



U.S. Department of Justice

PS

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Name: HERNANDEZ PINA, FRANCISCO

A073-976-639

Date of this notice: 1/19/2012

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.  
Greer, Anne J.  
Pauley, Roger

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Falls Church, Virginia 22041

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File: A073 976 639 - Los Angeles, CA

Date: **JAN 19 2012**

In re: FRANCISCO HERNANDEZ PINA a.k.a. Francisco Xavier Reyes Hernandez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Claire Cifuentes, 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

APPLICATION: Special rule cancellation of removal; cancellation of removal under  
section 240A(b)

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's March 1, 2010, decision denying his application for special rule cancellation of removal pursuant to section 203 of the Nicaraguan and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193, 2196 ("NACARA"). On appeal, the respondent also argues that the Immigration Judge failed to enter a decision on his applications for asylum under section 208 of the Immigration and Nationality Act and for cancellation of removal under section 240A(b) of the Act. The appeal will be sustained and the record remanded for further proceedings consistent with this order.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a *de novo* standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

As background, we note the following Immigration Judge findings of fact, which are not clearly erroneous. The respondent is a native and citizen of Mexico who entered the United States in or around February 1990 without inspection or parole (I.J. at 2). He is married to a lawful permanent resident of the United States who is a native of El Salvador (*Id.*). He applied for NACARA relief as the spouse of someone who was granted that relief (*Id.*). In 1995, with the help of a notario, he filed an application for asylum<sup>1</sup> and a form<sup>2</sup> related to registration for benefits under the settlement

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<sup>1</sup> Such filings made on or before December 31, 1991, triggered eligibility for certain benefits under the Act.

<sup>2</sup> On appeal, the respondent states that this form was a "change of address form." Respondent's Brief at 1.

agreement in *American Baptist Churches, et al. v. Thornburgh, et al.*, 760 F. Supp. 796 (N.D. Cal. 1991) (“ABC”) wherein he stated that he was a native and citizen of El Salvador (I.J. at 3). Although the asylum application was in English (a language that the respondent could not then understand), the ABC-related form was in Spanish (I.J. at 4). Based on the asylum application and the ABC form, the respondent received work authorization, which he renewed annually at first with the help of the notario, but after about 1999, on his own (I.J. at 5-7). The respondent most recently renewed his work authorization, certifying that he was a native and citizen of El Salvador while knowing this to be untrue, in 2008 (I.J. at 5-7). Although the respondent on appeal claims that he found out in 1999 that the notario had represented the respondent as a native of El Salvador, below, he testified that he was aware when he signed the forms that they reflected (incorrectly) that he was an El Salvadoran citizen (Tr. at 39-40).

As to the application for relief under the NACARA, the respondent has the burden of establishing that he is eligible for this relief and that it should be granted in the exercise of discretion. See 8 C.F.R. § 1240.8(d). A prerequisite to NACARA relief is a showing of 7 years of continuous physical presence immediately preceding the date the application was filed and a showing of good moral character during the required period of continuous physical presence. 8 C.F.R. §§ 1240.65(b), 1240.66(b)(2)-(3). While the respondent met the physical presence requirement, the Immigration Judge found that the repeated misrepresentations made by the respondent in support of his application for work authorization barred him from showing good moral character during the statutory period (I.J. at 3-11). In this regard, the Immigration Judge noted that while the misrepresentations were not listed in section 101(f) of the Act as one of several examples that would automatically bar a finding of good moral character—e.g., “false testimony” under §101(f)(6) of the Act—the respondent’s conduct fell under the “catch all” portion of the section and prevented the respondent from showing his good moral character (I.J. at 8). The Immigration Judge also denied voluntary departure on this basis (I.J. at 10-11).

On appeal, the respondent argues that because he only renewed his work authorization out of fear of the consequences of revealing his nationality at such a late date, and because he was otherwise a person of good moral character, the Immigration Judge should not have found that the respondent was precluded under section 101(f) from showing his eligibility for NACARA relief. Respondent’s Brief at 1, 5. Specifically, the respondent argues that because the Board recently stated in *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008), that a finding of a lack of good moral character was not “mandated” in a case where an alien makes a false claim to United States citizenship on a Form I-9, the Immigration Judge should have exercised discretion on this issue by balancing the respondent’s positive character attributes against his misrepresentations. Respondent’s Brief at 5.

We will sustain the respondent’s appeal. We read the Immigration Judge’s decision as finding an absolute bar to a showing of good moral character due to the application of section 101(f)’s catch-all provision. However, as we stated in *Matter of Guadarrama, supra*, the fact that an alien’s conduct triggers the “catch-all” provision and might raise an issue as to his moral character does not mandate a finding that good moral character has not been shown. Rather, the Immigration Judge should have exercised his discretion to determine, considering the respondent’s conduct during the whole of the relevant statutory period, whether he has exhibited the requisite good moral character. *Matter of Guadarrama, supra*, at 626-27; see *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986).

Here, as in *Matter of Guardarrama, supra*, at 627, we note that we need not remand this matter for a new assessment of the respondent's good moral character, because the Immigration Judge stated that but for her understanding that the respondent's misrepresentations indicated a lack of good moral character, she would have granted relief (I.J. at 10) ("I would find that what he has done here, the good he has done, would outweigh the bad and I would grant it in the exercise of discretion"). We therefore find that the respondent is eligible for relief and has demonstrated his fitness for a positive exercise of discretion.

On appeal, the respondent also argues that the Immigration Judge failed to enter decisions on his application for cancellation of removal under section 240A(b) of the Act and on his circa-1995 application for asylum, in which he represented himself to be a native and citizen of El Salvador. See Respondent's Brief at 5. Given our decision to grant his application for special rule cancellation of removal pursuant to section 203 of NACARA, we need not address these additional arguments. Accordingly, the respondent's appeal will be sustained, and the record will be remanded for completion of the requisite background checks.

The following orders will be entered.

ORDER: The appeal is sustained.

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