



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

**Greenberg, Michael D., Esq.
Law Offices of Michael D. Greenberg
59 Temple Place, Suite. 605
Boston, MA 02111**

**DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114**

Name: HERNANDEZ-GARCIA, BACILIO

A098-237-003

Date of this notice: 4/11/2012

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.
Pauley, Roger
Wendtland, Linda S.

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UG

Falls Church, Virginia 22041

File: A098 237 003 - Boston, MA

Date:

APR 11 2012

In re: BACILIO HERNANDEZ-GARCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael D. Greenberg, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: Voluntary departure

In a decision dated July 27, 2007, an Immigration Judge denied the respondent's application for voluntary departure pursuant to section 240B(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a)(1). The respondent appealed that decision and in a decision dated January 30, 2009, the Board remanded the record for the Immigration Judge to weigh the favorable and unfavorable factors. On remand and in a decision dated March 31, 2010, the Immigration Judge denied the respondent's application for voluntary departure. The respondent appealed. The appeal will be sustained and the record will be remanded.


The Board reviews an Immigration Judge's findings of fact and determinations of credibility for clear error, but reviews de novo questions of law, discretion, and judgment, and all other issues. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). *See Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). Section 240B(a)(1) of the Act provides that the Attorney General *may* permit an alien to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4)(B). *See also* 8 C.F.R. § 1240.26. An alien need not establish his good moral character to obtain relief from removal under this provision. However, the language of the statute clearly reflects that voluntary departure under section 240B(a)(1) of the Act is discretionary.

We have held that in exercising discretion on a voluntary departure application, the Immigration Judge may take into account many factors, including the alien's prior immigration history, the nature of his entry or entries, his violations of the immigration and other laws, and the like. *See Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972); *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995).

On appeal, the respondent asserts that the Immigration Judge's denial of voluntary departure was an abuse of discretion. In balancing the favorable and unfavorable factors, the Immigration Judge correctly found the respondent's attempt to procure a United States passport by impersonating a United States citizen is a serious negative factor, and he found the respondent's inability to explain when he entered the United States is also a negative factor (I.J. at 2, 3). We agree with the respondent, however, that the equities in this case outweigh the adverse factors, and as a matter of discretion, we will grant the respondent this minimal form of relief. While the respondent could not recall the exact date of entry, he testified that he entered the United States shortly before he was served the March 16, 2007, Notice to Appear (Tr. at 8, 9). We are unwilling to give any significance to the respondent's inability to recall the exact date of entry. In addition, the record reflects that the respondent is married to a United States citizen, they have a 4 year old United States citizen child, and he is willing and able to depart from the United States at his own expense (Tr. 7, 8). Based on our review of the record, we find that the positive factors offset the negative factors of record. See *Matter of Rojas*, 15 I&N Dec. 492, 493 (BIA 1975).

The record will be remanded to grant the application for voluntary departure under section 240B(a)(1) of the Act, in accordance with the requirements set forth at 8 C.F.R. § 1240.26(b). Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the record is remanded to the Immigration Judge for further proceedings relating to voluntary departure, consistent with this decision.


FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents without opinion.

UNITED STATES IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

IN THE REMOVAL CASE OF

Alien # 098-237-003

Alien Name: HERNANDEZ-GARCIA, BACILIO
RESPONDENT

ORDERS

This is a memorandum of the Court's Decision and Orders entered on **March 31, 2010.**

This memorandum is solely for the convenience of the parties.

The oral or written Findings, Decision and Orders is the official opinion in this case.

() Both parties waived issuance of a formal oral decision in the case.

- [] The respondent was ordered REMOVED from the United States to _____ () in absentia.
- ☒ Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to Dominican Republic, in the alternative to _____.
- [] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of \$ _____ to DHS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to DHS within () thirty days () sixty days from the date of this Order, all necessary travel documents for voluntary departure.
- [] Respondent's application for ASYLUM was
() granted () denied () withdrawn with prejudice.
() subject to the ANNUAL CAP under the INA section 207(a)(5).
() Respondent knowingly filed a FRIVOLOUS asylum application.
- [] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was
() granted () denied () withdrawn with prejudice.
- [] Respondent's application for WITHHOLDING of removal under the Torture Convention was
() granted () denied () withdrawn with prejudice.
- [] Respondent's application for DEFERRAL of removal under the Torture Convention was
() granted () denied () withdrawn with prejudice.
- [] Respondent's application for CANCELLATION of removal under section () 203(b) of NACARA, () 240A(a) () 240A(b)(1) () 240A(b)(2) of the INA, was
() granted () denied () withdrawn with prejudice.
If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order.
Respondent () is () is not subject to the ANNUAL CAP under INA section 240A(e).
- [] Respondent's application for a WAIVER under the INA section _____ was
() granted () denied () withdrawn or () other _____.
() The conditions imposed by INA section 216 on the respondent's permanent resident status were removed.
- [] Respondent's application for ADJUSTMENT of status under section _____ of the
() INA () NACARA () _____ was
() granted () denied () withdrawn with prejudice.
() granted on a conditional basis under § 216 of the INA.
If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

Alien Number: 098-237-003

Alien Name: HERNANDEZ-GARCIA, BACILIO

- ☐ Respondent's status was RESCINDED pursuant to the INA section 246.
- ☐ Respondent's motion to WITHDRAW his application for admission was () granted () denied. If the respondent fails to abide by any of the conditions directed by the district director of DHS, then the alternate order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to _____.
- ☐ Respondent was ADMITTED as a _____ until _____ As a condition of admission, the respondent was ordered to post a \$ _____ bond.
- ☐ Case was () TERMINATED () with () without prejudice () ADMINISTRATIVELY CLOSED.
- ☐ Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.
- ☐ If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least \$1,000, but not more than \$5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).
- ☐ If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to \$500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).
- ☐ Other: _____


Francis L. Cramer, Immigration Judge

Date: March 31, 2010

APPEAL: WAIVED RESERVED

BY: RESPONDENT X DHS -- BOTH

DUE BY: 4/30/2010

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE X

TO: ☐ ALIEN ☐ ALIEN c/o Custodial Officer X ALIEN's ATT/REP X DHS

DATE: Mar 31, 2010 BY: ☐ COURT STAFF X JUDGE

Attachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other