



**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*

**Bhagat, Pooja  
Bhagat Law Firm  
6412 Brandon Avenue  
273  
Springfield, VA 22150**

**DHS/ICE Office of Chief Counsel - BAL  
31 Hopkins Plaza, Room 1600  
Baltimore, MD 21201**

**Name: S [REDACTED], M [REDACTED] A [REDACTED]**

**A [REDACTED]-751**

**Date of this notice: 1/6/2020**

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:  
Noferi, Mark

Id: HkAr

Userteam: Docket

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Falls Church, Virginia 22041

File: A [REDACTED] -751 – Baltimore, MD

Date: JAN - 6 2020

In re: M [REDACTED] A [REDACTED] S [REDACTED] a.k.a. [REDACTED]  
[REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pooja Bhagat, Esquire

APPLICATION: Cancellation of removal

The respondent appeals from an Immigration Judge's March 15, 2018, decision ordering him removed from the United States. The record will be remanded.

The respondent, a native and citizen of Mexico, concedes removability by virtue of his unlawful presence in the United States (Tr. at 3), but argues on appeal that the Immigration Judge improperly denied his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012). The record will be remanded because the existing factual record does not provide us with a meaningful basis for appellate review. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

An applicant for cancellation of removal under section 240A(b)(1) of the Act must prove, among other things, that he has been a person of "good moral character" for the last 10 years and that he merits a favorable exercise of the Attorney General's discretion. The Immigration Judge found that the respondent did not carry his burden of proof in this regard because of his appearance in several photographs, which the Department of Homeland Security ("DHS") alleged were downloaded from his Facebook profile, that show him (and others) flashing gang signs with their hands (IJ at 5-6; Exh. 10). The respondent testified that he did not know the hand gesture depicted in the photos is a gang sign (Tr. at 70-71, 73, 74-75); but the Immigration Judge declined to credit that testimony. Based on the photos, the Immigration Judge denied the respondent's application for lack of good moral character and also in the exercise of discretion (IJ at 5-6).

If, within the last 10 years, the respondent has been a gang member or a person who has openly associated with or expressed support for gang members, that would be relevant evidence for the Immigration Judge to consider when evaluating whether he lacks good moral character under the "catch-all" provision of section 101(f) of the Act, or should be granted cancellation of removal in discretion. *See generally Matter of Castillo-Perez*, 27 I&N Dec. 664, 669, 670-71 (A.G. 2019). However, no evidentiary foundation has been laid for the "gang sign" photographs upon which the Immigration Judge relied here. The photos are undated, so it is not clear whether they were taken within the last 10 years, nor are they supplemented by objective evidence—such as testimony or a written statement from a qualified law enforcement officer—establishing that the gestures depicted therein are in fact "gang signs." *Cf. United States v. Clark*, 535 F.3d 571, 578-79 (7th Cir. 2008) (discussing the necessity of laying an evidentiary foundation for the admission of a photo purporting to depict a gang sign); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506

(BIA 1980) (recognizing that the statements of counsel are not evidence).<sup>1</sup> Though the DHS submitted a Record of Inadmissible/Deportable Alien (Form I-213) stating its opinion that the respondent is a gang member, the form does not identify the specific evidence that formed the basis for that conclusion.<sup>2</sup>

As no adequate evidentiary foundation appears in the record for the Immigration Judge's decision, the matter will be remanded for further supplemental fact-finding and the entry of a new decision. The Immigration Judge also summarized some other evidence of record, including the fact that the respondent has rarely paid taxes in the United States and that one of his children suffers from ADHD, but he did not make specific findings regarding this evidence in light of the legal criteria governing the respondent's eligibility for cancellation of removal. On remand, the Immigration Judge should make specific findings regarding the criteria for cancellation of removal. *See, e.g., Matter of Guadarrama*, 24 I&N Dec. 625, 627 (BIA 2008) (stating that good moral character does not require moral excellence but is the measure of a person's natural worth derived from the sum total of all his actions in the community) (citing *Matter of U-*, 2 I&N Dec. 830, 831 (BIA, A.G. 1947)); *Matter of Castillo-Perez*, 27 I&N Dec. at 669-70 (emphasizing that discretionary analysis for cancellation of removal requires a balancing of positive and adverse factors rather than a focus on one single factor to the exclusion of others); *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001) (explaining "exceptional and extremely unusual hardship" standard). We express no opinion as to the ultimate outcome of this case.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for entry of a new decision.



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FOR THE BOARD

<sup>1</sup> Whether a particular hand gesture establishes a person's gang membership or affiliation is not the sort of commonly-known fact of which we can take administrative notice under 8 C.F.R. § 1003.1(d)(3)(iv).

<sup>2</sup> The respondent also points out on appeal that he does not appear in all of the photos, and that it is unclear whether they were posted to Facebook by him or someone else (Respondent's Br. at 9-10). As several of the photos clearly depict the respondent making the pertinent hand gesture, however, the identity of the person who posted them is of marginal importance.