U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BALTAZAR-SALCEDO, SAUL A... **A 205-934-715**

Date of this notice: 4/18/2016

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.

Userteam: Docket

File: A205 934 715 – Eloy, AZ

Date: **APR 18 2016**

In re: SAUL ALBERTO BALTAZAR-SALCEDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Salvador Ongaro, Esquire

ON BEHALF OF DHS: Julie Nelson
Assistant Chief Counsel

APPLICATION: Voluntary departure under section 240B of the Act

The respondent, a native and citizen of Mexico, appeals the decision of the Immigration Judge, dated December 2, 2015, ordering his removal from the United States. The Department of Homeland Security ("DHS") is opposed to the respondent's appeal.

We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Considering the totality of the circumstances presented, we conclude that remanded removal proceedings are warranted in order to provide the respondent with a renewed opportunity to retain counsel and present his request for voluntary departure under section 240B of the Immigration and Nationality Act, 8 U.S.C. § 1229c.[1] We recognize that the respondent initially indicated that he wished to proceed without the assistance of counsel (Tr. at 8). However, he later indicated that he had contracted his current counsel to represent him (Tr. at 26). *See Matter of C-B-*, 25 I&N Dec. 888, 890 (BIA 2012) (recognizing that, while it is critical that a detained docket move efficiently, it is also essential that Immigration Judges be mindful of a respondent's invocation of procedural rights and privileges). Moreover, despite the respondent's criminal record, the DHS expressly stated that it did not oppose his request for voluntary departure (Tr. at 17). Accordingly, the following order is entered.

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

FOR THE BOARD

[1] The respondent is subject to removal from the United States because he is an alien who is present in this country without being admitted or paroled by an immigration officer or who arrived at any time or place other than as designated by the Attorney General (I.J. at 1-2; Exh. 1; Tr. at 9-11). *See* section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ELOY, AZ 85131

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
BALTAZAR-SALCEDO, Saul Alberto	**File No. A205-934-715**
RESPONDENT	**Date: December 2, 2015**

CHARGE: INA § 212(a)(6)(A)(i); Inadmissible as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

ON BEHALF OF THE RESPONDENT:
Saul Alberto Baltazar-Salcedo, *Pro Se*
Eloy Detention Center
1705 E. Hanna Rd.
Eloy, AZ 85131

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
Department of Homeland Security
1705 E. Hanna Rd.
Eloy, AZ 85131

DECISION AND ORDER OF THE IMMIGRATION COURT

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The respondent is a native and citizen of Mexico, who last entered the United States without inspection, admission, or parole, on or about an unknown date. (Exh. 1, Form I-862.) On October 14, 2015, the respondent was issued a Notice to Appear ("NTA") by the Department of Homeland Security ("DHS" or "the Department") charging him with removability. (*Id.*) On October 19, 2015, the DHS filed the NTA with the Court, commencing proceedings and vesting jurisdiction with this Court. 8 C.F.R. § 1003.14(a).[1]

On November 24, 2015, the respondent admitted all allegations and conceded the charge of removal, pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), as amended, as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. After considering the evidence of record, the Court sustained removal by clear and convincing evidence.

[1] In removal proceedings, the NTA shall be served in person on the alien or, if personal service is not practicable, through service by mail to the alien or the alien's counsel of record. INA § 239, 8 C.F.R. § 1003.13. Here, the respondent conceded proper service of the NTA. Based upon the respondent's admissions, and the certificate of service contained in the NTA, the Court finds that the NTA was properly served.

The respondent did not expressed a fear of return to Mexico and designated Mexico as the country for removal. The respondent expressed an interest in pursuing voluntary departure; subsequently he changed his mind.

II. STATEMENT OF THE LAW

A. Removability

The Department has the burden to prove by clear and convincing evidence that the respondent is removable as charged. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. *See* INA § 240(c)(3)(A). Any document prepared by the court in which the conviction was entered, that indicates the existence of a conviction, constitutes proof of that conviction. INA § 240(c)(3)(B)(vi).

