U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: G[redacted]-A[redacted], R[redacted]

A [redacted]-403

Date of this notice: 1/22/2020

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:
Mann, Ana
Couch, Stuart V.
Liebmann, Beth S.

Userteam: Docket

File: A[redacted]-403 – Denver, CO

Date: JAN 22 2020

In re: R[redacted] G[redacted] -A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: David N. Simmons, Esquire

APPLICATION: Cancellation of removal; remand

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's decision dated March 28, 2018, denying the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b).[1] On July 29, 2019, the respondent filed a motion to remand in lieu of appeal brief based on new evidence. The Department of Homeland Security has not responded to the respondent's appeal or motion and thus the motion is deemed unopposed. The motion to remand will be granted and the record will be remanded for further proceedings consistent 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 Immigration Judge denied the respondent's application for cancellation of removal on March 28, 2018, finding that the respondent did not establish exceptional and extremely unusual hardship to his two United States citizen children, who reside with the respondent's former partner. In the respondent's motion to remand in lieu of appeal brief, the respondent explains that he is now married, and his wife has two children from a prior relationship. The respondent states that his marriage on May 3, 2019, and the creation of his new blended family, is a circumstance that has arisen since his final hearing on January 30, 2017.

The respondent indicates that he now has a sixteen-year old stepdaughter and a thirteen-year old stepson. The respondent states that his stepdaughter suffers from Down's Syndrome and that his stepson has been diagnosed with ADHD, he has a learning disability, and he has had behavioral problems. The respondent asserts that his marriage is bona fide and that both of his stepchildren have positively responded to the respondent's presence in the household. The respondent has submitted evidence in support of his motion (Motion to remand in lieu of appeal brief, attachments 1-26).

[1] In order to resolve any issue as to untimeliness, we will accept the appeal on certification. 8 C.F.R. § 1003.1(c).

Where evidence is new or previously unavailable it may support a remand. *See* 8 C.F.R. § 1003.2(c)(1), (4). We find that a remand is warranted for the Immigration Judge to consider the respondent's new evidence. *See* 8 C.F.R. § 1003.1(d)(3)(iv). We emphasize that our decision to remand the record does not indicate any opinion as to the proper outcome of this matter.

ORDER: The motion to remand is granted.

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

FOR THE BOARD

DISSENTING OPINION: V. Stuart Couch, Appellate Immigration Judge

I respectfully dissent because I believe the Immigration Judge correctly denied relief, the respondent's untimely appeal should not be cured by our certification, and his motion to remand lacks merit.

As a predicate matter, we lack jurisdiction to consider the respondent's direct appeal as it was filed too late and, in my view, this case does not present such exceptional circumstances to warrant our certification to permit review under 8 C.F.R. § 1003.1(c) through an exercise of discretion. *Matter of Liadov*, 23 I&N Dec. 990, 993 (BIA 2011) (citations omitted). While the respondent's current counsel contends "[t]his is not exactly a *Lozada* situation," in effect that is exactly what it is. Resp't Mot., Attachment 6 at 1; *see Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), *reinstated by Matter of Compean, et. al.*, 25 I&N Dec. 1 (A.G. 2009); and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). And despite the prior counsel's admission of professional negligence in missing a filing deadline, *Lozada* still requires the filing of a formal complaint with the counsel's licensing authority. *Id.* Given the circumstances presented by this record, I think it is inappropriate to consider certification of this case in the absence of any attempt to comply with *Lozada*, which is a failure by the respondent to exhaust his administrative remedy. *Galvez Pineda v. Gonzales*, 427 F.3d 833, 836, 838 (10th Cir. 2005).

Motions to reopen immigration cases are "plainly disfavored" and the respondent bears a "heavy burden" due to the "strong public interest in bringing [this] litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *Maatougui v. Holder*, 738 F.3d 1230, 1239 (10th Cir. 2013) (cleaned up, citing *INS v. Abudu*, 485 U.S. 94, 107, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)). Even though the respondent may submit new facts in support of his claim, we have "discretion to deny a motion to reopen [though] the alien has made out a prima facie case for relief." *Id.* at 1240 (citing *Abudu*, 485 U.S. at 105–06, 108 S.Ct. 904).

The respondent's motion to remand is based upon his effort to obtain "after-acquired equities" and renew his claim for cancellation of removal under INA § 240A(b)(1). Through his recent marriage, the respondent now increases the number of his qualifying relatives to include a new wife with two stepchildren, one of whom suffers from Down Syndrome, to in effect bolster his evidence related to exceptional and extremely unusual hardship in order to get his case remanded. Given the circumstances I seriously question whether the respondent's new marriage is a bona fide relationship. *Cf. Matter of Mendez-Morales*, 21 I&N Dec. 296, 302 (BIA 1996) (citing *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993)) (the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of proceedings with knowledge that the alien might be deported).

As admitted by the respondent, he began the relationship with his wife 7 months after his first attempt at cancellation of removal was denied, and 5 months after he knew the deadline to appeal the decision was missed. While I am sympathetic to the hardship the respondent's new stepdaughter and stepson may suffer, the fact remains that the respondent knew the state of his immigration removal proceedings, did not disclose them to his current wife when they began their dating relationship (see her affidavit at p. 19), but presumably she became aware of it before they decided to marry. The practical effect is the respondent's current wife knew (or at least should have known) what she was bargaining for, to include the prospect her new husband may have to leave the United States. I note that her first husband (and father of both stepchildren) himself was "deported to Mexico," so obviously she was aware how immigration removal proceedings work, and before she entered the marital relationship with the respondent. These facts support my view this is an effort by the respondent to "game the system" which we should not allow.

For these reasons I respectfully dissent.