U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: DIAZ-MENDOZA, HECTOR **A044-371-296**

Date of this notice: 5/23/2011

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:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

File: A044 371 296 - El Paso, TX

Date: MAY 23 2011

In re: HECTOR DIAZ-MENDOZA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose G. Moreno, Esquire

ON BEHALF OF DHS: Daniel Estaville
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Waiver of inadmissibility

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's September 14, 2009, decision denying his request for discretionary relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and moves to remand to allow the Immigration Court to consider additional evidence. The appeal will be sustained and the record remanded.

As the respondent's removability and eligibility for a section 212(c) waiver is not in dispute, the sole question on appeal is whether he merits this form of relief in the exercise of discretion. The grant of a section 212(c) waiver requires a balancing of adverse factors evidencing the respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the granting of a waiver appears in the best interests of this country. *See Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). We review discretionary determinations *de novo*, but the factual findings underlying those judgments are reviewed for clear error. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

We find ourselves unable to meaningfully review the Immigration Judge's discretionary judgment on the present record. Although the Immigration Judge entered a number of findings bearing on discretion, he did not address several important factors with the specificity they require. The Immigration Judge noted in passing that one of the respondent's children "has medical concerns and problems" (I.J. at 8), but he did not make any findings as to the nature or severity of those problems, and did not discuss what effect (if any) the respondent's removal would have on the child's health, despite the existence of record evidence bearing on that question (Group Exh. 3A, Tab A). That omission is problematic because such health considerations can be very significant equitable considerations, yet this Board is not permitted to make findings regarding such matters. 8 C.F.R. § 1003.1(d)(3)(iv).

Further, the Immigration Judge received the respondent's latest evidentiary filing moments after delivering the oral decision on September 14, 2009 (Tr. at 59-64). According to the Record, on September 2, 2009, the respondent filed a motion for leave to file additional documents after the August 14, 2009, filing deadline. Neither the Immigration Judge nor the respondent realized the documents were omitted from the Record until after the Immigration Judge rendered his oral decision, at which point someone from the court staff delivered the motion to the Immigration Judge. Therefore, the Immigration Judge did not rule on the motion or consider the evidence because the evidence was not before him. We conclude that it was error for the Immigration Judge to afford *no* consideration to the respondent's September 2, 2009, motion and evidentiary filing, which included, *inter alia*, potentially-significant documentation concerning the medical condition of his minor son. Accordingly, the record will be remanded to the Immigration Judge for consideration of the most recent evidentiary submission, additional fact finding, and for the entry of a new decision. *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) ("If incomplete findings of fact are entered and the Immigration Judge's decision ultimately cannot be affirmed on the basis that he or she decided the case, a remand of the case for further fact-finding may be unavoidable.") On remand, the Immigration Judge should receive, consider, and address any and all relevant evidence bearing on the discretionary calculus.

ORDER: The respondent's appeal is sustained, the Immigration Judge's September 14, 2009, decision is vacated in part, and the record is remanded for further proceedings consistent with the foregoing order and for entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
El Paso, Texas

File No.: A 044 371 296 September 14, 2009

In the Matter of	)	
	)	
HECTOR DIAZ-MENDOZA	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 212(a)(2)(A)(ii) of the Act - alien convicted of a crime involving moral turpitude.

APPLICATIONS: A waiver pursuant to the former 212(c) of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Jose Moreno, Attorney El Paso, TX	Daniel Estaville Assistant Chief Counsel El Paso, TX

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 35-year-old single male, native and citizen of Mexico. He was served with a Notice to Appear on June 5, 2007. Exhibit 1. The Notice to Appear charges that the respondent is removable under Section 212(a)(2)(A)(ii) of the Act in that he is an alien who has been convicted of a crime involving moral turpitude. The respondent has admitted the factual allegations in the Notice to Appear and conceded that he

is removable. Further, in support of the allegations and charge, the Government submitted a conviction document, Exhibit 2, for the respondent's conviction for conspiracy to commit a felony, grand larceny, a felony. The Court is satisfied, based on the admissions on behalf of the respondent as well as the Court's review of Exhibit 2, the conviction document, that the respondent is removable as charged, and the Court so does find. Mexico will be designated as the country of removal.

The respondent has applied for a waiver pursuant to the former 212(c) section of the Immigration and Nationality Act. The issue before the Court today is his eligibility for these forms of relief.

STATEMENT OF FACTS

The Notice to Appear has been marked and admitted as Exhibit 1. Additionally, the following documents have been marked and received into evidence: Exhibit 2 was the conviction from the Seventh Judicial District Court in the state of Wyoming; Exhibit 3 was the Form I-191, application for advance permission to return to unrelinquished domicile; Exhibit 3A was a group exhibit of supporting documentation for that application.