Applicable regulations provide in pertinent part that "the immigration judge may determine that removability as charged has been established by the admissions of the respondent." 8 C.F.R. § 1240.10(c) (2008). The distinct and formal admissions, made by respondent during his removal hearing, are binding on the respondent as judicial admissions. *See Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986); 8 C.F.R. § 1003.1 (d)(2)(i)(B) (2008); *see also Matter of Pichardo*, 21 I&N Dec. 330, 333 n.2 (BIA 1996) (noting that "had the respondent admitted to the Service's factual allegation or conceded his deportability... it would have been unnecessary for the Service to present a record of conviction or other documents admissible as evidence in proving a criminal conviction").

Hearsay is admissible in immigration proceedings if it is probative and its admission would not be fundamentally unfair. *See Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 680-81 (9th Cir. 2005). Records of Deportable/Inadmissible Alien (Forms I-213) are admissible and sufficient to establish removability. *See Espinoza v. INS*, 45 F.3rd 308 (9th Cir. 1995); *but see Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995).

B. Burden of Proof

The respondent has the burden of proof on applications for relief. INA §§ 240(c)(4)(A), 208(b)(1)(B)(ii); *Chebchoub v. INS*, 257 F.3d 1038, 1042 (9th Cir. 2001). More specifically, the respondent "shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds so not apply." 8 C.F.R. § 1240.8(d). An alien whose application for relief was filed after the May 11, 2005, effective date of the REAL ID Act has the burden to prove that he satisfies the applicable eligibility requirements and merits a favorable exercise of discretion under INA § 240(c)(4)(A), and must provide corroborating evidence requested by the Immigration Judge pursuant to INA § 240(c)(4)(B), unless it cannot be reasonably obtained. *Young v. Holder*, 697 F.3d 976, 988-89

(9th Cir. 2012).

C. Voluntary Departure

Voluntary departure is a form of discretionary relief and involves a weighing of positive and negative factors present in the case. Among these factors are the alien's prior immigration history, criminal history, the length of his residence in the United States, the extent of his family, business, and societal ties in the United States, and any evidence of bad character and/or the undesirability of the applicant as a permanent resident. *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972); *see also Matter of Arguelles*, 22 I&N Dec. 811, 817 (BIA 1999); *Matter of Thomas*, 21 I&N Dec. 20, 22 (BIA 1995). As cited in *Gamboa*, at 248, "The mere fact that an alien may be eligible for some form of discretionary relief does not mean that he must be granted that relief; discretion must still be exercised, *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957)." *See also Matter of M-*, 4 I&N Dec. 626 (BIA 1952); *Matter of Pimentel,* 12 I&N Dec. 50 (BIA 1967); *Matter of Wong*, 13 I&N Dec. 242 (BIA 1969). Discretion may be favorably exercised in the face of adverse factors where there are compensating elements such as long residence here, close family ties in the United States, or humanitarian needs. *Matter of S-*, 6 I&N Dec. 692 (A.G. 1955) (as cited in *Gamboa, supra,* at 248).

The burden of proof to show worthiness for a favorable exercise by the immigration court is on the respondent. *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967). The respondent cannot carry this burden by standing mute. If a respondent stands mute on the advice of counsel and refuses to answer relevant questions, voluntary departure should be denied because the respondent has failed to meet this burden of proof. *Matter of Yam*, 12 I&N Dec. 676 (BIA 1968); *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968). In determining whether an application for relief is merited as a matter of discretion, the Court is not limited to considering conduct, which has culminated in a final conviction. *See Matter of Thomas*, 21 I&N Dec. 20, 22 (BIA 1995); *see also Paredes-Urrestarazu v. INS*, 36 F.3d 801,810 (9th Cir. 1994). In addition, an applicant must show that he has the means and intention to depart immediately.

