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

Sedaghat, Shawn S
Law Offices of Shawn Sedaghat
14011 Ventura Blvd.
Suite 400
Sherman Oaks, CA 91423

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: G[redacted]-L[redacted], A[redacted]

A [redacted]-744

Date of this notice: 7/12/2017

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:
Adkins-Blanch, Charles K.
Grant, Edward R.
Guendelsberger, John

Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished BIA decisions, visit
www.irac.net/unpublished/index/

File: [redacted] 744 – Los Angeles, CA Date: JUL 12 2017

In re: [redacted] G[redacted]-L[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Shawn S. Sedaghat, Esquire

APPLICATION: Cancellation of removal; voluntary departure; remand

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's June 16, 2016, decision denying his applications for cancellation of removal and voluntary departure under sections 240A(b)(1) and 240B(b)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229b(b)(1), 1229c(b)(1). The respondent has also filed a motion to remand on appeal. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent seeks cancellation of removal on the basis of hardship his two United States citizen children will suffer in the event of his removal to Mexico (Form EOIR-42B, Exh. 2). The Immigration Judge concluded that the evidence presented did not demonstrate that either child would experience hardship that is exceptional and extremely unusual in nature (IJ at 4-6). *See* section 240A(b)(1)(D) of the Act. On appeal, the respondent has submitted new, previously unavailable evidence pertaining to additional medical and educational hardships of his youngest child (Mot. to Remand, Tabs A-C; Respondent's Br., Tab A). Upon review, we conclude that a remand is warranted for consideration of this newly submitted evidence. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992).

In remanding the record, we note that the Immigration Judge also denied the respondent's request for cancellation of removal on the ground that he lacked good moral character during the relevant 10-year period (IJ at 3-4). Section 240A(b)(1)(B) of the Act. The Immigration Judge's finding in this regard is based on the catch-all provision of section 101(f) of the Act, 8 U.S.C. § 1101(f), and relies on instances of unfavorable conduct that no longer fall within the relevant 10-year period (*see id.*). *See Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005); *accord Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). Further fact-finding and analysis is therefore needed to determine whether the respondent meets the good moral character requirement under section 240A(b)(1)(B) of the Act.

Finally, in light of the intemperate remarks by the Immigration Judge during the prior proceedings, this matter will be reassigned to a new Immigration Judge on remand. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690-91 (BIA 2015). On remand, the parties will have the opportunity

Immigrant & Refugee Appellate Center, LLC | www.irac.net

to submit additional argument and evidence, including testimony. We express no opinion concerning the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for assignment to a new Immigration Judge and for further proceedings consistent with this decision.

FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
LOS ANGELES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.:	[redacted] 744	)
		)
In the Matter of:		)
		)
	GARCIA-LOPEZ, Arturo,	) **IN REMOVAL PROCEEDINGS**
		)
		)
Respondent		)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) (2013)—*present in the United States without being admitted or paroled*

APPLICATION: Cancellation of Removal for Certain Nonpermanent Residents

ON BEHALF OF THE RESPONDENT:
Ali Taheripour, Esquire
Law Offices of Ali Taheripour
15760 Ventura Boulevard, Suite 700
Encino, California 91436

ON BEHALF OF THE DHS:
Lee Crystal, Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. Procedural History

A[redacted] G[redacted]-L[redacted] (Respondent) is a native and citizen of Mexico. Exh. 1. On September 12, 2013, Respondent was convicted of driving under the influence (DUI) in violation of California Vehicle Code (CVC) § 23152(b) and sentenced to 120 days in jail. *See* Exh. 2, Tab D at 27-28. On September 25, 2013, the U.S. Department of Homeland Security (the DHS) served Respondent with a Form I-862, Notice to Appear (NTA). Exh. 1. Therein, the DHS alleged that Respondent is not a citizen or national of the United States, is a native and citizen of Mexico, and entered the United States without being admitted or paroled following inspection. *Id.* Accordingly, the DHS charged Respondent with inadmissibility pursuant to INA § 212(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled. *Id.* Jurisdiction vested and removal proceedings commenced when the DHS filed the NTA with the Court on October 1, 2013. *See* 8 C.F.R. § 1003.14(a) (2013).

