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Name: RODRIGUEZ-VAZQUEZ, JORGE ... A 205-292-786

Date of this notice: 6/15/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

**Panel Members:
Pauley, Roger
O'Connor, Blair
Wendtland, Linda S.**

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Falls Church, Virginia 22041

File: A205 292 786 – El Paso, TX

Date:

JUN 15 2017

In re: Jorge Alberto RODRIGUEZ-Vazquez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carlos Spector, Esquire

ON BEHALF OF DHS: William M. Hunt
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment of status

The respondent appeals the Immigration Judge's April 25, 2016, decision denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). The Department of Homeland Security (DHS) has not filed a brief on appeal. The appeal will be sustained and the record will be remanded.

We review findings of fact under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent does not challenge his removability (I.J. at 1-2; Tr. at 53; Respondent's Br. at 5).

The respondent is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on his behalf by his United States citizen daughter (I.J. at 2; Tr. at 60). Based on this petition, he seeks adjustment of status. The Immigration Judge determined that the respondent was statutorily eligible for adjustment of status under section 245(a) of the Act (I.J. at 8). However, the Immigration Judge denied him adjustment of status in discretion (I.J. at 8-11).

Before adjustment of status may be granted, an applicant bears the burden of demonstrating that he merits relief as a matter of discretion. *See Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970); *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976). The "extraordinary discretionary relief" of adjustment "can only be granted in meritorious cases." *Id.* at 630. Generally, the existence of favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of administrative discretion. *Matter of Arai, supra*, at 496. However, where adverse factors are present, it may be necessary for the alien to present evidence of unusual or even outstanding equities to outweigh the negative factors. *Id.*

The Immigration Judge found the respondent's five convictions between 2006 and 2009 for driving under the influence of alcohol (DUI) to be a negative discretionary factor outweighing his positive equities (I.J. at 9-10; Exh. 2, Tab F). While we do not underestimate the seriousness of the respondent's DUI convictions, we find it important that the respondent's last incident occurred approximately 8 years ago, and the Immigration Judge acknowledged that the respondent has not been drinking since 2009, factors that suggest genuine rehabilitation.

The record of proceedings establishes that the respondent has numerous positive equities in the United States, including his lawful permanent resident wife, and close family ties to his five United States citizen children, including his two step-children (I.J. at 8-9). The Immigration Judge observed that the respondent has worked as a mechanic for 15 years and that he is the primary financial support for the family; he volunteers as a youth soccer coach, and he and his family are contributing members to their church community (I.J. at 4, 7, 9; Tr. at 115-20, 205). The respondent completed his court-ordered alcohol treatment and still voluntarily participates in Alcoholics Anonymous meetings weekly (I.J. at 6; Tr. at 112-14). His application is supported by letters from friends, relatives, neighbors, and employers attesting to his good character and expressing the wish that he be permitted to remain in the United States (Exh. 2, tabs D, E). The respondent has taken responsibility for his transgressions, and has acknowledged that his church and his family provided support and motivation for his recovery (I.J. at 3-4; Tr. at 115, 133-34).

Under the totality of the circumstances and taking into account both the positive and negative factors, upon de novo review, we conclude that, although close in some respects, the equities presented outweigh the negative factors. As such, we determine that the respondent merits a favorable exercise of discretion. See *Matter of C-V-T-*, 22 I&N Dec. 7, 11-12 (BIA 1998); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).¹ Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained, and the respondent is found eligible for and deserving of adjustment of status.

FURTHER ORDER: The Immigration Judge's decision denying the respondent's application for adjustment of status is vacated.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).


FOR THE BOARD

¹ We note that the DHS did not argue against a favorable exercise of discretion (Tr. at 210-11).

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

File: A205-292-786

April 25, 2016

In the Matter of

JORGE ALBERTO RODRIGUEZ-VAZQUEZ)
) IN REMOVAL PROCEEDINGS
RESPONDENT)

CHARGES: Section 237(a)(1)(B) of the Immigration and Nationality Act.

APPLICATIONS: Adjustment of status pursuant to Section 245 of the Act.

ON BEHALF OF RESPONDENT: CARLOS SPECTOR, Esquire
 El Paso, Texas

ON BEHALF OF DHS: WILLIAM M. HUNT, Assistant Chief Counsel
 Homeland Security, El Paso, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 42-year-old married male native and citizen of Mexico. He was served with a Notice to Appear on March 29, 2012. Exhibit 1. The Notice to Appear charges that the respondent is removable under Section 237(a)(1)(B) of the Immigration and Nationality Act in that after admission as a nonimmigrant has stayed in the United States for a time longer than permitted. The respondent, through counsel, admitted the factual allegations in the Notice to Appear and conceded that he is removable. Accordingly, I find that there is clear and convincing evidence to establish

that he is removable as charged. Mexico is designated for the country of removal. The respondent has applied for adjustment of status pursuant to Section 245 of the Act. The issue before the Court today is his eligibility for this form of relief.

