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

[redacted]

DHS/ICE Office of Chief Counsel
Montgomery Proc Ctr, 806 Hilbig Rd
Conroe, TX 77301

Name: C[redacted] G[redacted], A[redacted]

A [redacted]-948

Date of this notice: 9/30/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Donovan, Teresa L.
Pepper, S. Kathleen
Greer, Anne J.

Userteam: Docket

File: A[redacted]948 – Conroe, TX

Date: SEP 30 2020

In re: A[redacted] C[redacted] G[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

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

The respondent, a native and citizen of Mexico, and a lawful permanent resident of the United States, appeals from the Immigration Judge's February 26, 2020, decision finding the respondent removable and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and request for voluntary departure in lieu of removal under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this decision.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from the Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

As a threshold matter, we affirm the Immigration Judge's determination that the respondent's conviction for possession of a controlled substance, to wit: cocaine, under Tex. Health & Safety Code § 481.115(a) renders him removable pursuant to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i) (IJ at 1; Exh. 2; Respondent's Br. at 6-15). The respondent's statute of conviction is overbroad and divisible, and the Department of Homeland Security (DHS) has established that the respondent possessed a controlled substance as defined under the Act. *See Nichols v. State*, 52 S.W.3d 501, 503 (Tex. Crim. App. 2001) (holding that "possession of each individual substance within the same penalty group constitutes a different statutory offense" under section 481.115); *see also Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (stating that drug possession convictions constitute categorical controlled substance violations only if they necessarily involve a federally controlled substance).

Section 237(a)(2)(B)(i) of the Act contains an exception for simple possession of 30 grams or less of marijuana for personal use, but the exception excuses only possession of marijuana and not any other federally controlled substance. As the respondent's conviction involved possession of cocaine, the exception does not apply to the respondent's case (Tr. at 30-31; Exh. 2; Respondent's Br. at 14-15).

Turning to the respondent's appeal of the Immigration Judge's denial of cancellation of removal as a matter of discretion and for voluntary departure, we conclude remand is appropriate

for the Immigration Judge to provide further factual findings and legal analysis (IJ at 2-5). *See Matter of A-P-*, 22 I&N Dec. 468, 477 (BIA 1999) (stating that the Immigration Judge is "responsible for the substantive completeness of the decision"); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (emphasizing the need for Immigration Judges to include in decisions clear and complete findings and analysis that are in compliance with controlling law, in view of this Board's inability to conduct fact-finding on appeal).

When deciding whether to grant discretionary relief, an Immigration Judge must consider the positive and negative factors presented in each individual case. *See Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978); *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (holding that "the factors we have enunciated as pertinent to the exercise of discretion under section 212(c) are equally relevant to the exercise of discretion under section 240(a) of the Act"). Favorable considerations in the exercise of discretion include such factors as family ties within the United States, residence of long duration in this country, evidence of hardship to the respondent and his family if deportation or removal occurs, a history of employment, 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. *Matter of C-V-T-*, 22 I&N Dec. at 11. "Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of ... [removal] that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." *Id.*

The Immigration Judge found the respondent's application for cancellation of removal should be denied for two reasons, the respondent's conviction for possession of cocaine and lack of candor to the court regarding his conviction (IJ at 2-5). However, the Immigration Judge did not make sufficient findings of fact as to both the positive and negative factors presented in this case, or show how, in balancing such factors, the Immigration Judge reached this conclusion (Respondent's Br. at 16). Additionally, the record reflects the respondent applied for voluntary departure and that the Immigration Judge denied the request during the final hearing, but the basis for denial is not reflected in the decision (Tr. at 68-70). On remand, the Immigration Judge should hold additional hearings, if necessary, and make all necessary factual findings to allow the Board to conduct a meaningful review of the Immigration Judge's decision. In remanding, we express no opinion concerning the respondent's ultimate eligibility for relief.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for the Immigration Judge to conduct further proceedings, if necessary, and for the entry of a new decision consistent with this order.

FOR THE BOARD