During a hearing on December 18, 2013, Respondent admitted the factual allegations in the NTA and conceded the charge of inadmissibility. On May 14, 2014, Respondent filed with the Court a Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents. *See* Exh. 2, Tab A. As relief from removal, Respondent

Immigrant & Refugee Appellate Center, LLC | www.irac.net

seeks cancellation of removal based on hardship to his United States citizen children. In the alternative, he seeks post-conclusion voluntary departure.

For the following reasons, the Court denies Respondent's application for relief and his request for voluntary departure.

II. Summary of Testimony

The following is a summary of Respondent's testimony given under oath in court on January 27, 2015, and April 11, 2016.

Respondent testified that he was born in Oaxaca, Mexico. His wife is also from Oaxaca. Respondent and his wife have two children together: a nine-year-old son and a seven-year-old daughter. Both children were born in the United States. Respondent's son was diagnosed with vision problems when he was approximately four years old. He is required to wear glasses to treat his vision issues. Last year, Respondent and his wife took their son to the eye doctor three times. Respondent testified that his son does not need surgery to correct his vision problems, although he does require continuing treatment. Respondent's daughter does not have any health issues.

In 2010, Respondent and his wife returned to Mexico to get married there. They brought their children with them and remained there for approximately two months. Respondent testified that the milk and eggs in Mexico made his son ill, but his son was able to eat other food in Mexico. They returned to the United States in 2010. At that time, Respondent and his wife re-entered the United States illegally.

On September 10, 2013, Respondent was arrested for driving while under the influence of alcohol. Respondent testified that he drank more than ten beers before driving his car with a passenger inside. He then crashed his car into two empty parked cars. When the police arrived at the scene, Respondent told the police officer that he had only drunk two beers. Respondent testified that he lied to the police officer because he was afraid that he would be arrested. Respondent testified that this was the first time he drove while intoxicated. He testified that this was his first and only arrest.

In 2014, Respondent received a California driver's license for the first time. Prior to that, from 2003 to 2013, Respondent was driving without a license. At the hearing on January 27, 2015, Respondent testified that he did not have a license but was continuing to drive.

Respondent has been attending Alcoholics Anonymous (AA) meetings three times per week since his hearing on January 27, 2015, when the Court recommended that he do so. Respondent testified that after attending AA meetings he has learned to be a better person and spends more time with his family.

Respondent testified that, if ordered removed, he would comply with the Court's order within the time set forth by the Court. He also testified that he has documents allowing him to

Immigrant & Refugee Appellate Center, LLC | www.irac.net

enter Mexico and sufficient funds to leave the United States. Respondent testified that he would pay a voluntary departure bond of $5,000 if required to do so.

III. Law and Analysis

The Attorney General may cancel the removal of and adjust the status of an alien who is inadmissible or deportable from the United States to that of an alien lawfully admitted for permanent residence. *See* INA § 240A(b)(1). To qualify for cancellation of removal, a nonpermanent resident must establish that

> (1) [he] has been physically present in the United States for a continuous period of not less than [ten] years immediately preceding the date of such application;
> (2) [he] has been a person of good moral character during such period;
> (3) [he] has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [of the INA], subject to paragraph (5); and
> (4) . . . removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Id. "Even when an alien meets these eligibility requirements, however, he or she must establish that relief is warranted as a matter of discretion." *Ridore v. Holder*, 696 F.3d 907, 920 (9th Cir. 2012).

In this case, Respondent failed to establish that he was a person of good moral character during the ten years immediately preceding his application for cancellation of removal. Additionally, Respondent did not establish that removal would result in exceptional and extremely unusual hardship to either of his U.S. citizen children.

