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

Zovinova, Katarina, Esquire
Perez Gardini LLC
P.O. Box 6318
Boston, MA 02114

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

Name: MELGAR, MARIO

A 200-550-222

Date of this notice: 10/14/2015

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:
Grant, Edward R.
Holmes, David B.
O'Leary, Brian M.

Userteam: Docket

File: A200 550 222 – Boston, MA

Date: OCT 14 2015

In re: MARIO MELGAR a.k.a. Yamilton Madrid a.k.a. Jorge Lopez a.k.a. Jorge Mario Lopez Madrid

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Katarina Zovinova, Esquire

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; voluntary departure

The respondent appeals from the Immigration Judge's decision dated February 27, 2014, which denied the respondent's applications for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), and voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), in the exercise of discretion. The Immigration Judge's discretionary denial of adjustment of status is reversed. The respondent's appeal from the discretionary denial of his application for adjustment of status will be sustained, and the record will be returned to the Immigration Judge for completion of background checks.

We review an Immigration Judge's findings of fact for clear error; but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). The respondent submitted his applications after May 11, 2005. Therefore, his applications for adjustment of status and voluntary departure, including determinations regarding credibility, are governed by the provisions of the REAL ID Act.

Upon de novo review, this Board finds that the respondent has established that a favorable exercise of discretion is warranted on his application for adjustment of status. The respondent's length of residence and family ties to this nation outweigh the respondent's fraudulent actions committed several decades ago, his more recent conviction for driving under the influence, and his lack of tax compliance. There being no issue that the respondent otherwise qualifies for adjustment of status under section 245(a) of the Act, we find that he has demonstrated that he is deserving of this relief. Accordingly, 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 DHS the opportunity to complete or update

identity, law enforcement, or security investigations or examinations, and the further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:

MELGAR, Mario		
a.k.a Jorge Lopez	)	**In Removal Proceedings**
A 200-550-222	)	
	)	
Respondent	)	

CHARGES: Immigration and Nationality Act (INA or Act) § 237(a)(1)(B) – Alien who, after admission as a nonimmigrant under Section 101(a)(15) of the Act, remained in the United States for a time longer than permitted.

APPLICATION: Adjustment of Status;
Voluntary Departure

ON BEHALF OF RESPONDENT
Julio Vasquez
Perez Garini L.L.C
PO Box 6318
Boston, MA 02114

ON BEHALF OF DHS
Assistant Chief Counsel
Office of the Chief Counsel
15 New Sudbury St., Room 425
Boston, MA 02203

ORDER OF THE IMMIGRATION COURT

I. Procedural History

The Respondent, Mario Melgar (a.k.a. Jorge Lopez), is a native and citizen of Colombia, who was admitted to the United States at Newark, New Jersey, on or about February 16, 1997, as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to extend beyond August 15, 1997. Notice to Appear (NTA). On August 7, 2012, the Department of Homeland Security (DHS) personally served the Respondent with an NTA, alleging that the Respondent remained in the United States beyond August 15, 1997, without authorization. *Id.* The NTA charged the Respondent with removability pursuant to INA § 237(a)(1)(B), as an alien who, after admission, remained in the United States for a time longer than permitted. *Id.*

On October 3, 2012, the Respondent, through counsel, submitted written pleadings to the Boston Immigration Court (Court) seeking relief through adjustment of status and, in the alternative, voluntary departure. Exh. 2. On October 15, 2012, his wife, Martha Rodriguez, filed

an I-130 on his behalf with the United States Citizenship and Immigration Services (USCIS), and the petition was approved on January 14, 2013. Exhs. 3, 5.

At a hearing on May 30, 2013, DHS filed an oral motion to pretermit the Respondent's application for adjustment of status, alleging that he had been convicted of a crime involving moral turpitude (CIMT). The Respondent filed his I-485 Application for Adjustment of Status with USCIS on June 3, 2013, and filed a copy with the Court on June 24, 2013. On September 27, 2013, after considering the evidence, the Court denied DHS's motion, finding that there was insufficient evidence to conclude the Respondent had been convicted of a CIMT, and it allowed the Respondent to proceed with his application.

On same day, the Respondent testified in support of his application. The Respondent rested on his application and was cross-examined by DHS.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Credibility

The Respondent has not met his burden under the Real ID Act of 2005, of proving that his testimony was credible. *See* INA § 240(c)(4)(C) (2013). The Court specifically finds his testimony was not credible. Id. The Respondent lacked candor before this Court. Additionally the Respondent has a history of making false statements to government authorities. The Respondent was arrested twice, first in 1997 for obtaining a false driver's license, and again in 2009 for operating under the influence and unlicensed operation of a motor vehicle.[1] His testimony revealed that he had made false statements to the authorities on both occasions.

