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]-F[redacted], V[redacted]

A [redacted]988

Date of this notice: 7/25/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Adkins-Blanch, Charles K.
Mann, Ana

Userteam: Docket

File: [redacted] 988 – El Paso, TX Date: JUL 25 2017

In re: V[redacted] R[redacted]-F[redacted], a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brenda M. Villalpando, Esquire

ON BEHALF OF DHS: Michael Pleters
Assistant Chief Counsel

APPLICATION: Waiver of inadmissibility under section 212(c) of the Act

The respondent, a native and citizen of Mexico and lawful permanent resident of the United States, appeals from the Immigration Judge's decision dated October 5, 2016, which denied his application for a waiver of inadmissibility under the former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The parties have provided arguments on appeal. The appeal will be sustained, and the record will be remanded.

The only issue before us is whether the respondent warrants a favorable exercise of discretion, a question that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii). In making such a determination, we consider the totality of the circumstances, balancing the adverse factors affecting the alien's undesirability as a permanent resident with the favorable social and humane considerations. *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978).

Upon de novo review, we find that the respondent has met his burden to show that he merits relief in the exercise of discretion. The record shows that the respondent has been a lawful permanent resident of the United States since 1989; he has been married to his spouse, also a lawful permanent resident, since 1987; and he has three United States citizen children (I.J. at 2, 8; Exh. 4 at 4, 10-13, 17). His spouse has serious medical conditions, does not work, and relies on the respondent for assistance (I.J. at 4, 6-7; Exh. 4 at 52). We acknowledge that the respondent has a lengthy criminal history (I.J. at 9-10; Exhs. 2, 3, 4A). Although we do not wish to diminish the seriousness of that history, the respondent has no convictions since 1997. A majority of the offenses were directly related to, or at least associated with, the respondent's use of alcohol or marijuana, but the respondent testified that he stopped drinking in 1997 and stopped using marijuana in 1992 (I.J. at 3-4). Although the respondent admitted to an episode in 2002 in which he drank, it is speculative for the Immigration Judge to conclude that the respondent may be drinking now (I.J. at 6, 10; Tr. at 113-115). *See* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C) (if the Immigration Judge does not make an explicit adverse credibility finding, there is a rebuttable presumption of credibility on appeal). Although the record reflects factors that weigh against his application, considering the totality of the circumstances, we find that the respondent has met his burden to show that he merits a favorable exercise of discretion. Thus, we will sustain the appeal.

The record will be remanded to allow the Department of Homeland Security an opportunity to perform or update a background and security investigation. 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 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

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
EL PASO, TEXAS

File: [redacted]988 October 5, 2016

In the Matter of

V[redacted] R[redacted]-F[redacted]) IN REMOVAL PROCEEDINGS
)
RESPONDENT)

CHARGE: Section 237(a)(2)(C) of the Act.

APPLICATION: Waiver pursuant to Section 212(c) of the Act.

ON BEHALF OF RESPONDENT: Brenda Villanpando, attorney
El Paso, Texas

ON BEHALF OF DHS: Michael Pleters
Assistant Chief Counsel
Homeland Security
El Paso, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 58-year-old married male, native, and citizen of Mexico. He was served with a Notice to Appear on April 13th, 2012. Exhibit 1. The Notice to Appear charges that the respondent is removable under Section 237(a)(2)(C) of the Act, and that he has been convicted of any law related to a weapon/firearm. The respondent, through counsel, admitted the factual allegations in the Notice to Appear and conceded he is removable as charged. The government's support of the conviction

stated on the Notice to Appear, submitted Exhibit 2, the respondent's conviction record for the weapons possession. Based on respondent's admissions and the conviction record, the court was satisfied the respondent was removable as charged, and so did find. Mexico was designated as the country of removal. Since the respondent obtained lawful status back in 1989 and was convicted in 1995 before changes to the law, both parties agree that he was statutorily eligible for a waiver underneath the previous 212(c) section of the Immigration Act. The issue before the court today is his eligibility for that form of relief.