A. Good moral character

Respondent must demonstrate that he was a person of good moral character from 2004 to 2014, the ten-year period preceding his application for cancellation of removal. INA § 240A(b)(1)(B). Aliens described in INA § 101(f) *per se* lack the requisite good moral character. In this case, Respondent does not fall into the *per se* categories listed in INA § 101(f). However, this list is not exhaustive; the Court may find in its discretion that an alien not described in INA § 101(f) lacks good moral character. *See* INA § 101(f).

In evaluating good moral character under INA § 240A(b)(1), the Court balances the favorable and unfavorable factors bearing on the alien's character, such as school records, family background, employment history, financial status, and lack of criminal record. *See Torres-Guzman v. INS*, 804 F.2d 531, 533 (9th Cir. 1986); *Hussein v. Barrett*, No. 14-16303, 2016 WL 1719326, at *3 (9th Cir. Apr. 29, 2016).

In the present case, Respondent has failed to demonstrate good moral character during the requisite period. First, Respondent testified that he drove without a license between 2003 and 2014. Second, Respondent was convicted in 2013 for driving under the influence of alcohol in

Immigrant & Refugee Appellate Center, LLC | www.irac.net

violation of CVC § 23152(b) and sentenced to 120 days in jail. *See* Exh. 2, Tab D at 17. The arrest report indicates that Respondent had a blood alcohol level of 0.18 or 0.19 percent. *See* Resp't's Suppl. Docs. (Nov. 28, 2014), Tab L at 286. Moreover, Respondent testified that he lied to police officers who arrived on the scene of the crash, telling them he drank only two beers, instead of ten beers. *See also id.* at 284. Respondent also testified that he continued to drive without a license after being convicted of a DUI in 2013. Respondent's decision to drive while under the influence of alcohol and repeatedly drive without a license reflects his disregard for the law and for the safety of the public.

Third, Respondent claimed tax benefits to which he was not entitled. Specifically, Respondent improperly claimed his mother, sister, and one or both grandparents as dependents on his United States tax returns from 2003 through 2007; improperly claimed his mother and sister as dependents on his tax returns from 2008 through 2011; and improperly claimed his mother as a dependent on his tax returns in 2012 and 2013. *See* Resp't's Suppl. Docs. (Oct. 22, 2014), Tab J. Although Respondent submitted evidence that he subsequently filed amended tax returns for those years with the Internal Revenue Service, *see* Resp't's Suppl. Docs. (Jun. 30, 2015), Tab P, the Court notes that he filed the amended returns only after the Court identified his false claims to tax benefits as a potential reason for denying his application for cancellation of removal on the basis of good moral character.

In assessing whether Respondent is a person of good moral character, the Court also acknowledges the positive factors in this case. Respondent has two young United States citizen children. *See* Exh. 2, Tab E at 36, 49. He also has a history of steady employment, *see* Resp't's Suppl. Docs. (Oct. 22, 2014), Tab J, and provided positive character reference letters from his employers. *See* Exh. 2, Tab D at 34-5. Nevertheless, Respondent's history of driving without a license, driving under the influence, and claiming tax benefits to which he was not entitled, all weigh against a finding of good moral character. Accordingly, the Court finds that Respondent is not eligible for cancellation of removal under INA § 240A(b)(1), and pretermits his application for relief.

B. Hardship to qualifying relative

In the alternative, the Court will deny Respondent's application for cancellation of removal based on his failure to demonstrate "exceptional and extremely unusual hardship" to a qualifying relative. *See* INA § 240A(b)(1)(D). To establish exceptional and extremely unusual hardship, an alien must show that his qualifying relative would suffer hardship substantially beyond that which would ordinarily result from the alien's removal. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 59 (BIA 2001). When the qualifying relative is an alien's child, the Court considers the child's best interests, including his or her age, health, and any special educational needs, among other considerations. *See Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1012 (9th Cir. 2005); *Matter of Recinas*, 23 I&N Dec. 467, 468 (BIA 2002). If the qualifying child will accompany the alien to the country of removal, the Court considers "adverse conditions that [the child] might experience" there. *Cabrera-Alvarez*, 423 F.3d at 1012. The Court also takes into account the child's financial support and educational opportunities in the country of removal. *Id.* The standard of living and other country conditions in the country in question are relevant to determining hardship to the child but are "generally . . . insufficient in

Immigrant & Refugee Appellate Center, LLC | www.irac.net

themselves to support a finding of exceptional and extremely unusual hardship." *Monreal-Aguinaga*, 23 I&N Dec. at 63-64.

