



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: E [REDACTED] C [REDACTED], M [REDACTED]

A [REDACTED] 039

Date of this notice: 10/13/2017

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:
Pauley, Roger

SENDING
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Falls Church, Virginia 22041

File: [REDACTED] 039 – Dallas, TX

Date:

OCT 13 2017

In re: M [REDACTED] E [REDACTED] C [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Flor Bermudez, Esquire

APPLICATION: Remand

On March 29, 2017, the Immigration Judge denied the respondent's application for cancellation of removal for lawful permanent residents. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The respondent, a native and citizen of Mexico, appeals, requesting only a remand. 8 C.F.R. § 1003.2(c)(4). The Department of Homeland Security (DHS) has not responded to the appeal. The record will be remanded to the Immigration Judge.¹

The respondent does not appeal the discretionary denial of his cancellation of removal application, and as such, we do not consider it. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012). Rather, the respondent argues that he suffered a due process violation because the Immigration Judge did not notify him of the possibility of asylum (Resp. Brief at 8-18).

We will remand. Under 8 C.F.R. § 1240.11(c)(1)(i), if an alien “expresses fear of persecution or harm upon return . . . the immigration judge shall: [a]dvice the alien that he or she may apply for asylum in the United States or withholding of removal[.]” When an alien is pro se, the Immigration Judge may question the alien to evaluate whether such an application may be appropriate. See section 240(b)(1) of the Act (requiring IJs to “interrogate, examine, and cross-examine the alien and any witnesses”); *Matter of E-F-H-L-*, 26 I&N Dec. 319, 321-24 (BIA 2014).


The respondent was pro se before the Immigration Judge. The Immigration Judge refers to having informed the respondent of his rights, but that information is absent from the record (Tr. at 1). The Immigration Judge found the respondent credible (IJ at 4). The record reflects that the respondent was asked why he could not return to Mexico, and he replied it was because he was afraid someone would take his life (Tr. at 3-4). The respondent testified that he regularly dresses as a woman (IJ at 5-6; Tr. at 35-40). The respondent's cancellation of removal application states that he is gay (Exh. 3 at 6). The respondent wrote a letter to the Immigration Judge pleading for mercy because he was suffering from knife wounds and could not go back to Mexico; he testified that the person who attacked him had returned to Mexico (Tr. at 4; Exh. 3). The Immigration Judge did not question the respondent about any fear he might have returning to Mexico. He also did not clearly inform the respondent about the possibility of asylum if he had any fear, despite the respondent asking if there was any other form of relief available (Tr. at 75).

¹ The respondent's request for a fee waiver is granted. His request for oral argument is denied.

Given the record does not contain any explicit advisals regarding the possibility of asylum, and the DHS has not entered an opposition, we conclude that remand is appropriate.

Accordingly, the following order will be entered.

ORDER: The record is returned to the Immigration Court to provide the respondent with an application for asylum and to hold additional proceedings as necessary.


FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS

File: [REDACTED] 039

March 29, 2017

In the Matter of

M [REDACTED] E [REDACTED] C [REDACTED])	
)	IN REMOVAL PROCEEDINGS
RESPONDENT)	
)	

CHARGE: Section 237(a)(2)(B)(i) of the Act.

APPLICATION: Cancellation of removal pursuant to Section 240A(a) of the Act.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: ELIZABETH EINHORN, Esquire
U.S. Department of Homeland Security
Office of the Chief Counsel
125 East John Carpenter Freeway, Suite 500
Irving, Texas 75062

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of Mexico. The present action commenced when the Department of Homeland Security issued a Notice to Appear dated October

20, 2016. The Notice was served on respondent on the same date [Exhibit 1].

In the Notice to Appear, the Department alleged that respondent was subject to removal from the United States, notwithstanding his status as a lawful permanent resident, as a consequence of a February 27, 2015, conviction in the 432nd District Court, Tarrant County, Texas, for the offense of possession of methamphetamine in violation of Texas Health Safety Code Section 481.115(b).

This conviction, according to the Department, made respondent subject to removal under the provisions of Section 237(a)(2)(B)(i) of the Act, in that respondent was convicted of a violation of a law or regulation of a State, the United States or a foreign country related to a controlled substance other than a single offense involving possession for one's own use of marijuana of 30 grams or less.

Respondent first came before the Court on November 17, 2016. At that time, respondent's rights were explained to him in both English and his native language, Spanish.¹ Respondent admitted the four factual allegations in the Notice to Appear.

For their part, the Department issued a Form I-213 relating to respondent, as well as a copy of respondent's conviction set forth above.

