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Name: U[redacted] - C[redacted], F[redacted]

A [redacted]-463

Date of this notice: 7/9/2019

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:
Wendtland, Linda S.
Donovan, Teresa L.
Rosen, Scott

Userteam: Docket

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File: A[redacted]-463 – Las Vegas, NV Date: JUL - 9 2019

In re: F[redacted] U[redacted]-C[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sylvia L. Esparza, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's decision, dated January 17, 2018, denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2012), and ordering him removed from the United States. The record will be remanded.

The only issue on appeal is whether the Immigration Judge properly denied the respondent's application for cancellation of removal.[1] According to the Immigration Judge, the respondent is ineligible for such relief for two reasons: (1) he did not prove that he has been a person of "good moral character" throughout the last 10 years (IJ at 3-4); and (2) he did not prove that his removal will cause "exceptional and extremely unusual hardship" to any spouse, parent, or child who is a United States citizen or lawful permanent resident (IJ at 4-5).[2] The respondent challenges both determinations on appeal.

I. GOOD MORAL CHARACTER

We begin with the question of good moral character. Section 240A(b)(1)(B) of the Act requires an applicant for cancellation of removal to prove that he has been a person of good moral character throughout the 10-year period immediately preceding final adjudication of the application. The phrase "good moral character" is not defined in the Act, except in negative terms. Section 101(f) of the Act, 8 U.S.C. § 1101(f), lists nine classes of individuals who are precluded from establishing good moral character, but the first sentence of the final, "catch-all" paragraph of that subsection also clarifies that "[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

[1] The respondent conceded removability below (IJ at 1; Tr. at 8-9; Exh. 1), and did not request any other form of relief from removal.

[2] The Immigration Judge found that the respondent satisfied the 10-year continuous physical presence requirement of section 240A(b)(1)(A) of the Act (IJ at 3), and did not find that he had been convicted of any disqualifying criminal offense under section 240A(b)(1)(C). Having found the respondent ineligible for relief based on a lack of good moral character and family hardship, moreover, the Immigration Judge found it unnecessary to decide whether he merits such relief in discretion (IJ at 5).

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The Immigration Judge did not find that the respondent is barred from demonstrating good moral character; thus, our analysis proceeds under the "catch-all" provision. Good moral character under that provision does not mean moral excellence; rather, it is a concept of a person's natural worth derived from the sum total of all his activities, measured by reference to the conduct of the average person in the community. *See, e.g., Matter of Guadarrama,* 24 I&N Dec. 625, 627 (BIA 2008). Whether a person has exhibited good moral character is a question of judgment that we review de novo, 8 C.F.R. § 1003.1(d)(3)(ii) (2019), but any such judgment must be based on the Immigration Judge's factual findings. 8 C.F.R. § 1003.1(d)(3)(iv).

In finding that the respondent lacked good moral character, the Immigration Judge focused on his criminal record in Nevada, including a 2008 conviction for attempted domestic battery, a 2013 conviction for driving under the influence of alcohol (DUI), a 2015 conviction for reckless driving, and a 2016 arrest for suspected DUI that did not result in criminal charges (IJ at 3-4; Tr. at 45-50, 56-59; Exh. 4, at 130-144).

As the respondent points out on appeal, however, "an application for cancellation of removal [is] a continuing one for purposes of evaluating an alien's moral character." *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 798 (BIA 2005). In other words, "the 10-year period during which good moral character must be established ends with the entry of a final administrative decision" and is "calculated backward from the date on which the application is finally resolved by an Immigration Judge or the Board." *Id.* at 797, 798. As relevant here, this means that the respondent's 2008 conviction for attempted domestic battery no longer falls within the 10-year period during which his good moral character must be shown.

Because the Immigration Judge found that the respondent's attempted domestic battery conviction was the "most troubling aspect of his criminal record" for purposes of the moral character assessment (IJ at 3), we are unable to affirm that assessment on the present record. Further, although the respondent's 2013 and 2015 convictions for DUI and reckless driving remain within the good moral character period, it is not clear that the Immigration Judge would deem those transgressions sufficient by themselves to defeat the respondent's good moral character when gauged in light of the "sum total of all his activities," to include his activities as a father, a husband, and a worker. *Matter of Guadarrama,* 24 I&N Dec. at 627.

In light of the foregoing, we are unable to affirm the Immigration Judge's adverse good moral character determination on the present record. Therefore, we turn to the Immigration Judge's alternative reason for finding the respondent ineligible for cancellation of removal.

II. EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP

Section 240A(b)(1)(D) of the Act requires an applicant for cancellation of removal to prove that his "removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." The "exceptional and extremely unusual hardship" test is a demanding one, and can be satisfied only in "'truly exceptional' situations," where hardship to qualifying relatives will be "'substantially' beyond the ordinary hardship that would be expected when a close family member

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leaves this country." *Matter of Monreal*, 23 I&N Dec. 56, 62 (BIA 2001) (internal citations omitted); *see also Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002). As with good moral character, whether an alien's removal will cause "exceptional and extremely unusual hardship" to a qualifying relative is a question of judgment that we decide for ourselves, *see* 8 C.F.R. § 1003.1(d)(3)(ii), but any such judgment must be based on the Immigration Judge's factual findings, *see* 8 C.F.R. § 1003.1(d)(3)(iv). We review the Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i).