In this case, Respondent has two qualifying relatives: his United States citizen son and United States citizen daughter. It is not clear whether Respondent's children would return with him to Mexico or remain in the United States with their mother, who lacks lawful immigration status. Respondent asserts that his removal would constitute exceptional and extremely unusual hardship to his son, Arturo, due to his son's health issues. Respondent presented evidence that Arturo suffers from two eye-related conditions: esotropia (eye turned inward) and amblyopia (reduced vision in one eye). *See* Resp't's Suppl. Docs. (Oct. 22, 2014), Tab I at 161; Resp't's Suppl. Docs. (Nov. 28, 2014), Tab M at 288. The evidence indicates that Arturo receives vision therapy for his condition. *See* Resp't's Suppl. Docs. (Oct. 22, 2014), Tab I at 163. Respondent testified that Arturo wears glasses to treat his medical issues. Respondent also testified that he believes Arturo's condition does not require surgery. Additionally, according to Respondent, Arturo became ill when the family traveled to Mexico in 2010 due to the milk and eggs he ingested there. However, Respondent stated that Arturo was able to eat other foods in Mexico without issue. Respondent has not presented evidence that his daughter has any special medical or educational needs.

The Court finds that, despite Arturo's medical conditions, Respondent's removal to Mexico will not constitute exceptional and extremely unusual hardship to Arturo. Respondent does not argue that Arturo would be unable to receive necessary medical care for his eye condition were he to return to Mexico. Similarly, although Arturo had difficulty digesting certain foods during the family's trip to Mexico in 2010, Respondent testified that Arturo was able to eat other foods in Mexico. Therefore, Arturo's dietary restrictions also do not rise to the level of exceptional and extremely unusual hardship.

Additionally, Respondent presented evidence of country conditions in Mexico, including unemployment, poor economic growth, and limited educational opportunities. *See generally* Resp't's Suppl. Docs. (Oct. 22, 2014), Tab K; Exh. 2, Tab G. However, poor economic conditions alone are not sufficient to support a finding of exceptional and extremely unusual hardship. *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002). Moreover, although Respondent testified that he currently provides for his family financially, he has not demonstrated that he will be unable to do so if he is removed to Mexico. Furthermore, although the quality of education in Mexico might be lower than in the United States, Respondent has not demonstrated that his children would be prevented from attending school in Mexico were they to return with him. *See id.* (differentiating between diminished educational opportunities and total deprivation of schooling in determining hardship).

Therefore, having considered all of the evidence in this case, including Respondent's children's personal circumstances as well as the conditions in Mexico, the Court finds that Respondent's removal will not constitute exceptional and extremely unusual hardship to either of his United States citizen children. Accordingly, the Court denies Respondent's application for cancellation of removal on this ground.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

C. Discretion

In addition to demonstrating statutory eligibility, an alien who applies for cancellation of removal bears the burden of showing that relief is warranted in the exercise of discretion. *See Ridore*, 696 F.3d at 920; *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). To determine whether an exercise of discretion is merited, the Court considers favorable factors such as family ties in the United States, hardship to an alien and his family, duration of residence, and history of employment; as well as negative factors such as the underlying grounds of removal, any criminal history, and evidence of bad character. *See Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998).