At the conclusion of removal proceedings, the Court may grant voluntary departure in lieu of removal. INA § 240B(b); 8 USC § 1229c(b). To establish eligibility, the alien must prove that he (A) has been physically present in the United States for at least one year immediately preceding the date the notice to appear was served under section 239(a) [8 USC § 1229(a)]; (B) is, and has been, a person of good moral character[2] for at least five years immediately preceding his application for voluntary departure; (C) the alien is not deportable under § 237(a)(2)(A)(iii) (aggravated felony) or § 237(a)(4) (security and related grounds) [8 USC § 1227(a)(2)(A)(iii), or 1227(a)(4)]; and (D) has established by clear and convincing

[2] Certain aliens described in INA § 101(f) cannot be found to be persons of good moral character. Even if the alien is not barred by INA § 101(f), the Immigration Judge retains discretion to evaluate the alien's moral character by weighing the negative against the favorable factors. *See Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007); *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797-798 (BIA 2005); *see also Matter of Guadarrama de Contreras*, 24 I&N Dec. 625 (BIA 2008).

evidence that he has the means to depart the United States and intends to do so. INA § 240B(b)(1). The alien must be in possession of a valid travel document. 8 C.F.R. § 1240.26(c)(2).

III. ANALYSIS AND FINDINGS

Based on the evidence of record, the above-named respondent is a single twenty-six-year-old male, native and citizen of Mexico who first entered the United States without inspection, admission or parole. The respondent has been arrested twice; he was arrested for driving under the influence in 2013, and disorderly conduct in 2015. The respondent has no children and neither of his parents have immigration status in the United States. The respondent received deferred action on September 13, 2014; it was terminated on October 14, 2015.

In sum, the respondent has not presented sufficient proof of his desirability as a resident to outweigh his negative conduct. *Matter of Gamboa, supra.* The respondent has not presented special or humanitarian needs that would warrant a favorable exercise of discretion. In reaching its decision on whether relief should be granted in the exercise of discretion, the Court has considered, weighed, and balanced, the favorable factors present in the respondent's case against the adverse factors also present. After reviewing all evidence of record, the Court finds that the negative factors outweigh the positive factors in his case. Thus, the Court will deny the respondent's application for voluntary departure in its discretion.

IV. CONCLUSION

Based on the evidence of record, the Court finds that the respondent is not a citizen or national of the United States, and that he is a citizen and national of Mexico. The Court further finds that the respondent is removable pursuant to INA § 212(a)(6)(A)(i), as an alien present in the United States without being inspected, admitted or paroled; thus, the Court sustains removability by clear and convincing evidence.

In that the respondent is not applying for any other benefits in the United States, even if eligible, the Court finds that he has deemed all other forms of relief from removal to be abandoned, and thereby waived, pursuant to 8 C.F.R. § 1003.31(c) ("If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived."). Moreover, the respondent's failure to proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file; those applications are deemed abandoned and denied for lack of prosecution. *See Matter of Pearson*, 13 I&N Dec. 152 (BIA 1969); *Matter of Perez*, 19 I&N Dec. 433 (BIA 1987); *Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992).

Despite the respondent's equities in the United States, the Court finds that the negative factors outweigh the positive ones, and, therefore, the Court will deny voluntary departure in the exercise of its discretion. That is, after assessing the totality of the evidence, this Court finds that

the respondent is removable as charged and does not merit discretionary relief under any of the forms of relief available to him. Accordingly, the Court will enter the following Orders:

ORDERS: **IT IS ORDERED** that voluntary departure is herein **DENIED**;

IT IS LASTLY ORDERED that the respondent be **REMOVED** from the United States to **MEXICO**.

Irene C. Feldman
U.S. Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision of the Immigration Judge in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before thirty calendar days from the date of service of this decision.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN (P) ALIEN c/o Custodial Officer ( ) ALIEN'S ATT/REP (P) DHS
DATE: December 2, 2015 BY COURT STAFF:
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other