During the first incident, the Respondent stood by while an interpreter he had hired presented a false New Jersey driver's license with the Respondent's picture and in the name of "Yamilton Madrid,"—a name which the Respondent confirmed had never been his own—to the Massachusetts Registry of Motor Vehicles. This man was attempting to exchange the false New Jersey license for a Massachusetts driver's license on the Respondent's behalf. Although the Respondent testified that he did not know the New Jersey driver's license was false, his testimony reveals that he knew he was not applying for a license through proper means. When asked why he did not replace his Colombian driver's license through the proper means, he testified that to do so, he needed more documents than he had available. He knew that the application had been filled out for him using the false name "Yamilton Madrid," and he was waiting to accept and use that driver's license at the time he was arrested. Even assuming that the Respondent had not filled out or signed the application himself, his testimony indicates that he was fully aware that he was participating in fraudulent activity.

The police report for the second incident reveals that witnesses observed the Respondent hit another car and drive away, and the Respondent confirmed in Court that he had in fact done this, and explained that he left thescene because he was nervous. The witnesses wrote down the Respondent's license plate number, and called the police, who pulled the Respondent over some distance from the accident. When the police questioned the Respondent about damages on the

[1] Although DHS asked if the Respondent had been arrested for driving with a suspended license, and the Respondent replied affirmatively, the record shows that he was convicted of operating without a license. Exh. 9.

passenger side of his car, which "appeared to be fresh due to debris and paint chip still hang and lose [sic]," the Respondent replied that "those damages were old and happen [sic] several weeks ago." Exh. 9. The police asked the Respondent how much he had to drink, and the Respondent replied "that he only had a two (2) or three (3) Bud light beers." *Id.* However, the Respondent testified in Court that he had five or six beers. When asked about the discrepancy, the Respondent again pointed to the fact that he was nervous as an explanation of his false statements to the police.

The Respondent testified that when he was pulled over, he was arrested under the name "Mario Melgar." He did not volunteer an explanation in Court for why that name differed from his given name, Jorge Lopez Madrid. Instead, he responded to a series of questions on cross-examination, confirming first that he had presented a driver's license in that false name to the police, then that he it had never been his real name, though he noted that he used the driver's license in order to drive to work. He confirmed that he knew he had obtained the license illegally.

In the Respondent's written affidavit, he asserts, "I never falsified any document nor used any falsified document." Exh. 4 at 7. However, the evidence indicates that in 1997, he knowingly allowed another person to present a false license in order for the Respondent to obtain a valid driver's license. In addition, in 2009, not only did the Respondent present an illegally obtained license with a false name to the police, but he also testified he had been using that license for eleven years. This directly contradicts his written statement.

The Court also considers the Respondent's lack of candor regarding the extent to which he knew that his driver's licenses were obtained illegally. First, the Respondent testified that during the 1997 incident, he merely followed the instructions and advice of the man he had hired, who suggested that the Respondent use the name "Yamilton Madrid" to apply for a driver's license. The Respondent confirmed that he paid the man and gave him two passport photos and that the man came back with a New Jersey driver's license with one of those photos in the name of "Yamilton Madrid." Nonetheless, the Respondent testified that he did not know the license was false and his written statement indicates that "I did not in fact falsify anything." Exh. 4 at 6. Nowhere during his testimony or in his written statement does he take responsibility for knowing that he attempted to get a driver's license through illegal means. Instead, he indicated that the authorities "tricked" him, which led to his arrest. The Court recognizes the fact that the Respondent had been in the United States only a short time when he was first arrested. However, the Respondent knew that the man he hired was using a license the Respondent had never seen with the Respondent's photograph and a name that was not the Respondent's to get the Respondent a new driver's license, and the Respondent was prepared to accept that new license. Accordingly, it is wholly implausible that he did not know that his actions were illegal.

Second, the Respondent's statements about the driver's license he was using in 2009 falsely implied that he had received the license through legal means. The Respondent's written statement indicates that he obtained the driver's license "through an actual employee of the Massachusetts Registry of Motor Vehicles who issued the license to me." Exh. 4 at 7. During cross-examination, he further stated that he obtained the license "with the cooperation of" a Massachusetts RMV employee. The Respondent only conceded his culpability after DHS

directly asked whether he knew that he was not completing the driver's license application in the proper manner, and whether he knew that he was getting a driver's license illegally, to which the Respondent replied affirmatively. Although he never directly stated that he had obtained the license legally, he did not volunteer his culpability until he was asked about it directly on cross-examination.

