U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Ochoa, Bibiana, Esq.
Bibiana Ochoa Attorney at law PC
5288 S Commerce Drive Suite B100
Murray, UT 84107

DHS/ICE Office of Chief Counsel - SLC
2975 Decker Lake Dr. Stop C
West Valley City, UT 84119

Name: F[redacted]-L[redacted], G[redacted]

A [redacted]133

Date of this notice: 5/17/2017

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Grant, Edward R.
Kendall Clark, Molly

Lulsegos
Userteam: Docket

File: [redacted] 133 – West Valley, UT Date:

MAY 17 2017

In re: G[redacted] F[redacted]-L[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bibiana Ochoa, Esquire

APPLICATION: Cancellation of removal under section 240A

The respondent, a native and citizen of Mexico, has filed an appeal of the Immigration Judge's decision dated September 8, 2016, which denied his application for cancellation of removal, and granted voluntary departure with an alternative order of removal. The Department of Homeland Security (DHS) has not filed a brief or other response. The record will be remanded for further proceedings consistent with this decision.

The record indicates that a different Immigration Judge ("the second Immigration Judge") from the Immigration Judge who presided over the respondent's hearing ("the first Immigration Judge") signed and issued the September 8, 2016, decision (I.J. at 5). In this regard, and in relevant part, the respondent applied for cancellation of removal based on his claim that his removal would result in exceptional and extremely unusual hardship to his qualifying relatives (his United States citizen children) (I.J. at 2, 4; Exh. 2). At the conclusion of the merits hearing on June 8, 2015, the first Immigration Judge indicated that a decision would be issued at a later, unspecified dated (Tr. at 94). *See* section 240A(e) of the Act; 8 C.F.R. § 1240.21(c)(1) (directing immigration judges to reserve granting or denying applications for cancellation of removal until such time as a grant becomes available in a subsequent fiscal year).

On September 8, 2016, the second Immigration Judge signed and issued a written decision "for" the first Immigration Judge. That decision, evidently prepared by the first Immigration Judge, denied the respondent's cancellation of removal application (I.J. at 5).

Section 240A(e) of the Act provides context for analyzing this case and addressing some of the concerns we have with this case before us. That section states that no more than 4,000 applications for cancellation of removal under section 240A(b) of the Act or suspension of deportation under former section 244(a) of the Act, 8 U.S.C. § 1254(a), may be granted in any fiscal year. Federal regulations at 8 C.F.R. § 1240.21 set up a procedure to implement this statutory cap. Under this procedure, the Immigration Judges and the Board can grant (or deny) cancellation and suspension cases as long as numbers are available. With certain exceptions, once the cap is reached further decisions will be reserved and issued once numbers become available. The regulation provides in pertinent part:

> When grants are no longer available in a fiscal year, further decisions to grant or deny such relief shall be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year. Immigration judges and the Board

> may deny without reserving decision or may pretermit those suspension of deportation or cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. [1]

8 C.F.R. § 1240.21(c)(1)

We find additional guidance on the applicability of the annual cap in an Operating Policies & Procedures Memorandum ("OPPM") issued by the Office of the Chief Immigration Judge. *Procedures on Handling Applications for Suspension/ Cancellation in Non-Detained Cases Once Numbers are no Longer Available in a Fiscal Year* (OPPM 12-01) (February 3, 2012). The OPPM sets forth the procedures for reserving decisions in non-detained suspension of deportation or cancellation of removal cases which are subject to the cap. The OPPM does not specifically address or authorize one Immigration Judge to render and reserve an oral or written decision while another Immigration Judge issues that decision. *See* OPPM 12-01.

Federal regulations provide that where an Immigration Judge is no longer available to complete his or her assigned cases, another Immigration Judge may be assigned to complete those cases. 8 C.F.R. § 1240.1(b). The regulations require that the new Immigration Judge familiarize himself or herself "with the record in the case and shall state for the record that he or she has done so." 8 C.F.R. § 1240.1(b). In this case, the record does not reflect that the second Immigration Judge complied with this regulation as he did not state on the record that he had familiarized himself with the case. Additionally, assuming the first Immigration Judge prepared the written decision, the second Immigration Judge's effort to give legal effect to the first Immigration Judge's decision by signing the decision on his behalf on September 8, 2016, was also improper.

Accordingly, we will remand the record for the Immigration Judge who is substituted for the first Immigration Judge to comply with the requirements of 8 C.F.R. § 1240.1(b). We express no opinion as to the respondent's ultimate eligibility for the requested forms of relief or protection from removal.

