifying relatives pursuant to section 240A(b)(1)(D) of the Act. We will remand the record to allow the respondent to present updated evidence and argument concerning hardship to each of her qualifying relatives, followed by the issuance of a new decision.

Accordingly, the following order is entered.

ORDER: The appeal is sustained and the record is remanded for further proceedings and the entry of a new decision consistent with this opinion.

Linda S. Wendtland
FOR THE BOARD

address she provided indicating that she should appear before the Immigration Judge at a specific time, date, and place. The respondent then appeared at her noticed hearings. Under these circumstances, we conclude that jurisdiction properly vested with the Immigration Judge.