



U.S. Department of Justice

Executive Office for Immigration Review

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Name: HERNANDEZ, JOSE H

A 094-054-192

Date of this notice: 11/25/2013

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:

Holmes, David B.

yungc

Userteam: Docket

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Falls Church, Virginia 20530

File: A094 054 192 – Atlanta, GA

Date: **NOV 25 2013**

In re: JOSE H. HERNANDEZ a.k.a. Jose Hernandez Flores

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sarah Owings, Esquire

ON BEHALF OF DHS: Abby L. Meyer
Assistant Chief Counsel

ORDER:

This Board has been advised that the Department of Homeland Security's ("DHS") appeal has been withdrawn. *See* 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record is returned to the Immigration Court without further action.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A094-054-192

April 25, 2013

In the Matter of

JOSE HUMBERTO HERNANDEZ-FLORES

RESPONDENT

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IN REMOVAL PROCEEDINGS

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act.

APPLICATIONS: Application for temporary protected status.

ON BEHALF OF RESPONDENT: SARAH OWINGS
PO Box 89097
Atlanta, Georgia 30312

ON BEHALF OF DHS: RENAE M. HANSELL

ORAL DECISION OF THE IMMIGRATION JUDGE

This case came before the Court as the result of a Notice to Appear that was issued by the Department of Homeland Security. The matter was previously before the Court at a hearing during which the charge of removability was sustained. The respondent's application for temporary protected status was denied. The matter was appealed by the respondent to the Board of Immigration Appeals. In a decision dated August 23, 2012, the Board remanded the record to the Court. The Board found that the Court had not provided enough information to determine the outcome of the case.

The Board provided some guidance for the Court to consider in adjudicating this matter. The Board noted that an alien who has been convicted of two or more misdemeanors is deemed ineligible for temporary protected status pursuant to 8 C.F.R. 1244.4(a). The Board further noted that the classification of an offense as a misdemeanor or some other descriptive category in the jurisdiction where it occurred does not exclusively control classification of the offense as a misdemeanor for the purposes of determining eligibility for TPS. The Board went on to state that the classification of an offense in the context of a TPS application must contain the essential elements set forth in 8 C.F.R. 1244.1. The Board cited the Fifth Circuit decision in Yazdchi v. INS, 878 F.2d 166, 167 (5th Cir. 1989).

The Fifth Circuit decision makes clear that the consequences that a state chooses to attach to a conviction in its court for the purposes of its own law are not to control in Immigration proceedings. Immigration proceedings are governed by federal law, and the Court found that federal law should control.

It is undisputed that the respondent has been convicted for four offenses. The parties have agreed that the respondent was convicted for the offenses of speeding in 2005 and 2009. In addition, the respondent was also convicted in 2010 for two offenses. The record concerning these convictions are attached to the respondent's brief on TPS eligibility that was submitted to the Court on April 22, 2011. At pages 48 to 51 of that filing are the documents relating to the convictions in 2010. The record reflects that on October 15, 2010, at about 11:41 p.m., the respondent was convicted for driving while license was expired, and also failure to obey a traffic control sign.

The respondent argues that the conviction for driving while license is expired is a traffic offense, and should not be deemed a misdemeanor under federal law. The Court rejects this argument. The conviction for driving while the license is

suspended has nothing to do with violation of the traffic laws. Such a conviction as set forth violates the statute, and in the Court's view, such a conviction is in fact a misdemeanor, as it is unrelated to a traffic violation.

The issue in this case becomes whether the other convictions constitute a misdemeanor sufficient to deprive the respondent of being eligible for TPS. The three convictions that are at issue are the ones for speeding in 2005 and 2009 and the offense failure to obey a traffic control device on October 15, 2010.

These are prototypical traffic offenses. It is undisputed that the state of Georgia has decided to characterize these offenses as misdemeanors. Presumably, that is why the Government argues that the state courts' determination that these traffic offenses are misdemeanors are sufficient to establish that the respondent is ineligible for TPS. The Government also points out that there is jail time associated with such convictions. The respondent points out that these convictions generally do not even require the respondent to appear in court, in the nature of minor traffic offenses. At best, they may be minor misdemeanors.

