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

Zuniga, Bertha A.
Zuniga Law, PLLC
2619 McCullough Ave.
San Antonio, TX 78212

DHS/ICE Office of Chief Counsel - PSD
566 Veterans Drive
Pearsall, TX 78601

Name: L[redacted]-O[redacted], J[redacted]

A [redacted]-511

Date of this notice: 10/4/2018

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.
Wendtland, Linda S.
O'Connor, Blair

Userteam: Docket

File: [redacted]511 – Pearsall, TX Date: OCT - 4 2018

In re: J[redacted] L[redacted]-O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bertha A. Zuniga, Esquire

ON BEHALF OF DHS: Sarah M. Ellison
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, appeals from the Immigration Judge's April 6, 2018, decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2012). The appeal will be sustained and the record will be remanded for further proceedings consistent with this order.

At issue on appeal is whether the respondent is deserving of cancellation of removal as a matter of discretion (IJ at 11). This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review questions of law, discretion, and judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii). Pursuant to our de novo review and for the following reasons, we will sustain the appeal because we disagree with the Immigration Judge that the negative discretionary considerations in this case outweigh the positive. *See Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (following *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)).

The respondent's family ties to this country are strong. He entered this country in August 1997 at around age 5 and has been a lawful permanent resident of the United States for over twenty years (IJ at 2; Exh. 1). He has a United States citizen wife and two United States citizen children (IJ at 2).[1] He also has close family ties, his parents and siblings are lawful permanent residents.

The respondent's negative factors include his non-violent convictions, and numerous juvenile adjudications. In 2007, when he was about 14 years old, the respondent was arrested and charged with possession of marijuana and received deferred adjudication (IJ at 5).[2] At age 15, he was

[1] The respondent and his wife are in a common law marriage and the validity of this marriage is not at issue on appeal.

[2] The respondent argues on appeal that the Immigration Judge incorrectly referred to his juvenile adjudications as "convictions" and seeks remand for the Immigration Judge to correct this

arrested for possession of cocaine and unauthorized use of a vehicle and received probation and as a condition of the probation, was sent to rehabilitation and to perform community service (*Id.*). He was arrested for theft in 2010 and was sentenced to probation, but his probation was revoked when he was caught in possession of marijuana (*Id.*). This incident occurred when he was over the age of 18 and the respondent received 20 days in jail (IJ at 5-6). In 2012 and 2014, the respondent was arrested and charged with possession of a controlled substance (IJ at 6). In 2017, the respondent was arrested and charged with driving while intoxicated; this charge remained pending as of the time of the hearing below (IJ at 4, 6). The Immigration Judge found that the respondent was not completely candid about his juvenile adjudications, but that he did testify credibly about the bulk of his criminal record (IJ at 10).

Considerable time was spent during the hearing below on questions about the respondent's numerous tattoos. The respondent was questioned about the meaning and timing of his tattoos by his counsel, counsel for the Department of Homeland Security ("DHS"), and the Immigration Judge. The respondent described tattoos of, inter alia, his mother's name, the Virgin Mary, Jesus Christ, the State of Texas, stars, skulls, women's faces, his nickname "J," his wife's lips, and the Chicago Bulls (IJ at 4, 6-7, 10, 13). The respondent stated that his tattoos were not gang related (IJ at 4). His wife, mother, and father submitted affidavits in which they also deny that the tattoos are gang-related (IJ at 9, 11). The DHS proffered that some of the respondent's tattoos denote gang membership, and the Immigration Judge stated that she was "aware" that certain of the respondent's tattoos have connotations of gang-affiliation (IJ at 10, 13). The Immigration Judge found, based on her "aware[ness]" of the gang connotations of certain types of tattoos, that the respondent was not being candid about the whether his tattoos are gang-related (IJ at 10).

The Immigration Judge determined that the respondent's violations of this country's criminal and civil laws outweighs his strong family ties. She also gave significant weight to her findings regarding the respondent's tattoos. We will sustain the respondent's appeal and find that the respondent is deserving of a positive exercise of discretion on his application for relief.[3] First, we find the Immigration Judge's determination that the respondent's tattoos signify gang affiliation to be untethered to evidence of record, and, therefore, clearly erroneous. Furthermore, there is no evidence in the record that the respondent was a member of, or affiliated with, any particular criminal gang or known gang members. Accordingly, we do not rely on any factual findings

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erroneous fact-finding. While we acknowledge that the Immigration Judge did incorrectly refer to the juvenile arrests and adjudications as "convictions" in parts of the decision (*see* IJ at 12), elsewhere, the Immigration Judge refers to these juvenile adjudications as "offenses" (IJ at 6). Our review of the entire record reflects that the Immigration Judge was cognizant of the effect of a juvenile adjudication as being distinct from a conviction, and that she gave appropriate weight to these adjudications in the context of the record.

[3] We note that the Immigration Judge stated below that even if the respondent truthfully stated that his tattoos denoted no affiliation with gangs, the respondent still would not be able to prove that he merited relief given his "length of criminal history" (Tr. at 97).

relating to the respondent's tattoos, nor do we find these findings probative on the issue of whether the respondent is deserving of a positive exercise of discretion on his application for relief.[4]

We therefore will vacate the Immigration Judge's order and grant the application for cancellation of removal under section 240A(a) of the Act. We will remand this record to the Immigration Judge so that background checks and any other necessary investigations can be completed or updated and we will therefore enter the following orders.

ORDER: The appeal is sustained and the Immigration Judge's order is vacated.

FURTHER ORDER: The respondent's application for cancellation of removal under section 240A(a) is granted.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

Board Member Blair T. O'Connor respectfully dissents without opinion.

[4] We note that the respondent sought a remand of this record based on evidence that a private investigator's background investigation of him revealed no gang affiliation in the State of Texas, and on the fact that the Immigration Judge speculated that the respondent earned a living through unlawful activity. As noted above, we have not given weight to the Immigration Judge's findings regarding the respondent's unproven gang affiliation, and, in light of our decision to sustain this appeal, we need not address the evidence proffered on appeal.