U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted]-R[redacted], J[redacted] C[redacted].. **A[redacted]-184**

Date of this notice: 5/29/2020

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:
Grant, Edward R.
Mann, Ana
Mullane, Hugh G.

Userteam: Docket

File: A[redacted]-184 – Dallas, TX

Date: MAY 29 2020

In re: J[redacted] C[redacted] R[redacted]-R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pedro A. Lopez Onna, Esquire

APPLICATION: Cancellation of removal; administrative closure; voluntary departure

The respondent, a native and citizen of Mexico, timely appealed the Immigration Judge's decision denying the respondent's application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), as well as the Immigration Judge's denial of voluntary departure and a motion to administratively close. The appeal will be sustained in part, and the record remanded for further findings of fact in accordance with this decision.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1 (d)(3)(ii).

The respondent was placed in proceedings, conceded removability, and, as relief, he requested cancellation of removal under section 240A(b)(1) of the Act (IJ at 2; Tr. at 3, 7). At the time of his individual hearing on the merits, he presented evidence of seven qualifying relatives (IJ at 14). He had three United States children, two from his first marriage, and one from his second marriage. In addition, he was married to his third wife, a United States citizen, and had three step-children from that marriage (IJ at 14).

At the close of the hearing, the Immigration Judge took the matter under advisement (Tr. at 245-46). On February 22, 2018, the respondent filed a motion to administrative close proceedings so that he could pursue a provisional I-601A waiver as the beneficiary of an approved I-130 visa petition filed by his United States citizen wife. On March 2, 2018, the Immigration Judge denied the motion because a decision had already been drafted but had not yet been issued due to caps on cancellation decisions.

On July 13, 2018, the Immigration Judge issued a decision denying cancellation of removal. The Immigration Judge found that the respondent had the requisite 10 years of continuous physical presence and no disqualifying convictions (IJ at 9-10). The Immigration Judge did not need to reach the question of good moral character because he found that the respondent did not demonstrate that his removal would result in exceptional and extremely unusual hardship to his then qualifying relatives (IJ at 10-17). Section 240A(b)(1)(D) of the Act. In addition, the Immigration Judge denied post-conclusion voluntary departure because the respondent did not specifically request voluntary departure prior to his individual hearing on the merits (IJ at 1, n.1).

We agree with the Immigration Judge that proceedings should not be administratively closed. *Matter of Castro-Tum*, 27 I&N Dec. 271 (BIA 2018).[1] Therefore, we affirm the Immigration Judge's March 2, 2018, order denying the motion.

We do not agree, however, that the respondent was ineligible for post-conclusion voluntary departure. Neither the Act nor the regulations require that a request for post-conclusion voluntary departure be made before the individual hearing on the merits. Section 240B(b) of the Act, 8 U.S.C. § 1229c(b); 8 C.F.R. § 1240.26(c). Further, the record indicates that during his individual hearing, the respondent presented evidence on voluntary departure (Tr. at 66-68), and at the end of the hearing, requested a grant of voluntary departure as an alternative to cancellation of removal (Tr. at 240-41). Therefore, we will remand the record for consideration of whether the respondent now qualifies for voluntary departure, and whether he warrants such a grant as a matter of discretion.

Finally, it appears that the respondent has divorced and now married his fourth wife, who naturalized on January 5, 2016. Therefore, he no longer has four of the qualifying relatives existing at the time of the hearing, i.e., his three step-children from his third marriage, and his third wife. His children from his first and second marriages are still qualifying relatives, and, in addition, it appears that he now has a fourth wife who is a United States citizen, as well as a new child born October 28, 2013.

Considering these intervening material facts that arose after the close of the individual hearing but before issuance of the Immigration Judge's written decision, the passage of almost 10 years between the hearing and issued decision, and the limits on our fact finding authority, upon remand the parties may present further evidence for the Immigration Judge to consider whether the respondent's removal would result in exceptional and extremely unusual hardship to his now existing qualifying relatives.

The following orders will be entered.

ORDER: The appeal is sustained in part and dismissed in part.

FURTHER ORDER: The record is remanded for further proceedings in accordance with this decision.

FOR THE BOARD

[1] The Fourth Circuit's decision in *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019), which vacated and remanded *Matter of Castro-Tum*, is not binding on us as this case arises in the Fifth Circuit.