U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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3400 FM 350 South
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Name: [redacted] [redacted]

Date of this notice: 2/25/2011

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:
Pauley, Roger

File: A[redacted] - Houston, TX

Date: FEB 25 2011

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dalia Castillo-Granados, Esquire

ON BEHALF OF DHS: John W. McPhail
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization Service, appeals from an Immigration Judge's October 14, 2010, decision granting the respondent's application for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(a). The appeal will be dismissed and the record will be remanded for completion of background checks and security investigations.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). The Board reviews *de novo* questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The respondent is a native and citizen of Mexico who entered the United States as a lawful permanent resident in 1979 when he was about 27 years old (Exh. 1; I.J. at 3). He has three United States citizen children and three United States citizen grandchildren (I.J. at 4). He only has a relationship with his daughter from his first marriage and his grandchildren (*Id.*). The respondent worked steadily since his admission until 2007, when he was injured in a work-related accident (*Id.*). The respondent has a history of significant volunteer work at his Pentecostal church and other churches, including teaching English classes and reading, providing construction-related assistance and advice, and reading to children (*Id.*; Tr. at 84-85). He also has done service work for a community theater group (Tr. at 97).

The respondent has suffered the following convictions and arrests of note: (1) a 1988 conviction for possession of over 5 but less than 50 pounds of marijuana, (2) a 2009 conviction for possession

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of less than 1 gram of cocaine, (3) a 1997 conviction for evading arrest at a traffic stop, (4) a 2003 conviction for driving with a suspended license, and (5) a 2006 incident of fighting at his workplace (I.J. at 4-5; Exhs. 3, 5, 6). The Immigration Judge considered the respondent's testimony offering his explanation for his involvement in the above-noted incidents (I.J. at 5). That is, he indicated that he was not the primary participant in the marijuana scheme, but admitted that he provided assistance to a relative who was dealing the drug (Tr. at 81). As to the 2009 incident with the cocaine, the respondent denied that it was his and denied having a problem with cocaine (Tr. at 83). He stated that the 1997 evading arrest conviction resulted from him speeding and running a red light (Tr. at 90). He described the fighting incident as relating to his attempt to break up a workplace fight, and indicated that everyone involved received the same punishment, i.e., a $100 fine (Tr. at 82).

The Immigration Judge took all of the above explanations into account and in so doing, implicitly found the respondent credible and credited his testimony. On appeal, the DHS argues that the respondent's testimony sought to "downplay" and "minimize" his criminal history and that he has not shown rehabilitation. *See* DHS's Brief at 3-7. The DHS argues that the record would support an inference that the respondent has a continuing problem with abuse of controlled substances and that he was attempting to conceal his criminal history (*Id.*).

The sole question to be decided on appeal is whether the respondent merits relief under section 240A(a) of the Act in the exercise of discretion, a matter which this Board reviews *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2004). In making this determination, we must balance the adverse factors evidencing the respondent's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of cancellation of removal appears in the best interests of this country. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). Among the factors deemed adverse to an alien are the nature and underlying circumstances of the removability ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

Although we find the question close, we are not persuaded that the negative factors militate against a favorable exercise of discretion in this instance. We agree with the DHS position that the conviction for possession of a large amount of marijuana suggests at least some knowledge that trafficking was planned, and as such, indicates that this is a serious matter that tends to cut against a positive exercise of discretion. But we do not agree with the assertion that the respondent's testimony attempted to downplay this crime, since he readily admitted that he "knew" that his cousin was going to attempt to "sell marijuana" and that he went along with the scheme out of "stupidity" (Tr. at 81, 86, 95). We also are aware of the fact that this incident occurred some 22 years ago and that the respondent has had no further apparent involvement in drug trafficking. His 2009 conviction

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for possessing a small amount of cocaine also is a negative factor, but by itself does not necessarily suggest recent or persistent involvement in drug trafficking, as the DHS appears to suggest.

Furthermore, we reiterate that the Immigration Judge apparently found the respondent credible. The DHS does not point out clear error in this determination and our review of the record reveals none. Therefore, we find no cause to disturb the Immigration Judge's reliance, for discretionary purposes, on the respondent's explanations of the circumstances of the various incidents at issue, both minor and serious. In sum, although we do not condone any of the respondent's criminal conduct, we note that aside from the long ago marijuana possession incident, the rest of the convictions are relatively minor and did not cause serious injury. The respondent has a very long history of lawful residence and employment, and has submitted evidence of significant service to his community. Overall, we are unpersuaded that the grant of relief in this case should be overturned.

Accordingly, the following orders will be entered.

ORDER: The 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 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