STATEMENT OF FACTS

The Notice to Appear, again, has been admitted as Exhibit 1. Additionally, the following documents have been marked and received into evidence. Exhibit 2 was the conviction record related to the respondent. Exhibit 3 were other criminal matters related to the respondent. Exhibit 4 was the 212(c) waiver with various supporting document, over 200 pages. Exhibit 4A was additional supporting documents focusing on respondent's criminal history. The respondent testified in support of his application. His testimony summarized as follows. It will also be noted that initially, the court first inquired of the respondent, but based on, in part, respondent's responses, the court felt best to turn the case back over to respondent's counsel, and proceeded henceforth. Once again, respondent's testimony is as follows. The respondent states he is age 58, married to Rita, his lawful permanent resident spouse. He married her in 1987, have been together since then. They have four children from that relationship, three United States citizen children, one from Mexico that resides in Mexico after being deported. The respondent testifies that he lives in a trailer with his wife, two children, and a grandson -- the trailer he purchased. He testifies that he obtained his lawful residency through amnesty in 1989, as did his spouse. According to the respondent, he started

living in the United States in 1982, subsequently obtaining lawful status. Respondent then began to review his criminal history. Respondent acknowledges having his first DWI in 1987, El Paso, Texas, where he was at home, had been drinking, went out, was stopped by police, eventually pled guilty, given a probation. Next arrest was in 1991. Once again, El Paso, Texas, driving while intoxicated, where the respondent pled guilty. Also obtained probation, completed those terms as required. His third offense was in 1992 for a third DWI. Apparently, that arrest also involved the possession of marijuana that the respondent also pled guilty to besides the DWI. He states that he used marijuana for approximately one year, in 1992. He states he has not used marijuana since 1992. In 1993, the respondent had his fourth DWI. Again, he pled guilty, only served several days in jail, and had a probated sentenced. In 1994, the incident with the gun occurred. According to the respondent, he was driving with his mother, they were in an accident that was caused by another vehicle. Apparently, his mother, unfortunately, died because of that incident, but while they were taking the respondent to the hospital, they found in his possession the pistol. The respondent states that he did not have a license for that gun, that he had the gun in his possession that day because he was trying to obtain parts for the pistol, apparently to make it functional. According to the respondent, he also pled guilty to that possession of a weapon, given probation. Respondent recall in 1995 that he was apparently at home drinking approximately 12 beers, and police came to scene because they thought he was perhaps stealing a vehicle. The result was arguing with police. Respondent indicates he does recall perhaps fighting with the police. He understands that arrest did not result in a conviction. Next, in 1996, respondent states he had his next DWI, once again in El Paso, Texas. Once again, pled guilty and complied with the terms of that conviction. In 1997, he states he had his final DWI, once again, in El Paso, Texas. According to the

respondent, he thought it best to request as part of his conviction to go into rehab, which he did, first for nine months, and then another rehab location for three months, then placed on probation for approximately four years. The respondent does acknowledge that he had a drinking problem for many years, starting when he was around age 17. He states, however, he never had an accident because of drinking and driving. Further, he testifies that since his last DWI in 1997, that he has stopped drinking. Further, he has been more involved with church and does not get involved with drugs. The respondent testifies that his wife of many years has serious medical conditions to include kidney issues, involving a need for constant dialysis or frequent dialysis care. Further, she cannot walk well, and has been hospital as recently as the previous week. The respondent testifies that he does work full time, and when he's working, his adult children help care for his wife. He does acknowledge being the primary breadwinner for the family. He testifies that some of his family siblings are in the U.S., others in Mexico. While he's working full time now in construction, apparently, in 2015, he was unemployed, and obtained government support for that year of unemployment. Government chose not to ask questions at this stage for the respondent, so the court then re-questioned the respondent. The court reviewed respondent's testimony with the evidence submitted to that, and the court noted the following concerns. It does appear, and the respondent does now acknowledge, that the DWI offense that had apparently occurred in June 1992 did involve the respondent striking another vehicle that required that driver's need to be involved to the point of having respondent's vehicle ultimately stopped and be arrested by police. Next, when questioned as to any family members in the vehicle when respondent was convicted for his numerous DWI's, initially, the respondent stated he does not believe they were ever in the vehicle. Respondent was then directed to the DWI in February 1993 that