Because the Respondent repeatedly made false statements to authorities, for which he was reluctant to accept responsibility before the Court, the Court declines to accept his testimony as credible. *See* INA § 240(c)(4)(C).

B. Adjustment of Status Under INA § 245(a)

Assuming the Respondent is statutorily eligible to adjust his status under Section 245(a) of the Act, the Court considers, as a matter if discretion, the Respondent's lack of credibility, his failure to take responsibility for his actions leading to his two criminal convictions, and his failure to file income taxes. The Court balances these negative factors against all of the positive facors in the record, taken in the aggregate and in the best light for the Respondent. After carefully balancing the positive and negative factors present in the record, the Court denies adjustment of status finding that the Respondent has failed to meet his burden of proof under the Real ID Act of 2005 of demonstrating he merits relief as a matter of discretion.

1. Statutory Eligibility

The Respondent was inspected upon entry to the United States, and he is eligible to receive a visa based on an approved I-130 Petition on his behalf. Although DHS challenged the Respondent's admissibility, alleging that his conviction for Falsifying a Motor Vehicle Document constitutes a crime involving moral turpitude (CIMT), the Court found insufficient evidence to find that the Respondent was inadmissible. *See* INA §§ 212(a)(2)(a)(i)(I), 245(a)(2).

The Respondent was convicted on June 4, 1997, of violating Massachusetts General Laws, ch. 90 § 24B (1997). Exh. 7. Both parties stipulated that the statute of conviction is divisible, encompassing both offenses that do and do not qualify as CIMTs. *See Descamps v. United States*, 133 S. Ct. 2276, 2281, 2286 (2013) (noting that a statute is divisible when it "defines [a crime] . . . alternatively, with one statutory phrase corresponding to the generic crime and another not."); *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Patel v. Holder*, 707 F.3d 77 (1st Cir. 2013); *Campbell v. Holder*, 698 F.3d 29, 33 (1st Cir. 2012). The only document available in the record of conviction is the docket sheet from the Quincy District Court. Exh. 7. Repeated attempts by both the Respondent's counsel and DHS revealed that all other records had been destroyed. *See* Exh. 4, Julio Vasquez Aff. (June 13, 2013); Exh. 6. The Respondent met his burden of proof by diligently attempting to obtain other documents from the record of conviction. INA § 240(c)(2)(A). Finding no record documents available that discern whether the Respondent's crime was, in fact, one involving moral turpitude, the Court found that it could not proceed to consider outside evidence. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (A.G. 2008).[2]

[2] In this case, considering outside evidence without considering the full record of conviction would violate the Respondent's right to due process, where the absence of record documents was not attributable to the

Based on the docket sheet alone, the "least culpable conduct" for which the Respondent could have been convicted was not a crime involving moral turpitude. *See Silva-Trevino*, 24 I&N Dec. at 693–94 (citing *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006); *Partyka v. Att'y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005)); *see also* Mass. Gen. Laws ch. 90, § 24B (penalizing, *inter alia*, possession of a "falsely made . . . license to operate motor vehicles").

Accordingly, the Respondent has met his burden of proving that he is statutorily eligible to adjust his status. *See* INA §§ 240(c)(4)(A), 245(a)(2).

2. Discretion

Even assuming the Respondent is statutorily eligible, the Court denies the Respondent's application for adjustment of status finding that the Respondent has failed to meet his burden of proof under the Real ID Act of 2005 of demonstrating he merits relief as a matter of discretion. *See* INA § 245(a); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). First, on the negative side of the balance, the Court notes the Respondent's criminal record, particularly the Respondent's conviction for operating a motor vehicle under the influence of intoxicating liquors. *See* Exh. 9; *see also Matter of Khan*, 17 I&N Dec. 508, 511 (BIA 1980) (indicating that a criminal record can be an adverse discretionary factor in an application for adjustment of status). Moreover, the Respondent testified in Court that prior to his arrest, he not only hit another car, but also left the scene of the accident and made false statements to the police about it, explaining only that he did so because he was nervous. He denied that he had driven while intoxicated on any other occasion. However, in light of the Court's adverse credibility finding and the lack of evidentiary support for his self-serving statements, the Court is not persuaded that he would not repeat those actions.