The question then becomes is whether the respondent's convictions for traffic offenses should be construed as misdemeanors for the purposes of denying his eligibility for TPS.

The Government has submitted a document that the Court has marked as Exhibit R1. This is a decision by another panel of the Board. The Government takes the position that this case is sufficient to show that the Board would treat the respondent's convictions for traffic offenses as disqualifying. The Court disagrees with the Government's assessment of this decision. On the first page of the decision, the Board notes that it is undisputed that the respondent's conviction for driving under the influence constitutes one of the two requisite misdemeanors. The Board then states as

follows: "We will focus on respondent's conviction for driving without a license to determine whether the respondent is barred from TPS." In other words, even though the respondent in that case was apparently also convicted of other prototypical traffic offenses, the Board construed only whether a conviction for driving without a license should be deemed to be sufficient to bar the respondent from TPS. The decision in that case found that such a conviction is in fact a disqualifying offense, and therefore the respondent was barred from TPS.

In the context of this case, the Court has discussed above that the respondent's conviction for driving with an expired license is a misdemeanor conviction. Thus, the Court's finding today is not inconsistent with the panel's decision that the Government refers to and that is part of the record as Exhibit R1.

In any event, the Government's citation to this non-precedential decision of the Board is of no avail in this case. Presumably, the Board's decision in this case was aware that the respondent was convicted of two speeding offenses. There was nothing new to add to that, and there is no indication that the panel in this case believed that either of those convictions constitutes a misdemeanor for the purposes of denying the respondent's application for TPS. The Court will not use the non-binding decision of another panel to overrule the law that is set forth in this case. In this case, the panel was aware that the respondent was convicted of a traffic offense for speeding. It did not find that to be a disqualifying conviction.

What is also important is that the panel in this case has pointed out that whether a particular state treats a conviction as a misdemeanor does not control the decision for the purposes of TPS. Put another way, it appears that the panel has determined that when the TPS regulations were enacted, the determination of whether a conviction was a misdemeanor did not include or was intended to extend to

convictions for traffic offenses. The fact that Georgia now has chosen to call traffic offenses misdemeanors and to impose the possibility of some jail time does not control the issue of whether traffic offenses are disqualifying offenses for the purposes of TPS. Put another way, someone convicted of a traffic offense in a state that does not consider it a misdemeanor or does not impose a term of imprisonment should not be deemed eligible for TPS when someone who is convicted for the same offenses in the state of Georgia is disqualified.

This is perhaps what concerns the panel in this case. The Court is similarly concerned about it, and finds that the respondent's convictions in this case for speeding and for failure to obey a traffic control device are prototypical traffic offenses. There is nothing that suggests that those are the types of convictions that would bar the respondent from being eligible for TPS. The fact that Georgia decides to call such convictions misdemeanors and to attach possible jail time to them does not change the essential nature of those convictions from traffic offenses. The respondent points out that these offenses are generally disposed of without the need to go to court. They are subject to fines, generally, and that is generally how they are disposed of in the state of Georgia.

In sum, the Board has asked the Court to look at whether these convictions should be deemed disqualifying for the purposes of TPS. The Court has read the case cited by the Board, and concludes that the state of Georgia's determination that traffic offenses should be deemed misdemeanors such that they would disqualify the respondent for TPS is not controlling. The respondent has been convicted of three traffic offenses and one misdemeanor. He has not been convicted of two misdemeanors within the meaning of the regulations relating to TPS. The Court finds that the respondent is statutorily eligible for TPS, and will change its ruling from

the prior ruling that was reached when this matter was last before the Court. In view of the foregoing, the Court will grant the respondent's application for TPS. The Court will enter the following order.

ORDER

IT IS HEREBY ORDERED the respondent's application for temporary protected status be, and hereby is, granted.

Please see the next page for electronic

signature

EARLE B WILSON
Immigration Judge

//s//

Immigration Judge EARLE B WILSON

wilsons on August 22, 2013 at 12:18 PM GMT