Pursuant to the admissions and submissions of the parties, the Court found removability established by clear and convincing evidence as charged.

Respondent designated Mexico as the country of removal and expressed no fear of returning there. Respondent sought relief from an order of removal by filing an application for cancellation of removal pursuant to Section 240A(a) of the Act. That application was submitted in a timely fashion, and is contained in the record as Exhibit No. 4. Prior to admission of the application into the record, respondent was given the opportunity to make additions and corrections to the application, and then swore or

¹ The proceedings were conducted in Spanish through an interpreter at respondent's request.

affirmed that the application, as amended, was true and correct to the best of his knowledge, information and belief.²

STATEMENT OF THE LAW

To be eligible for cancellation of removal under Section 240A(a) of the Act, an applicant must demonstrate that he has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and not convicted of an aggravated felony. The Court notes that the statutory requirements were met by respondent in this case.

In addition to satisfying the statutory eligibility requirements, an applicant for relief under this section must establish that he warrants such relief as a matter of discretion. The general standards developed in Matter of Marin, 16 I&N Dec. 581 (BIA 1978), for the exercise of discretion under former Section 212(c) of the Act are applicable to the exercise of discretion under the section. See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). The Court, upon review of the record as whole, must balance the adverse factors evidencing an applicant's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the granting of relief appears to be in the best interest of the United States.

As was explained in Matter of C-V-T-, favorable considerations and negative ones are to be considered in this type of case. Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the residence is commenced at a young age), evidence of hardship to the respondent and his family if removal occurs, service in this country's armed forces,

² Respondent made a single correction relating to the identity of the person who helped him with his application (his sister). That correction was made in blue ink and initialed by the Court.

an employment history, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. On the contrary side, factors deemed adverse to a respondent are the nature and underlying circumstances of the grounds of removal at issue, the presence of additional significant violations of this country's Immigration laws, the existence of a criminal record, and if one exists, its nature, recently and seriousness, as well as the presence of other evidence indicative of an applicant's bad character or undesirability as a continuing permanent resident in this country.

Regarding rehabilitation, a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. However, applications involving applicants with criminal records are evaluated on a case-by-case basis with rehabilitation one of several factors to be considered in the exercise of discretion.

For purposes of this application, the Court notes that the provisions of the REAL ID Act of 2005 apply to this application.

The Court deems that respondent's testimony, as well as the testimony of the three witnesses he called in at the Individual hearing on March 29, 2017, were credible.

ANALYSIS AND FINDINGS

A finding that respondent and his witnesses were credible does not, however, necessarily lead to a finding that respondent is entitled to the relief he seeks under Section 240A(a) of the Act. For reasons that are set forth below, the Court denies respondent's application and orders him removed to Mexico.

Respondent testified that he is a 47-year-old native and citizen of Mexico, who came to the United States in 1989. Respondent has extensive family in the United

States, including four brothers and five sisters. All but one of these siblings have current status in the United States, with the last "in process" to obtain status.

Respondent is not married and has no children.

Respondent testified regarding a fairly extensive employment history in this country, including work at several temporary agencies and work for several food processing companies. Respondent testified that he has no property in the United States and no assets other than a 2002 Jeep Cherokee. Respondent stated that he has never been on public assistance. Respondent states that he helps clean the yards of his neighbors who are elderly, that he lives alone, and does not provide financial support for anyone other than himself. Respondent states that he is part of a large and close family, and that he sees at least some of his siblings every weekend. He has no military record and did not register for Selective Service. Respondent did, however, file with the Court a number of tax returns showing that he paid taxes for many of the years he was employed in the United States [Exhibit 4(a)]. The Court notes in passing that in addition to respondent's income, he also received unemployment benefits in both Texas and Wisconsin for a number of years.

On cross-examination, respondent admitted to seven different arrests. The record in fact shows the respondent has ten arrests and nine convictions. Among respondent's arrests and convictions include an arrest and conviction for driving under the influence in 2002. Respondent also has several other convictions including criminal trespass, as well as convictions for assault in 2007, three arrests and convictions for prostitution in 2007, 2009 and 2011, a conviction for obstructing the police in 2013, as well as a conviction for methamphetamine possession in 2015. Regarding the multiple prostitution convictions, respondent denies that he was involved in prostitution, stating that he pled guilty at each of the three charges because he thought it was the best way

to get out of jail.

