

Falls Church, Virginia 22041

File: A (b)(6) – New York, NY

Date: JAN 24 2018

In re: (b)(6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Dalbir Singh, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of India, has appealed from the decision of the Immigration Judge dated December 2, 2016, denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The appeal will be sustained.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a “clearly erroneous” standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Upon de novo review of the application of law to the facts, we find that the respondent has established his eligibility for a grant of cancellation of removal as a nonpermanent resident under section 240A(b)(1) of the Act. The respondent has the burden to establish that he satisfies the applicable eligibility requirements for cancellation of removal. Section 240(c)(4)(A)(i) of the Act, 8 U.S.C. § 1229a(c)(4)(A)(i). These include the requirements that he has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of his application for cancellation of removal, and that his removal would result in exceptional and extremely unusual hardship to his spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.¹ Sections 240A(b)(1)(A) and (D) of the Act. A period of continuous physical presence is deemed to end upon service of a Notice to Appear. Section 240A(d)(1) of the Act.

The respondent was personally served with a Notice to Appear on December 31, 2012, and thus must establish his continuous physical presence in the United States for not less than 10 years preceding that date. Although the respondent’s testimony regarding his travels more than a decade earlier was vague, and he offered three different months in 2002 for when he arrived in the United States (IJ at 3; Tr. at 2, 11, 24-29, 53-54), he consistently reported having entered the United States more than 10 years prior to December 31, 2012. Additionally, he presented a

¹ The Immigration Judge’s finding that the respondent established the necessary good moral character for a grant of cancellation of removal is supported by the record and has not been challenged on appeal (IJ at 3-4). Section 240A(b)(1)(B) of the Act.

Michigan driver's license along with a Driver License and ID Card Request Form dated November 13, 2002, which place him in the United States more than 10 years preceding service of the Notice to Appear (IJ at 3; Exh. 3 at Tabs F, G). We find that this evidence placing the respondent in the United States prior to December 31, 2002, along with evidence of his presence in this country, which includes birth certificates for two children born in the United States, a rent statement, documents relating to the purchase and registration of a vehicle, a Bilingual Parent Interview relating to the respondent's daughter's development (Exh. 3, Tab J), and an affidavit from the respondent's friend, along with the respondent's unchallenged testimony that he has resided continuously in the United States since 2002, is sufficient to meet the respondent's burden of proof with respect to his continuous physical presence in the United States (IJ at 3; Tr. at 32-42; Exh. 5 at 5).

Additionally, the respondent established that the hardship that would be visited upon his eldest United States citizen daughter reaches the level of "exceptional and extremely unusual." See section 240A(b)(1)(D) of the Act; *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); cf. *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). The respondent presented evidence that his eldest daughter has developmental delays that are quite profound and for which she requires constant supervision, special education services, and extensive rehabilitative services (Exh. 4 at Tabs E-I). The fact that she spent 2 years in India, where she has extended family (IJ at 5; Tr. at 51-53), does not alter our finding regarding the hardship she would experience in the future should the respondent be removed from the United States, especially where it is unclear when she lived in India and it is unlikely that the necessary educational or rehabilitative services would be available to her there. If the respondent's daughter should remain in the United States, the loss of not only the respondent's financial support, but his help in providing the constant supervision and extensive care that she requires, would amount to exceptional and extremely unusual hardship. The respondent has established the statutory requirements for a grant of cancellation of removal, and we find that he merits a favorable exercise of discretion. Accordingly, the respondent's appeal will be sustained.

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

Board Member Patricia A. Cole respectfully dissents. I would dismiss the respondent's appeal and affirm the Immigration Judge's finding that the respondent did not meet his burden of proof to establish the requisite continuous physical presence in the United States for cancellation of removal relief. The Immigration Judge gave the respondent more than 2 years to submit documentary evidence of his continuous presence and found that the evidence he submitted was "insufficient and too sporadic" to show his continuous physical presence in the United States including the absence of his children's supporting school and medical records (IJ at 3). I would not reach the question of whether the respondent met his burden of establishing that the hardship to his children if he should be removed to India is exceptional and extremely unusual.