STATEMENT OF FACTS

The Notice to Appear has been marked and admitted as Exhibit 1. Additionally, the following documents have been marked and received into evidence. Exhibit 2 was the adjustment of status submission along with various supporting documents in excess of 300 pages. Exhibit 2A was a one-page letter in regards to respondent's children. Exhibit 3 was the Government's evidence, specifically a Form I-213 related to the respondent.

The respondent testified in support of his application. His testimony is summarized as follows. The respondent states that he is age 42, married, and that he was born in Juarez, Mexico. He states he was married in 1997 in Mexico. He went to school for a period of time in Mexico but did not complete his full studies. According to the respondent, he has four sisters, three in Mexico, one in the United States. He has a good relationship with her. She is a United States citizen. The respondent's mother remains in Mexico. The respondent's father passed. His death was apparently due to in part liver problems based on the respondent's father's consumption of alcohol. The respondent did observe his father over the years drinking, and apparently at some point, perhaps at age 15, the respondent himself started drinking. Apparently, his father accepted that since his father again drank as well.

The respondent does have five children, several stepchildren, several of his relationship with his wife. One of his children is the petitioner for the respondent. The respondent states overall his children are in good health except one child has seen a psychologist for depression. One other child perhaps has some learning problems.

According to the the respondent, he is a mechanic at a car lot, has worked in the mechanic field for approximately 15 years working on cars. He also does some other work at a body shop. He has had work authorization for approximately six months.

According to the respondent, he states his last entry was in 2009 with a border-crossing card and has never left the United States since then. He presently lives in El Paso with his wife and children that are not on their own and renting that home since 2009. The respondent states his health is good.

The respondent then went on to describe his drinking habits wherein he would not drink often at first but then would drink more and more; his alcohol of choice, beer. He stated he realized that he had a drinking problem after he got married but apparently still drank to excess.

The respondent then reviewed his criminal history. His criminal history first was discussed dealing with an incident in December 2001 when apparently he was with some other people that ultimately got convicted for drug conspiracy distribution. According to the respondent, he was not involved at all in that illegal drug case, and apparently at some point the case was dismissed after several years; again, no conviction for the drug-related offense. The respondent then went on to describe his arrest and convictions with DWI, driving while intoxicated, offenses. They began in July 2006 in El Paso where he was granted pretrial diversion. Next was January 2007 where he was given one year probation which he completed. Next was November 2008. He was given 18 months probation, which he completed. The next DWI was in January 2009. The next and final DWI was in April 2009. He states that for that last conviction he was given 8 years probation. He is still on probation for that incident. He also had to attend AA classes and also involved with probation considerations by that office. According to the respondent, none of these driving while intoxicated offenses

resulted in any accidents or any harm to other individuals. The respondent states that his last drink was after his last arrest in 2009. He states now that he can control his drinking and he has great support both from his family, from his church, and from Alcoholics Anonymous. He states he does help the church, active in the church, and believes that has helped him tremendously. He also is involved with community activities to include assisting in sports events. He states that he is quite clear in his mind that if he is allowed to remain legally, lawfully that one beer could be his end. He states also that he has made plans if permitted to stay in the United States.

The Government examined the respondent. The respondent indicates that there is some Government assistance to the family. The respondent testifies that he filed taxes from 2013 to 2015. He states that he was informed apparently by agencies that he could not file taxes before then, those taxes being filed recently. Again, the respondent believes that he is taking care of all court requirements for the arrest and convictions he suffered. He states he does not have a current driver's license. He believes if he is removed to Mexico, his family would remain in the United States. The respondent believes he was arrested when he went to his probation office. On further examination, the respondent states that he is a very active, again, member of his St. Thomas church.

The Court then inquired the respondent. The respondent states that again he only filed taxes 2013 to 2015 when he recently got his tax identification number and believed those were the only years that he could file. He believes that he may have had to pay some penalties for the filing of taxes, but those were in fact paid. The respondent states that he does not use drugs, only had drank in the past beer and drank beer to an excess. Turning to another arrest in 2009, apparently, the respondent was initially charged with assault, was also drinking. And apparently, according to the

respondent, he himself was injured by the undercover police that stopped him when he was speeding and apparently drinking. The end result was the assault was dropped against the respondent, and apparently the conviction was only for driving while intoxicated.