The Immigration Judge found that the respondent has five qualifying relatives for purposes of the hardship inquiry—"his two [United States citizen] stepchildren ages 16 and 11, and his three natural [United States citizen] children, ages 11, 9, and 4" (IJ at 4). According to the judge, the respondent's removal would not result in exceptional and extremely unusual hardship to any of the children, for three reasons: First, the respondent's spouse was healthy and able to work to support the children; second, none of the children have "medical, mental health or educational problems that would be exacerbated" by the respondent's removal; and third, the respondent himself is healthy and able to work in Mexico to support his family (IJ at 4-5).

We respectfully conclude that several key factual findings underlying the Immigration Judge's hardship analysis do not withstand clear error review. First, the Immigration Judge miscalculated the number of the respondent's qualifying relatives. The respondent has a total of *six* United States citizen children, not five (Tr. at 17-18; 39-40; Exh. 4, ¶ 43, at 4, 9). To be precise, he has two stepchildren (A[redacted], who is now 19 years old, and B[redacted], who is 16) and four biological children (E[redacted], who is 14; twins V[redacted] and V[redacted], who are 12; and P[redacted], who is 9).

Further, though the Immigration Judge acknowledged that E[redacted] had a lazy eye and learning and speech delays for which she required special education services that are "lacking in Mexico," the judge found that the respondent's removal would not cause E[redacted] serious hardship because she "is a [United States citizen] and can remain in the [United States] and continue with her schooling" (IJ at 4-5). While it is true that there are no *legal* impediments to E[redacted]'s remaining in the United States, the judge's finding that she "can remain ... and continue with her schooling" here is in conflict with the respondent's credible[3] testimony that he "thinks" his wife and four biological children would accompany him to Mexico if he is removed (Tr. at 51).[4] The respondent's plan to relocate with his wife and children is corroborated by his written application for cancellation of removal, where he checked boxes marked "yes" when asked if his spouse and children would accompany him to Mexico if his application is denied (Exh. 4, ¶ 44, at 4), and by his wife's supporting affidavit, in which she explains that "[i]f [the respondent]

[3] The Immigration Judge found the respondent credible with respect to his testimony about his children and his desire to remain the United States (IJ at 4), and no argument to the contrary is presented on appeal.

[4] The respondent acknowledged that his stepchildren would probably not want to accompany him to Mexico (Tr. at 51-52), an assertion that finds support in Alexis' testimony that she would remain in the United States with her maternal grandparents if the respondent and her mother go to Mexico (Tr. at 29-30).

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were to be ordered removed from the United States, I would probably accompany him with all of our children so that I can keep my family together" (Exh. 4, at 152).[5]

In addition, we respectfully conclude that the judge's remaining factual findings are too incomplete to give us a meaningful basis for appellate review. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). Specifically, although the Immigration Judge noted the children's general good health (with the exception of E[redacted]'s issues, noted above) and acknowledged that the respondent's removal will likely cause his children "economic hardship" (IJ at 4-5), he made no specific findings with respect to the most crucial question, i.e., what effect the respondent's removal to Mexico would have on the lives of his children.

Will the respondent's wife and biological children really accompany him to Mexico, as he claims? If so, what effect would such relocation have on the children? Conversely, if the respondent's children would remain in the United States, where (and with whom) would they live, and how would separation from the respondent affect them? Without specific findings that resolve these and related factual questions, we have no way of assigning the appropriate weight to the respondent's various hardship factors.

In sum, because the Immigration Judge's decision with respect to family hardship contains erroneous and incomplete factual findings, we are unable to affirm his determination that the respondent did not carry his burden of proof under section 240A(b)(1)(D) of the Act.

III. CONCLUSION

In conclusion, on the present record we are unable to affirm the Immigration Judge's decision finding the respondent ineligible for cancellation of removal by virtue of his failure to satisfy section 240A(b)(1)'s good moral character and family hardship requirements. Accordingly, the record will be remanded for further proceedings and for the entry of a new decision which contains updated and complete findings with respect to all matters bearing on the respondent's eligibility for cancellation of removal.

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

Linda J. Wendtland
FOR THE BOARD

[5] We acknowledge the equivocal nature of the respondent's testimony that he "thinks" his wife and children will relocate to Mexico with him, as well as his wife's statement that she and the children would "probably" accompany the respondent to Mexico if he is removed. Under the circumstances, we do not discount the possibility that further inquiry could lead the judge to find that E[redacted] would indeed remain in the United States if the respondent is removed. Based on the present record, however, the Immigration Judge seems to have *assumed* that E[redacted] could remain in the United States without addressing any of the evidence to the contrary.

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