ORDER: The record is remanded to the Immigration Judge for the entry of a new decision consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[1] The regulation further specifies that the denial or pretermission may not be based on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the Act, 8 U.S.C. § 1101(f), or a failure to establish the requisite hardship. 8 C.F.R. § 1240.21(c)(1).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SALT LAKE CITY, UT

FILE: [redacted]133	)	
	)	
IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
G[redacted] F[redacted]-L[redacted]	)	
	)	
	)	
Respondent	)	

CHARGE: § 212(a)(6)(A)(i) of the Immigration and Nationality Act: Present in the United States without having been admitted or paroled

APPLICATIONS: Cancellation of Removal for non-permanent residents

ON BEHALF OF THE RESPONDENT:

Bibiana Ochoa, Esquire
5288 S. 320 W. Building B Suite 100
Murray, UT 84107

ON BEHALF OF THE DHS:

Matt Hall
Senior Attorney
2975 South Decker Lake Dr., Stop C
West Valley City, UT 84119

WRITTEN DECISION OF THE IMMIGRATION JUDGE

The respondent is a 34-year-old male who is a native and citizen of Mexico. The Department of Homeland Security ("DHS") issued a charging document, a Notice to Appear (NTA), dated December 17, 2010, charging the respondent with inadmissibility pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act"). The DHS alleged in the NTA that the respondent is an alien who is present in the United States without having been admitted or paroled. The NTA was filed with the Immigration Court in Salt Lake City on December 22, 2010. *See* Exh. 1.

At a hearing on February 15, 2011, the respondent admitted the factual allegations contained in the NTA. The respondent designated Mexico as the country for removal. Based on the respondent's admissions, the Court finds that his inadmissibility has been established pursuant to section 240(c)(2) of the Act.

The respondent requested an opportunity to apply for cancellation of removal for certain non-permanent residents pursuant to section 240A(b)(1) of the Act. The respondent's Form EOIR-42B, application for cancellation of removal, was filed with the Court on February 15, 2011.

See Exhibit 2.

A hearing on the merits of the respondent's application was conducted on June 8, 2015. The respondent and his father provided testimony. Based on the entirety of the respondent's testimony, the Court finds that the respondent and his father testified credibly.

SUMMARY OF THE FACTS

The respondent was born in Ignacio Zaragoza, in the Mexican State of Chihuahua. He lived there for two years before moving to Palomas, Mexico, where he lived until he was 14 years old. He completed 11 years of school and quit to come to the United States. He first lived in Phoenix but has resided in the Salt Lake City, Utah, area for nearly 15 years. The respondent has two United States citizen children, [redacted] and [redacted] He was never married to the mother of his children, [redacted] C[redacted] He testified that he has a good relationship with Ms. C[redacted] and that they have an informal custody arrangement where the children live with her during the week and with him on weekends.

The respondent lives with his brother [redacted]. Their parents reside in Kingman, Arizona, but visit nearly every month to see family and fill prescriptions. The respondent has worked in the construction business since 2001 as a drywall installer and finisher. He said that has 8 siblings who live in the United States, although just 2 have lawful status. The respondent and his father said that the respondent and his siblings each occasionally provide $100 to his parents for support. In addition, the respondent's father stated that the respondent transports him to his monthly medical appointment or to fill his prescription for medicine to help the blood clots in his legs.

The respondent testified that his children enjoy good health and do well in school. He said they both speak Spanish, but their written skills are not good. If removed to Mexico, the respondent worries that his children will not have the same educational opportunities because the schools in Palomas are not as good, and the schools cost a significant amount of money. Moreover, the respondent indicated that he would not be able to earn the same income as he does in the United States.

The respondent's father indicated that he filed a Petition for Alien Relative (Form I-130) on behalf of the respondent with a priority date of April 20, 2001. The Petition was approved on February 25, 2002.

STATUTORY ELIGIBILITY

The respondent bears the burden of establishing statutory eligibility for the requested relief. *See* section 240(c)(4)(A) of the Act. To be eligible for cancellation of removal under section 240A(b)(1) of the Act, an applicant must prove that he:

1) has been physically present in the United States for a continuous period of not less than 10

years immediately preceding service of the charging document and up to the time of application;

2) has been a person of good moral character during such period;

3) has not been convicted of an offense under certain specified sections of the Act (sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act); and

4) establishes that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent, or child, who is a United States citizen or lawful permanent resident.

In this case, the respondent's qualifying relatives are his two United States citizen children: [redacted] (age 10) and [redacted] (age 8), his 68 year-old United States citizen father, and his 66 year-old lawful permanent resident mother.

To establish exceptional and extremely unusual hardship, an applicant must demonstrate that a qualifying relative would suffer hardship that is substantially different from or beyond that which would ordinarily be expected to result from the alien's removal, but need not show that such hardship would be "unconscionable." The hardship must be beyond that which was required in suspension of deportation cases under former section 244(a)(1) of the Act. Hardship factors relating to the applicant himself may be considered only insofar as they might affect the hardship to a qualifying relative. *See 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).