indicates that there apparently was in this vehicle where he was driving and drinking, an unrestrained child under age two. To that end, respondent now believes that his nephew was in the vehicle at that time. Next, the court turned to the incident apparently in December of 1993, DWI, where now, the respondent does acknowledge that the court most likely is accurate when it says respondent had both his wife and child with him when arrested for that DWI. Next, the court questioned the respondent further about the gun conviction, questioning as far, in part, whether there were, in addition to the gun, any bullets. Ultimately, the respondent does now acknowledge, as is indicated on the police report, that there were apparently a brown bag with 50 cartridges of .25 automatic ammunition. The respondent testifies that while the gun was not functional, apparently not registered by the respondent, but he did choose to purchase bullets/ammunition for that weapon. Next, turning to the incident with the police in December of 1995, respondent was directed to the police report that indicates that the respondent apparently, when arrested by police, became violent, to include trying to break both windows in the police vehicle, and then kicking one of the officers in the groin area, causing that officer pain. Respondent does confirm that throughout all these convictions for DWI, that the respondent never had a driver's license even to drive in the U.S., and that he only obtained a driver's license approximately 2004. When questioned, the respondent believes that the only time that he drank to excess and drank and drove are the only times that he was arrested by police. Respondent was put on notice that the court found that highly unlikely, that in all likelihood, he had also been drinking and driving to excess times when he was not arrested by police. Further, as to marijuana use, respondent now states that his marijuana use occurred both before and after his conviction for marijuana. He states he used it till approximately December of 1993, and during that one-year use, once or twice per week. Respondent was informed

that he has no tax returns to show this court, after 2011, that he was, in fact, gainfully employed and filing taxes as required. As noted, respondent acknowledges no work in 2015. He states that his children during that time worked and provided support to the family. Another question the respondent does now also acknowledge that there was an incident in 2002 where he apparently was drunk at home and was arrested for perhaps noise violations. That apparently was dismissed. Respondent was informed that apparently, his testimony previously that he did not drink after 1997 would therefore not be accurate, since he admits drinking in 2002. Further, the court notes that the respondent, in March 1993, had his probation revoked, respondent believes, because of a subsequent DWI conviction. Testimony was then taken from respondent's wife. Her testimony's summarized as follows, but first, the court will note that the court does readily acknowledge that the respondent's wife does appear to this court to have serious medical conditions, came to court in a wheelchair with bandages on her legs, and a breathing device. This witness testifies that she has been married to the respondent since 1987, and has never separated. She states that they have gotten along very well over those many years. She states that she is aware of respondent's criminal history, that he had drinking problems in the past, and that he would drink and drive. According to the witness, she believes her husband stopped drinking about 12 years ago, and that he has changed a lot over those 12 years. Further, the witness states that the respondent's not only been a good husband, but a good father to their children, both children and grandchildren. Turning to her own medical condition, the witness acknowledges that she is undergoing dialysis, has diabetes, blood-pressure problems, and has had leg surgery. She also takes various medications for her ailments. The witness testifies that her daughter cares for her when the respondent is working. Further, the witness states that her husband, the respondent, does help her

and her children financially, and that if he's removed to Mexico, she is not sure how she could function and live. The witness asked the court not to deport her husband of many years. The witness further testifies that she had been using dialysis for approximately six years, and is still looking for a kidney donor. If a kidney donor is made available, that may make her medical condition improve. The witness does acknowledge that her husband did not work in 2015, that her children worked that year to support the family, and that while not presently working, could, again, work in the future.

STATEMENT OF LAW

The Immigration Act, 212(c), provided for waivers of inadmissibility or deportability for lawful permanent residents who had been lawfully domiciled in the U.S. for seven consecutive years, and who had not served an aggregate of more than five years' imprisonment for an aggravated felony or felonies. Once again, the parties agreed that the respondent was statutorily eligible for a 212(c) waiver.

FINDINGS OF THE COURT

The court will note that with individuals eligible for a 212(c) waiver, that they would, in all likelihood, have been lawful permanent residents for many years, and have had an ability to acquire significant equities in the United States over that time. The court further acknowledges that the decisions under Matter of Marin, 16 I&N Dec. 581 (BIA 1978) and Matter of Wadud, 19 I&N Dec. 182 (BIA 1984) should be considered when evaluating 212(c) waiver cases. Further Board decision, Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). Further, that the court should make a complete review to include favorable factors in a respondent's case. Matter of Edwards, 20 I&N Dec. 191 (BIA 1990). Further, that the court should, and must actually consider, and meaningfully address both the cost of equities and favorable evidence when reaching its decision, as well negative factors. Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992).