Respondent also admitted to the Court that he regularly dresses in women's clothes and that at least one of the arrests was because the police officer thought he "dressed sexily".³

Respondent has a current pending charge for what is characterized as "tampering with a consumer product causing serious bodily injury." See Texas Penal Code Section 22.09. The Court has no information relating to the pending charge, and respondent himself could not provide any information for that charge. The Court notes that under Texas Penal Code Section 22.09, the offense of tampering with a consumer product occurs when someone knowingly and intentionally tampers with a consumer product knowing that the product would be offered for sale to the public or as a gift to another, or intentionally threatens to tamper with a consumer product with intent to cause fear, to affect the sale of the consumer product, or to cause bodily injury to any person. See Texas Penal Code Sections 22.09(b) and (c). The Court notes that the charge that respondent currently faces in Mansfield, Texas, also includes a serious bodily injury charge. Section 22.09 of the Texas Penal Code says that an offense under this section is a felony of the second degree unless a person suffers serious bodily injury in which event it is a felony in the first degree. An offense under Section (c) (the knowingly or intentionally threatening section), would be a third degree felony under Texas law. It is impossible for this Court to determine the actual circumstances of that charge, since no evidence was provided.

The Court also heard from Lydia Esparza, respondent's sister. Ms. Esparza is a lawful permanent resident, lives in San Antonio, Texas, and has been a resident for

³ The Court does not make any negative connotation for respondent's lifestyle, but simply notes that as the basis of his three arrests and subsequent convictions for prostitution.

approximately 20 years. She testified that the respondent is an "excellent person and excellent brother". She states that she sees at least some of her family on the weekends, since some of her family lives in San Antonio and the rest live in Fort Worth. Ms. Esparza also testified that she was aware of several of respondent's arrests, but was only specifically aware of the trespassing charge in 2007. She states that her brother is hard working and is an excellent brother.

The Court also heard from [REDACTED], respondent's niece. She also stated that respondent is a good person, who would help with her daughters and helped around the house. She testified that she knows about respondent's drug conviction, as well as at least some of his prostitution arrests and convictions. She characterizes her uncle as "loving and caring."

Respondent also called [REDACTED] as a witness at the Individual hearing. Ms. [REDACTED] is a girlfriend to respondent's cousin, and has known respondent for approximately a year and a half. She states that in the time that she observed respondent, he was always a nice person, who was caring and also helped take care of the children in the house where he lived.

Respondent does in fact have a number of positive factors in his favor. Respondent has been a resident of the United States for nearly 30 years, and also has shown a significant work history. Respondent has a large and extended family in the United States, and has paid taxes, according to the documentation, for many of the years he has worked in the United States. The Court also notes that respondent testified that he sometimes helps his neighbors, who are elderly and need yard work.

While giving full credit to respondent's positive factors, the Court must also acknowledge the significant and serious criminal record that respondent has incurred over the years. Between 2002 and 2015, respondent has nine arrests and convictions

for a variety of offenses, most notably three convictions for prostitution as well as a conviction for possession of methamphetamine in 2015. The other convictions for obstruction of police, fraud, assault and driving while under the influence of liquor, are also significant and serious offenses. While the Court has no significant information relating to the respondent's pending charge for tampering with a consumer product, the statutory authority shows that it is also a significant felony under the laws of the State of Texas.

Respondent's significant criminal record cannot be ignored by this Court. While giving full credit and perhaps beyond full credit for respondent's positive factors, most notably his long residence in the United States and his family ties, the Court must note that his significant criminal record outweighs all the positive equity set forth on the record. There are simply too many arrests and convictions for too many different types of offenses for it to be in the best interest of the United States for respondent to remain as a lawful permanent resident. Thus, after a balance of both the positive and negative factors present in this case, including the social and humane considerations involved, the Court must find that respondent has not met his burden of showing that it would be in the best interest of the United States for him to remain as a lawful permanent resident.

Since respondent has not met his burden of proof, his application for relief must fail. The following orders are entered.

ORDER

IT IS ORDERED that respondent's application for cancellation of removal pursuant to Section 240A(a) of the Act is denied, for the reasons set forth above.

IT IS FURTHER ORDERED that respondent, having previously been found subject to removal from the United States, and, in the absence of any other viable

applications for relief before this Court, be, and is, hereby ordered removed from the United States to Mexico based on the charge contained in the Notice to Appear.⁴

Dallas, Texas, this 29th day of March 2017.

Please see the next page for electronic

signature

JAMES NUGENT
Immigration Judge

⁴ At the conclusion of the Individual hearing on March 29, 2017, respondent asked for voluntary departure. The Court denied respondent's request, both because he is a lawful permanent resident, and because of the extensive and significant criminal history set forth above.

//s//

Immigration Judge JAMES NUGENT

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