The respondent testifies that his last entry was in 2009. He said he was afraid to leave the United States after that because his border-crossing card was expired. He was not sure if requested he would be able to obtain another one. The respondent states he has never used false documents in the United States.

The respondent testifies that for most of the DWI offenses he was the only one in the vehicle. Apparently none of those vehicles were his but other vehicles that he borrowed. The respondent does acknowledge again the five separate DWIs. Apparently after the third DWI, his license was suspended, and for his fourth and fifth DWIs he also did not have a driver's license. The respondent still does not have a driver's license, and apparently his family drives him when required since the respondent testifies he himself does not drive.

The respondent confirms that he still has family in Mexico to include his mother and several sisters. To that end the respondent does acknowledge if required to return to Mexico, he does have some place to return to. Further, the respondent could do his mechanic work in Mexico. He believes his current work earns him approximately \$350 per week. In the end the respondent states he would wish the Court to provide him another opportunity to stay in the United States.

On further questioning, the respondent states his mother is 65. She is not in the best of health and that his sisters also have families of their own, so it would be difficult for him perhaps to return back to live with them in Mexico. Further, income is not as much as found in the United States.

The respondent's wife testified. Her testimony is summarized as follows. She states she is age 42, a lawful permanent resident. She has known the respondent for a long time, perhaps since age 20. They dated several years before getting married. She had two children from a previous relationship that the respondent has taken full responsibility for. The witness states that her husband, the respondent, did clearly abuse alcohol for many years, that he would always be drinking. Even though he was drinking there never was any physical abuse against the witness wife or their children. Most of the argument would be dealing with verbal discussions. Even though he would be drinking and have these arrests, he would still be responsible, according to the witness, for the family. The witness states that since 2009 everything has changed and everything is for the better now, that the family is more united, there is more church involvement, and respondent still takes time for AA meetings. She states that she needs him to stay here with the family, but would not go with him if removed to Mexico. The witness states overall the children are in good health except the one that is age 17 that did have a problem for several months dealing with facial paralysis. The witness further states that there has never been any physical separation between her and her husband, the respondent, that there has never been any restraining order against him, and she does not fear him.

The Court then inquired. The respondent states that she also obtained her status through one of their United States citizen children, that she does work, cleans homes part time, earns about approximately \$180 per week. Also there is food stamps to the family for over \$400 per month, those food stamps having been received for many years. The witness confirms that she drives. Her husband no longer drives. She also indicates that her health is good, and the child that had paralysis is now fine and plans to attend college.

Testimony was then taken from one of the respondent's children. This child, age 17, born in the United States plans to graduate school later this year. This child indicates that she was aware of the alcohol abuse by her father, the respondent. She remembers arguing previously because of the alcohol use, but again, the respondent was not violent to her or other family members. This child went on to describe that she had depression several years ago when there was facial paralysis. She states that her father, the respondent, was very encouraging to move forward past this point, and ultimately the witness was able to overcome her depression and hospitalization and has done all the better because of her father's, the respondent's, encouragement. This child now says she is doing very well in school, again will graduate, and she wants the respondent, her father, to be with her as she continues in the United States.

Testimony was then taken from another child from the respondent. This child, age 26, did in fact petition for the respondent. She states that she lives still in the respondent's, her father's, household, and he is the primary supporter. She also testifies that she recalls her father, the respondent, coming home often in early years being drunk, but again, he would never physically harm the family. She also believes that it is better for the respondent to remain in the United States with his family.

Both sides were then provided an opportunity to provide closing statements.

STATEMENT OF LAW

Adjustment of Status

The status of an alien who was inspected and admitted or paroled into the United States may be adjusted to that of an alien lawfully permitted for permanent residency if he applied for adjustment, he is eligible to receive an immigrant visa, and is admissible to the United States for permanent residency and an immigrant visa is immediately available to him at the time his application is filed. Section 245A of the Act. If eligibility

is established, adjustment of status may be granted in the exercise of discretion. Matter of Arai, 13 I&N Dec. 494 (BIA 1970). The alien bears the burden of establishing eligibility for adjustment of status and demonstrating that relief is merited in the exercise of discretion. See Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980); Matter of Blas, 15 I&N Dec. 65 (BIA 1974). The Court's discretion or decision depends on the facts of the particular case, and as such is a matter of discretion and of administrative grace not mere eligibility. Discretion must be exercised even though the statutory prerequisites have been met. Matter of Ortiz-Prieto, 11 I&N Dec. 317 (BIA 1965); see also Matter of Blas. A favorable exercise of administrative discretion is warranted where positive factors such as family ties, length of residency, and hardship outweigh adverse considerations. Matter of Arai. However, where adverse factors are present it may be necessary for the applicant to present unusual or outstanding countervailing equities to merit a grant of an application for adjustment of status. See also Mamoka v. INS, 43 F.3d 184 (5th Cir. 1995).