Further, that the court should basically waive the favorable and adverse factors in determining on balance whether on the totality of the evidence before the court whether the respondent has adequately demonstrated that he warrants a favorable exercise of discretion. Matter of Sotelo, 23 I&N Dec. 201 (BIA 2001). Further, while rehabilitation is the important factor, it is not a requisite requirement to obtain a waiver. See Matter of Edwards. The court will note the following in respondent's case. First, turning to the positive factors, the court notes that the respondent has been a lawful permanent resident for many years, since 1989. Next, that the respondent does have a long-term commitment to his wife, since 1987, and his four children, three U.S. citizens, and grandchildren in the United States. Next, the court notes that respondent's wife clearly has significant health problems. There is documentation of record, plus the respondent's wife did appear and testify. The court does, again, acknowledge that her condition is worse than most individuals at the age of 52. Further, the court acknowledges that the respondent's wife does heavily rely upon the respondent, since she is incapable of working and needs constant care through family members. Further, while they did not testify, there were letters provided by respondent's children indicating a level of hardship if their father, who they care for greatly, was deported/removed to Mexico. Further, it appears that for most of respondent's time in the United States, he has been gainfully employed, paying taxes. Turning to respondent's negative factors is where serious concern is raised and observed by this court. If the respondent only had his conviction for possession of a gun, this case would be very simple in granting respondent's waiver in the court's discretion. However, it appears to this court that the gun possession was just the tip of the iceberg as to respondent's extensive, long-term problems with the law. While the respondent repeatedly tells this court he has not had problems since 1997, it is not merely the age of respondent's criminal history that is of

importance, but also, the number of criminal involvements, and how they affected other individuals. To that end, as noted, the respondent has numerous DWI's. It appears that respondent could not control his drinking problems, and placed himself -- not only himself, but other individuals, to include family members, in potential harm's way over these numerous times that he was drinking and driving. The respondent has not one, not two, not three, but apparently, six driving while intoxicated offenses over a span of a number of years, approximately 10 years. The court finds this to be highly significant and adverse factors. Further, while the respondent did not acknowledge the evidence does indicate that at least on one incident, the respondent caused and accident to another individual, and also, on several incidents, on several incidents, had family members in the car, to include an under 2-year-old child in one incident. This clearly concerns the court as to potential harm to these individuals beyond the respondent. Further, while the respondent wishes this court to believe that he only drank to excess when he was stopped by police, the court finds it to be more-than-reasonable to believe there was many more times that respondent was drinking in excess and driving. Further, the court will note here that during all these years of drinking and driving, apparently, the respondent did not even have a driver's license to legally drive in the United States. Repeatedly, the respondent violated the law dealing with driving while intoxicated offenses. Next, the court notes that the respondent also has a conviction for marijuana. While that conviction apparently was for a small amount of marijuana, the respondent's own testimony is that he had used marijuana for approximately one year. Again, this court finds to be significant. Next, turning to the incident with the police and the respondent when the respondent had been drinking apparently had home, while the court notes that that charge did not result in a conviction, clearly, the respondent was intoxicated to a high level that actually injured a police officer. A further concern to this

court is while he states he never drank initially since 1997, his last DWI offense is that the testimony states he was, in fact, drinking in 2002. This court cannot be assured, therefore, that he is still not drinking and possibly drinking in excess. Based on a total review of respondent's criminal activity, the court finds that these numerous convictions, again, dealing with possession of a gun, possession of marijuana on a separate offense, and again, the numerous DWI's, clearly, outweigh, to this court, the positive factors that respondent maintains in the United States. While, again, there will be a struggle if the respondent is removed from the United States to Mexico, there does appear to be, again, his children living in the household that are capable of working and have working in the past. While, again, it might be difficult, there does appear to be an ability for the family without the respondent to maintain some form of stability, notwithstanding the concerns the court has noted with respondent's wife's health. Once again, the court believes that it has given the appropriate weight to both the positive and negative factors in respondent's case, and in the totality of the evidence, the court will and must find that while the respondent does have favorable factors, that, again, the negative factors dealing with his long-term criminal history outweighs the positive factors. Therefore, the court will deny respondent's request for a 212(c) waiver.

ORDERS OF THE COURT

Accordingly, the following order is hereby entered/ordered. The respondent's application for a waiver pursuant to Section 212(c) of the Act is hereby denied. It is further ordered that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

Please see the next page for electronic signature

ROBERT S. HOUGH
Immigration Judge

//s//

Immigration Judge ROBERT S. HOUGH

houghr on February 6, 2017 at 3:56 PM GMT