ANALYSIS AND FINDINGS

The first issue is whether the respondent has established 10 years of "continuous physical presence" within the meaning of sections 240A(b)(1)(A) and 240A(d)(1) of the Act. The record establishes that the NTA was served on the respondent on December 17, 2010, and he accordingly must demonstrate continuous presence since December 17, 2000. The DHS does not dispute the respondent's claim regarding the sufficiency of his presence. Accordingly, the Court finds that the record shows he established the requisite period of "continuous physical presence" under section 240A(b)(1)(A) of the Act.

The next issues are whether the respondent has demonstrated "good moral character" in accordance with section 240A(b)(1)(B) of the Act, and whether he has been convicted of a crime that falls under section 240A(b)(1)(C) of the Act. The period for determining "good moral character" is 10 years prior to the hearing on the merits of the application on June 8, 2015. *See Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005). Accordingly, the Court considers the issue of "good moral character" dating back to June 8, 2005.

Although the respondent was convicted of Assault in 2009, as well as traffic offenses in 2004 and 2007, the Court concludes that the respondent has not been convicted of an offense that

would serve as a disqualifying conviction. *Matter of Beltran*, 20 I&N Dec. 521, 526 (BIA 1992). Accordingly, the respondent does not appear prima facie ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act.

EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP

The court concludes that the respondent has not carried his burden of proving that his removal from the United States would result in "exceptional and extremely unusual hardship" to his qualifying relatives as required under section 240A(b)(1)(D) of the Act.

The respondent testified that his children would accompany him to Mexico if he is removed, but he has not submitted any evidence that he would be permitted to do so by the mother of his children. Although the respondent contends that he and Sandra Cruz have a good relationship, the children live primarily under the care of Ms. C[redacted]. Ms. C[redacted] did not appear to testify on behalf of the respondent nor did she submit a letter or affidavit on his behalf describing whether she would permit their children to accompany the respondent.

If the respondent is permitted to take his children to Mexico the resulting emotional hardship will be the choice of their parents. The respondent stated that he would transport the children to Utah to see their mother during summers and other school breaks which would lessen the emotional hardship for the children of leaving their mother, but again there is no evidence to support the respondent's claim that the mother of the children would agree to this arrangement. Both children presently enjoy good health, so there are no health concerns if their parents decide to allow them to relocate to Mexico.

The record also reveals that the respondent has an approved Petition for Alien Relative (I-130) filed on his behalf by his father. While the respondent's eligibility date for a visa is currently several years away from being available, he does have an alternate manner of legally returning to the United States in the future. The Court finds that this alternate means of lawfully immigrating to the United States provides some mitigation to the hardship the respondent's qualifying relatives may experience.

The record does not show that the respondent's mother will suffer hardship if the respondent is removed from the United States. Although he provides some income for his parents, the record does not show that he provides significant financial support for them. Moreover, since the respondent has 8 other siblings in the United States, they may be able to offset the respondent's financial contribution and the assistance he provides for their medical appointments.

After consideration of all the factors and evidence in the record both individually and cumulatively, the Court concludes that the respondent has not met his burden of proving "exceptional and extremely unusual hardship" to his qualifying family members in the event of his return or removal to Mexico. *See Matter of Andazola*, *supra*, and *Matter of Monreal*, *supra* at 63 (discussing hardship standard where "qualifying child with very serious health issues, or compelling special needs in school.").

The respondent also sought, in the alternative, post-conclusion voluntary departure under section 240B(b) of the Act. The respondent's counsel established the respondent's eligibility for this form of relief and the DHS indicated that the government did not oppose this request.

Accordingly, the application for cancellation of removal is denied pursuant to section 240A(b)(1)(D) of the Act. The respondent's application for voluntary departure will be granted. Based on the foregoing, the Court will enter the following orders:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal be DENIED.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure, in lieu of removal, and without expense to the United States Government. The respondent is permitted to depart the United States voluntarily no later than 60 days from the date of this decision.

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the amount of $500.00 with the Department of Homeland Security within five business days from receipt of this order.

IT IS FURTHER ORDERED that, if required by the DHS, the respondent shall present to the DHS all necessary travel documents for voluntary departure within 60 days of the date of this decision.

IT IS FURTHER ORDERED that, if the respondent fails to comply with any of the above orders, the voluntary departure order shall without further notice or proceedings vacate the next day, and the respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear.

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals on or before 30 calendar days from the date of service of this decision.

DATE: SEP - 8 [illegible]

for Glen R. Baker
Immigration Judge