FINDINGS OF THE COURT

The Court will note that the respondent has met in fact the statutory requirements for consideration for adjustment of status, the sole form of relief before this Court. However, as noted, it is also within the Court's discretion whether or not adjustment of status is appropriate based on the facts and circumstances of each specific case brought before it. The Court has carefully weighed the positive as well as negative factors in respondent's case in making its determination.

On the positive side, the Court will note the respondent does have family lawfully in the United States that certainly care for him and are very much part of that family. Further, the Court also notes respondent has been very involved with his church activities over the years and also kept involved with Alcoholics Anonymous based on his

alcohol problems of the past. Also there is assistance provided by the respondent to sport teams in the United States. Also the respondent is the primary breadwinner for the family. While it appears that the family overall is generally in good health, the Court does note also that the respondent's 17-year-old child has had some challenges in the past, but it appears presently she has overcome those challenges, and the Court finds no specific medical conditions presently for that child or any other of respondent's immediate family. The Court notes again the family ties which certainly result in some level of hardship to the respondent's family if they are left behind if the respondent is removed to Mexico.

Turning next to the negative factors, the Court clearly finds that the respondent's criminal history over many years dealing with driving while intoxicated offenses are very serious and significant adverse factors. As noted, the respondent has no lawful status in the United States but had saw fit to not once, not twice, but apparently five separate times violate the laws of the United States dealing with drinking and driving. While the respondent states that part of this is his upbringing because of his father's use of alcohol and the respondent's own use of alcohol over the years, the Court finds no medical reasons for the respondent's constant use of alcohol but instead a voluntary act by the respondent based on the evidence of record. The Court finds that these five separate offenses, the first it is noted was given pretrial diversion, but still the respondent does not deny drinking and driving that time as well as the other four times that he was arrested. These flagrant violations of law over several years demonstrate to this Court that the respondent chose to not recognize the significance of his events until 2009. While the Court does acknowledge that the respondent has not been drinking apparently since 2009 and has been working with the community, those are plainly not sufficient to overcome these offenses, again, in 2006, then in 2007, then in

2008, and two in 2009.

The Court notes that the incident dealing with the drugs are not considered an adverse factor since those charges were dismissed as well as the assault charge initially against the respondent that was later dismissed. Instead, the Court weighs the criminal history on the five driving while intoxicated offenses. The Court also notes that after the third offense the respondent apparently no longer had a valid driver's license but again chose to drive and drink on at least two other occasions when he was arrested. While there is no way to tell, there is a possibility that the respondent had been drinking and driving on other occasions when he was not convicted. However, the Court again will rely upon the criminal history of respondent.

The Court also notes that the respondent did not come to the United States at a tender age but came as an adult. Further, the respondent does have family back in Mexico that he could reunite with if returned. Further, while the respondent is making adequate income in the United States as a mechanic, he could continue that line of work in Mexico and have some income which could be sufficient to live in Mexico. While presently the family in the United States depends on the respondent for the bulk of the financial support, the Court does note that there is the ability of family members to engage in perhaps more work to support themselves if they could no longer rely on the respondent's income.

Once again, the Court finds it is the respondent's own criminal history dealing with driving while intoxicated that the Court finds significant. Fortunately there were no accidents involved and no individuals hurt. Nevertheless, the fact the respondent placed not only himself but others in potential danger by drinking and driving and apparently not taking heed to the first or second or third offenses by court-ordered requirements to no longer violate the laws was apparently not heeded by the

respondent. For that reason, the Court does not find that it is able or desirous for this respondent to remain in the United States and obtain lawful status based on his, again, significant continued violations of laws in the United States.

The Court believes it has given the appropriate weight to both the positive factors as noted as well as the negative factors in the respondent's case. Therefore, for these reasons the Court will find that, again, in its discretion, that the respondent is not deserving of the relief being sought, and therefore the respondent's request for adjustment of status shall hereby be denied.

ORDERS OF THE COURT

Accordingly, the following orders are hereby entered.

ORDER: The respondent's application for adjustment of status pursuant to Section 245 of the Act is hereby denied.

FURTHER ORDER: That the respondent be removed from the United States to Mexico on the charge contained on the Notice to Appear.

Please see the next page for electronic

signature

ROBERT S. HOUGH
Immigration Judge

//s//

Immigration Judge ROBERT S. HOUGH

houghr on August 2, 2016 at 8:12 PM GMT