Respondent's failures. *See Arizona v. Youngblood*, 488 U.S. 51, 69 (1988) (J. Blackmun, dissenting). The Court notes that the state's failure to preserve the documents in the record of conviction was not a result of bad faith, but merely the passage of time and departmental policies. *See* Exh. 4, Julio Vasquez Aff.; Exh. 6. Accordingly, the absence of those documents alone would not violate the Respondent's due process. Rather, the violation would arise from a default finding, based on the absence of those documents, that the Respondent committed a CIMT, and is therefore statutorily ineligible to adjust his status. *C.f. Youngblood*, 488 U.S. at 57–58 (holding that when considering evidence lost by the government, "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," a defendant must show that the government acted in bad faith in order to demonstrate a due process violation); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (finding removable aliens entitled to due process protections).

This scenario is distinguishable from *McCreath v. Holder*, where a respondent claimed that his due process rights were violated when the Immigration Court denied his claim to adjustment of status without considering a discretionary exception to a statutory bar. 573 F.3d 38, 41 (1st Cir. 2009). The First Circuit denied his claim, noting that "Adjustment of status is not a cognizable liberty or property interest for purposes of due process because it is a discretionary form of relief." *Id.* Nonetheless, even if the Respondent has no due process interest in the discretionary relief itself, he maintains an interest in "reasonably presenting his case" to maintain the *possibility* of receiving adjustment of status—a possibility that would be foreclosed if the Court were to hold the respondent to an impossible burden. *Compare Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (finding that "Ineffective assistance of counsel in a deportation proceeding is a denial of due process . . . 'if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his" argument that he was eligible for a discretionary form of relief) *with Matter of H-A-*, 22 I&N Dec. 728, 736 (BIA 1999) ("Despite the dissent's reference to an alien's 'statutory right' to apply for adjustment of status, adjustment is a form of relief from deportation or removal, the grant or denial of which remains within the exercise of this Board's discretionary authority.").

The Court also finds as significant on the negative side of the balance the Respondent's history of using false driver's licenses, particularly following his arrest and conviction for doing so in 1997. Even assuming that the Respondent was duped by a third party upon his arrival to the United States, as he alleges, and that he was not aware that his actions in 1997 were illegal, he knew that his actions were improper by the time he obtained his second driver's license through illegal means in 2009.

In addition to the Respondent's failure to take full responsibility for his criminal behavior and fraudulent statements, the Court also considers the fact that the Respondent worked without authorization and declined to file income taxes for at least fourteen years. On the positive side of the balance, the Respondent has lived in the United States continuously since 1997, and his U.S. citizen wife and child are also present in the United States. The Court considers all of the positive factors in the record, taken in the aggregate and in the best light for the Respondent. After carefully balancing the positive and negative factors present in the record, the Court denies adjustment of status finding that the Respondent has failed to meet his burden of proof under the Real ID Act of 2005 of demonstrating he merits relief as a matter of discretion. *See also Arai*, 13 I&N Dec. at 496. There is no indication that he has business or property interests in the United States, that he contributes to his community, or that he is a person of good moral character. *See Blas*, 15 I&N Dec. 626; *Arai*, 13 I&N Dec. at 496. Accordingly, the Respondent has not met his burden under the Real ID Act of 2005 of demonstrated that he merits a favorable exercise of discretion, and therefor the Court declines to grant the Respondent relief through adjustment of status. INA § 240(c)(4).

C. Voluntary Departure

Even assuming without deciding that the Respondent is statutorily eligible for voluntary departure, the Court denies the Respondent's application for voluntary departure in the exercise of its discretion for the reasons stated above. *See* INA § 240B(b)(1); *Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972); 8 C.F.R. § 1240.26(c)(1) (2013); *see also Matter of Arguelles*, 22 I&N Dec. 811, 817 (BIA 1999); *Matter of Thomas*, 21 I&N Dec. 20, 22 (BIA 1995). The Court adopts in this section, its entire analysis above as it relates to the Respondent's burden to demonstrate that he merits a favorable exercise of discretion.

III. ORDERS

Based on the foregoing, the following orders shall enter:

IT IS HEREBY ORDERED that the Respondent's application for adjustment of status under Section 245(a) of the Act be **DENIED**.

IT IS HEREBY FURTHER ORDERED that the Respondent's application for voluntary departure under Section 240B of the Act be **DENIED**.

IT IS HEREBY FURTHER ORDERED that the Respondent be removed from the United States to Colombia.

Date

MATTHEW D'ANGELO
Immigration Judge