U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted] L[redacted], R[redacted]... **A [redacted]-540**

Date of this notice: 11/2/2018

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:
Snow, Thomas G

SmithKi
Userteam: Docket

File: A[redacted]-540 – Florence, AZ

Date: NOV - 2 2019

In re: R[redacted] L[redacted] R[redacted] L[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Carmen Abarca Wilson, Esquire

ON BEHALF OF DHS: Troy E. Larkin
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The Department of Homeland Security (DHS) appeals the Immigration Judge's decision dated May 11, 2018, granting the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). On appeal, the respondent filed a motion to dismiss the appeal, arguing that the appeal was untimely filed. We will deny the respondent's motion and dismiss the DHS' appeal on the merits.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

Initially, we will address the respondent's motion to dismiss this appeal. The respondent argues that DHS failed to file the Notice to Appeal in a timely manner, having filed it one day after the due date. We concur with the respondent that the "mailbox rule" does not apply to filing a Notice to Appeal and it must be received and filed by the deadline, not just postmarked by that deadline. However, DHS submitted evidence that it made reasonable efforts to timely file its appeal and the one-day delay was caused by the United Postal Service. In light of these circumstances, we will deny the respondent's motion to dismiss the appeal and consider the matter on appeal pursuant to 8 C.F.R. §1003.1(c). We further note that the disposition of this appeal makes the respondent's motion to dismiss moot.

The DHS argues that the Immigration Judge erred in finding that the respondent's qualifying relative, his youngest United States citizen son who was 16 years old at the time of the Immigration Judge's decision, will suffer exceptional and extremely unusual hardship if the respondent is removed from the United States to Mexico. DHS also argues that the Immigration Judge erred in finding that the respondent merits relief as a matter of discretion.

Although this is a close case, based on the professional opinion of a Licensed Clinical Psychologist, the evidence supports the Immigration Judge's determination that the respondent's youngest son will suffer exceptional and extremely unusual hardship if the respondent is removed

to Mexico. Further, we do not conclude that the Immigration Judge erred as a matter of discretion in granting cancellation of removal to the respondent.

The respondent's son underwent psychiatric testing and evaluation in March and April 2018. The report of the assessment, dated April 8, 2018, in pertinent part, notes that the son indicated that he was experiencing specific fears and anxiety surrounding situations that included his father's possible deportation. It further notes that the son appeared to justify his negative behaviors by attributing his problems to his father's immigration issues. Exh. 22, Tab E.

The Licensed Clinical Psychologist found that the son's "consistent and repetitive behaviors seem independent of his father's immigration circumstances; rather they are indicative of antisocial behaviors that are greatly lacking in judgment and insight." However, the Licensed Clinical Psychologist also provided her professional opinion that if this child "is exposed to severe stressors in his life, he will be at high risk for significant mental deterioration that will interfere with his ability to live a normal life." The diagnoses were Conduct Disorder, Adolescent Onset Type and Rule-Out Unspecified Personality Disorder, with Cluster B traits. Exh. 22, Tab E. Unfortunately, after this assessment, which recommended further psychological intervention, it does not appear that the respondent's son received any psychiatric treatment.

This medical evidence indicates that the respondent's removal would be a severe stressor in his son's life and has a high likelihood of producing "significant mental deterioration" for his youngest United States citizen son. Accordingly, we do not conclude that the Immigration Judge erred in finding that the respondent's qualifying relative would suffer exceptional and extremely unusual hardship as a result of the respondent's removal to Mexico.

Further, we will not disturb the Immigration Judge's decision to grant cancellation of removal as a matter of discretion. Although the respondent was convicted in 1997 of two counts of child abuse, that incident occurred over 20 years ago and his sentence was two years of probation with no term of imprisonment.

Of great concern, however, is the respondent's arrest in 2016 for four counts of "threat-intimidating with injury - domestic violence and damage to property." The police record indicates that the respondent had gone to his adult daughter's residence to speak with his youngest son, the qualifying relative in this case. Apparently, there was some sort of altercation and the respondent and his wife blocked their daughter's vehicle from leaving. The record indicates that the respondent threatened to shoot his daughter and the other occupants in the vehicle. Apparently, he used hand gestures and no actual firearm was involved. The record does not show a conviction based on these charges.

The Immigration Judge, in exercising her discretion, considered the respondent's criminal history and expressed her concern about his recent arrest in 2016. However, she noted that the respondent had taken classes in anger management (IJ at 6). Additionally, we note that the record demonstrates that two of the respondent's sons, including his youngest son, who is the qualifying relative in this case, testified on the respondent's behalf. While we acknowledge and appreciate the argument of DHS that the Immigration Judge's discretionary grant of relief was improper, we will not overturn that determination. Therefore, the DHS' appeal will be dismissed.

Accordingly, the following orders will be entered.

ORDER: The respondent's motion to dismiss is denied.

FURTHER ORDER: The DHS' appeal is dismissed.

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 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