In the present case, even if Respondent were statutorily eligible for cancellation of removal, the Court would exercise its discretion to deny his application. The Court recognizes the favorable factors in this case: Respondent has two United States citizen children, has resided in the United States for over ten years, has had steady employment during that period, and provided positive letters of reference attesting to his character and work ethic. *See* Exh. 2, Tab D at 34-5, Tab E at 36, 49; Resp't's Suppl. Docs. (Oct. 22, 2014), Tab J. Nevertheless, the Court finds that the adverse factors in Respondent's case outweigh the favorable considerations. As noted *supra* Part III.A, the negative factors in this case are significant; for almost the entire duration of his residency in the United States, Respondent drove without a license. He presented a further danger to the public by driving with a blood alcohol level of at least 0.18 percent after drinking ten beers and crashing into parked cars. He then attempted to avoid responsibility for his actions by lying to a police officer who arrived at the scene of the crash. Additionally, Respondent claimed benefits to which he was not entitled on his tax returns every year from 2003 to 2013. The Court acknowledges Respondent's subsequent efforts to address his alcohol addiction and amend his improper tax returns. Nonetheless, Respondent only took these remedial measures at the direction of the Court, which lessens their mitigating effect. Based on the totality of the circumstances, the Court finds Respondent has not met his burden of establishing that he warrants relief as a matter of discretion. *See C-V-T-*, 22 I&N Dec. at 14.

D. Voluntary Departure

Finally, Respondent seeks post-conclusion voluntary departure. The Attorney General may permit an alien to depart the United States at his own expense, in lieu of removal, if the alien: (1) has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; (2) is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure; (3) is not deportable under INA § 237(a)(2)(A)(iii) or (a)(4); and (4) has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. *See* INA § 240B(b)(1)(A)-(D). In determining whether to exercise its discretion to grant voluntary departure, the Court may consider factors such as the alien's prior immigration history, his prior entries into the United States, his length of residence in the United States, family ties to the United States, and other humanitarian factors. *See Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972).

In this case, Respondent failed to demonstrate that he was a person of good moral character for at least five years immediately preceding his application for voluntary departure.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

See supra Part III.A. In so finding, the Court focuses on Respondent's disregard for the laws of the United States and for the safety of others. Respondent testified that he regularly drove without a license during the relevant five-year period. Respondent was also arrested in 2013 for driving with a blood alcohol level significantly higher than the legal limit. *See* Resp't's Suppl. Docs. (Nov. 28, 2014), Tab L at 286. He then proceeded to lie to the arresting police officer in an effort to diminish the seriousness of his offense. He was convicted of driving under the influence of alcohol in violation of CVC § 23152(b) and sentenced to 120 days in jail. *See* Exh. 2, Tab D at 17. Drunk driving is a serious offense that presents a grave danger to the public. *See, e.g.*, DHS's Background Information Regarding Driving Under the Influence (Jan. 27, 2015). Finally, as discussed in *supra* Part III.A., Respondent improperly claimed dependents on his tax returns during the relevant five-year period. In doing so, he received benefits from the United States to which he was not entitled. Although the Court acknowledges Respondent's efforts to address his alcohol addiction through regular attendance at AA meetings since 2015, as well as his recent amendment of his tax returns, Respondent's conduct during the relevant five-year period renders him ineligible for the privilege of voluntary departure.

Accordingly, the Court will enter the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for Cancellation of Removal for Certain Nonpermanent Residents pursuant to INA § 240A(b) be **PRETERMITTED and DENIED.**

IT IS FURTHER ORDERED that Respondent's request for voluntary departure be **DENIED.**

IT IS FURTHER ORDERED that Respondent be **REMOVED** from the United States to **MEXICO** pursuant to the charge of removability contained in the NTA.

ALTERNATE ORDER

Should Respondent be found statutorily eligible for Cancellation of Removal for Certain Nonpermanent Residents pursuant to INA § 240A(b)(1), **IT IS FURTHER ORDERED** that Respondent's application be **DENIED** in the Court's discretion.

Date: June 16, 2016

Anna Ho
Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty (30) calendar days from the date of service of this Order.

Immigrant & Refugee Appellate Center, LLC | www.irac.net