

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b)(6) - Memphis, TN

Date: **APR 11 2018**

In re: (b)(6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Divyesh R. Gopal, Esquire

ON BEHALF OF DHS: William A. Lund
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated April 7, 2017, denying his application for cancellation of removal, but granting his request for voluntary departure. Sections 240A(b) and 240B of the Immigration and Nationality Act, 8 U.S.C. §§ 1229b(b) and 1229c. The Department of Homeland Security has filed a brief in opposition to the appeal. The appeal will be sustained and the record remanded for appropriate background checks.

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) (2017). 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).

The Immigration Judge found the respondent did not demonstrate that his removal would result in exceptional and extremely unusual hardship to his United States citizen children. Section 240A(b)(1)(D) of the Act. The Immigration Judge did, however, find the respondent had met the other requirements for the requested relief, including the necessary continuous physical presence and good moral character, and he did not find that relief should be denied in the exercise of discretion. As we find the respondent has demonstrated the required level of hardship to his qualifying relatives, we find him eligible for the requested relief. We will remand the record for the appropriate background checks.

The respondent has three United States children, who were 8, 5, and 2 years old at the time of the merits hearing (Tr. at 84-86; Exhs. 5, 8). He lives with the mother of the children and the couple had a public marriage ceremony in 2012, but they are not legally married. The respondent remains married to his first spouse, who lives in Mexico with two other grown children fathered by the respondent. The respondent testified he has been unable to divorce his first spouse. Although the respondent has given conflicting accounts of his marital status throughout the proceedings, and this situation was held against him by the Immigration Judge in exercising discretion, the Immigration Judge did not deny relief in the exercise of discretion.

The Immigration Judge considered hardship to the three United States citizen children, but, properly, not to the mother given the uncertainty over the legality of the marriage (IJ at 4, 13). Although the Immigration Judge discusses the respondent's partner's drug problems (IJ at 4-5), we agree with the respondent that he did not specifically consider the increased hardship to the children that may result given the instability of their mother's situation (Respondent's Br. at 22).

The respondent's partner, and mother of the children, has been involved in drugs and she abandoned the respondent and the children for 1 year in 2011, and then spent 10 months in prison in 2013 for kidnapping and theft (IJ at 4-6). During this time, the respondent obtained custody of the children and provided for their care. Although the partner has been released and is now drug free and back with the family, we agree with the respondent that the tenuous nature of her status leaves the children facing significant hardship. The respondent provides financially for the family and cares for the children.

Two of the children have medical problems. The eldest has significant mental health problems, including bipolar disorder, and the respondent takes him to several doctors on a weekly basis (Tr. at 88-93). The respondent also testified that the youngest has heart problems and tires easily (*id.*). The Immigration Judge notes that the only medical evidence submitted shows the eldest suffers from attention deficit disorder and that the youngest has gastroesophageal reflux (IJ at 14; Exh. 6B). However, the Immigration Judge also found the respondent to be credible and he testified to these more serious problems. While the medical problems should have been better documented, they do increase the level of hardship the children will face.

The Immigration Judge properly did not consider what hardship the children's mother might face, as she is not a qualifying relative. More importantly, however, we do consider the problems the children will face due to their mother's dependence on drugs and her mental disorders. She has, apparently, been unable to care for the children in the past, with the respondent providing all of the financial support and most of the emotional, medical and educational support. The mother was missing entirely from their lives for a year and then for an additional 10 months due to her incarceration. Although she was drug free at the time of the hearing, the risk her drug addiction and mental health status poses is a significant hardship if the respondent were to be removed.

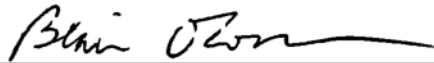
While we consider this a close case, we disagree with the Immigration Judge and find, in the aggregate, that the hardship the children will face is substantially beyond that faced by others with a family member required to leave the United States after living here for a lengthy period of time. See *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); see also *Gomez-Perez v. Holder*, 569 F.3d 370, 373 (8th Cir. 2009); cf. *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002) (concerning outer limits of hardship standard).

Given our finding of exceptional and extremely unusual hardship, and the Immigration Judge's conclusion that the respondent meets the other requirements, the following orders will be granted.

ORDER: The appeal is sustained and the respondent is found eligible for cancellation of removal.

(b)(6)

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