The respondent was the sole individual testifying in support of his application. His testimony is summarized as follows. Respondent states that he lives in Albuquerque, New Mexico with a

woman that he considers to be his wife, but that he is not legally married to. He states they have been together for approximately 12 years. She has no lawful status in the United States. Respondent states that he has four children from this relationship. Apparently only one child, Jayco, is a United States citizen. The other three children apparently were born outside the United States and are in the United States without any lawful status. Respondent states that he has other family in the United States to include his mother and father, both lawful permanent residents, as well as other siblings, brothers and sisters that have status in the United States.

The respondent states that he is presently unemployed and has been unemployed for 15 days. Part of that time, the respondent states that he has worked in the construction field earning approximately $10 per hour. According to the respondent, he is the primary supporter of the woman he lives with as well as his children. According to the respondent, he is not receiving any unemployment but has received some Government support in the form of food stamps.

The respondent testified as to his criminal history. The respondent states that he did, in fact, plead guilty to an offense dealing with attempted conspiracy to steal a truck in Wyoming. The respondent states that he was involved with this

illegal activity along with two friends in Wyoming. According to respondent, he pled guilty, served approximately one month in jail and then was on two years probation. Respondent states he has not had other problems with the law.

Respondent states that in his time that he is not working that he is involved with activities to include his church; to include also being involved with helping individuals do various jobs to include painting their residence without seeking pay. According to the respondent, since his arrest he has been a changed person.

The Government then inquired of the respondent, and the respondent confirmed that he did attempt to steal a Ford truck with two other friends. According to the respondent, his other friends may have had more experience with stealing a vehicle since they had tools with which to do so. Apparently, the reason, in part, to steal the vehicle was because they were in a state that they did not live in and they needed a way of getting transportation back to their home state.

According to the respondent, he is not sure that he, in fact, informed the state of Wyoming that he left that state after serving a short time in jail, even though the conviction record indicates there was a period of two years probation.

According to the respondent, he has always paid his taxes.

Further, respondent states that he legalized his status to that of a lawful permanent resident before entering the United States.

The Court then inquired of the respondent. First, the Court brought to the respondent's attention that it was concerned that Exhibit 3 appeared on its face to be wholly deficient. Question 3 dealing with admissions is completely blank. Question 4 dealing with seven years residency in the United States only starts at September 2006, three years instead of seven. Question 5 dealing with employment for the last seven years is blank. The respondent states that he should have been more diligent in completing the form that was required as part of his relief requested before this Court.

The respondent does acknowledge now that he has been outside the country on numerous and various occasions to include a time back in June 2007 when he was stopped by Immigration officials when attempting to reenter the United States (a records check uncovered the conviction in 1995 that the respondent suffered that placed him in removal proceedings).

Turning to the issue of employment, respondent states that he has had various employment and has worked over the years. He states that recently, because of being laid off from work, he has been unable to obtain new employment, even though apparently he has worked for his uncle for several days. The respondent

states, in part, is because he has a temporary card to be in the United States and not a permanent card that he had, perhaps, taken from him when he was placed in removal proceedings.

Turning back to the respondent's family, the respondent states that there is no specific reason why he never married the woman, the mother of his children, but apparently has not done so. Further, the respondent clearly admits that three of his children were born outside the United States and apparently entered the United States illegally to live with him at the present time. The respondent further states he has not been able to proceed with filing applications for any of these children, or at least to start the process.

The respondent states and acknowledges that apparently the woman he lives with does work on occasion, even though she has no proper documents to work in the United States. The income she earns apparently is in cash. It is not a great sum but still is work that she does perform.

On redirect, the respondent states that he is again diligently looking for work and he does expect to be fully engaged in work in the foreseeable future. Further, respondent states that he does fully intend to file any documents he can file for lawful status to be sought for his family members.

STATEMENT OF LAW

Individuals are eligible for the exercise of discretion under former Section 212(c) of the Immigration and Nationality Act if certain criteria is found. This criteria, in part, are laid out in 8 C.F.R. 1212.3. It does appear, first, to the Court that the respondent must have pled guilty to a conviction prior to April 1997. That appears to be the case before this Court based on Exhibit 2, and there has been no evidence to the contrary. Therefore, the Court does believe the respondent is statutorily eligible for consideration for a 212(c) waiver, especially since he has been not inadmissible underneath other grounds that would conclude consideration for a 212(c) waiver.

The Court then looks to whether or not the respondent has established certain things, as well as looking at the equities of respondent's case, looking at both the positive and negative factors in respondent's situation. Ultimately, it is up to the Court whether or not to grant or deny an application for relief in the exercise of discretion.

FINDINGS OF THE COURT

The Court will note the following in respondent's request for a waiver pursuant to former Section 212(c) of the Immigration and Nationality Act. As noted, the respondent apparently did plead guilty prior to 1997 to the criminal offense that places

him before the Immigration Court. However, the respondent must not simply be eligible for relief but must be able to establish to the Court's satisfaction that he is, in fact, deserving of such relief. In that regard, the Court notes the following.

First, as to positive factors, respondent states he is living with a woman for many years; however, not married. The respondent states he has four children from this relationship. However, only one is a United States citizen living legally in the United States. The respondent states that he has been employed in the past and the Court does note there is some indication that he has had employment in the past. Further, the respondent does have some other records in his Group Exhibit 3A showing that he has made some payments for various things over several years. Further, the Court notes that one of the respondent's children, Ender Diaz, has medical concerns and problems as outlined in a letter from a doctor from Albuquerque, New Mexico. Apparently, this child is one of the three children with no lawful status in the United States.

Turning next to the negative factors, the Court again is first concerned with the act of completion of respondent's application before this Court. The Court notes that the document is only a few pages in length. It does not have many questions that need to be filled out. However, it appears for whatever

reason that due diligence was not done on the application. As noted, in Question 3, any departures is blank. Question 4 does not show residency beyond three years and there is no employment listed whatsoever on the application. Further, as the respondent has testified, he has lived with a woman for many years who has no lawful status in the United States but still decides on occasion to work without proper documents. Further, the respondent's three of four children have no lawful status in the United States and to this day the respondent has chosen, for whatever reason, not to at least attempt to process to legitimize their presence in the United States with filing some form of petition.

Further, the Court will note that the respondent was not a lawful permanent resident for much more than one year when he committed the crime that placed him before this Court. Certainly, that is not a wrong point on respondent's case. It is only because he is eligible for a 212(c) waiver and that the time was not cut off when he committed this offense they gave him an opportunity to appear before this Court. However, the Court does believe that such an offense being committed shortly after coming to the United States raises the respondent's responsibility to this Government and United States into question. While the respondent does not appear to have other arrests, there is no

need specifically for other arrests for the respondent to have a negative factor in the way of convictions.

Further, the Court does have a concern whether or not the state of Wyoming is satisfied as to the respondent's meeting his terms of probation. As noted in Exhibit 2, the respondent was placed on two years probation and was to complete certain terms and conditions to include to be under the direct supervision of the Wyoming Department of Corrections for that two-year period of time. It does appear that the respondent chose to leave the state of Wyoming not properly informing the proper authorities to move to another location and subsequently to the Albuquerque, New Mexico area.

While the Court does acknowledge that the respondent very well could be the primary supporter of his family while he is working, it does appear most of his family have no lawful status to be in the United States and, therefore, certainly at least at the present time could, in fact, return back to Mexico with the respondent, if the respondent wishes to maintain his family unit.

The Court believes that it has, in making its review of the present case, considered the Board of Immigration Appeals present decisions dealing with 212(c) waivers to include Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Wadood, 19 I&N Dec. 182 (BIA 1984); as well as Matter of Edwards, 20 I&N Dec. 191 (BIA

1990). Again, the Court does believe it has reviewed respondent's entire case as presented to the Court, both the positive and negative factors; and while the respondent may have been in the United States for many years legally and while he may have family outside his immediate family to include his parents and siblings legally in the United States that he apparently has some ties with, the Court will have to find that it does believe that the negative factors as outlined in its decision outweigh the positive factors in respondent's case.

That is unfortunate, since the Court does believe that with more documentation and more persistence on respondent's case he may have presented a better case before this Court. However, the Court must only look at the evidence before it at the present time; and in basing its analysis and a review of the totality of the evidence before the Court, the Court will have to find that the respondent is, in fact, not deserving of the discretionary relief pursuant to former Section 212(c) of the Immigration and Nationality Act. Accordingly, the following orders are hereby entered?

ORDER

IT IS HEREBY ORDERED that the respondent's request for a waiver pursuant to former 212(c) of the Immigration and Nationality Act is hereby denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge contained on the Notice to Appear.

ROBERT S. HOUGH
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ROBERT S. HOUGH, in the matter of:

HECTOR DIAZ-MENDOZA

A 044 371 296

El Paso, Texas

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

June Gilbert, Transcriber
Free State Reporting, Inc.

November 19, 2009
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, and/or CD, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.