

NOT FOR PUBLICATION

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

MATTER OF:

(b)(6)

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(b)(6)

FILED

Apr 11, 2022

Respondent

ON BEHALF OF RESPONDENT: Samson Koyonda, Esquire

ON BEHALF OF DHS: David L. Meek, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS

On Appeal from a Decision of the Immigration Court, Orlando, FL

Before: Creppy, Appellate Immigration Judge; Hunsucker, Appellate Immigration Judge; Petty,
Appellate Immigration Judge

Opinion by Appellate Immigration Judge Creppy

CREPPY, Appellate Immigration Judge

The respondent, a native and citizen of El Salvador, appeals the Immigration Judge's July 31, 2019, decision denying his application for cancellation of removal for certain non-permanent residents under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security opposes this appeal. The appeal will be sustained, and the record remanded for further proceedings consistent with this opinion and entry of a new decision.

We review all 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 all other issues on appeal from an Immigration Judge, including questions of law, discretion or judgment, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge did not identify any impediments to the respondent's ability to establish the requisite physical presence, good moral character, and absence of any disqualifying criminal convictions for purposes of cancellation of removal for certain non-permanent residents (IJ at 4). Section 240A(b)(1)(A)-(C) of the Act. Thus, the sole issue on appeal is whether the respondent established that his removal would result in exceptional and extremely unusual hardship to his qualifying relative(s) (IJ at 4; Respondent's Br. at 7). Section 240A(b)(1)(D) of the Act.

The respondent has a total of seven qualifying relatives: his United States citizen wife, and six United States children and stepchildren, three who were 12 years old and three others who were 9 years, 3 years, and 16 months old at the time of the final hearing (IJ at 2, 5; Tr. at 31-33, 35, 37-43; Exhs. 2, 3B). Section 101(b)(1)(B) of the Act, 8 U.S.C. § 1101(b)(1)(B) (defining children

under the Act as including stepchildren where the stepparent/stepchild relationship is formed before the child turns 18 years old); see generally *Matter of Portillo-Gutierrez*, 25 I&N Dec. 148 (BIA 2009) (clarifying that stepchildren who qualify as children under the Act also are qualifying relatives for purposes of any application for cancellation of removal for certain non-permanent residents). Four of the children were living with the respondent and his wife at the time of the final hearing (IJ at 3; Tr. at 43). As acknowledged by the respondent on appeal, at the time of the final hearing, the respondent did not know whether his wife and children would remain in the United States or accompany him to El Salvador should he be required to leave the United States (Tr. at 45-46, 73; Respondent's Br. at 6).

To satisfy the exceptional and extremely unusual hardship requirement, the respondent must establish that the hardship to his qualifying relative(s) would be "substantially different from, or beyond, that which would be normally expected from the deportation" of the respondent from the United States. *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001); see also *Matter of Andazola*, 23 I&N Dec. 319, 321 (BIA 2002). Relevant hardship factors include the qualifying relatives' ages, health, and other circumstances. See *Matter of Monreal*, 23 I&N Dec. at 63. Adverse country conditions in the country to which a respondent may return may be considered only to the extent they would affect qualifying relatives. *Id.* The respondent bears the burden of proof as to whether qualifying relatives will leave with the respondent or remain behind in the United States. See *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994). On appeal, the respondent argues that the Immigration Judge erred in concluding he did not establish exceptional and extremely unusual hardship to a qualifying relative or relatives, because the Immigration Judge did not consider all hardship factors in the aggregate (Respondent's Br. at 8-13).

The Immigration Judge's limited factual findings are not clearly erroneous. Two of the respondent's qualifying relatives have identified health issues (IJ at 6; Tr. at 32, 44). The respondent's wife has three herniated discs sustained in an automobile accident a year before the final hearing, for which she was then seeing a chiropractor (IJ at 6; Tr. at 73-78). However, she was able to work full-time in a medical office and had only missed a few days of work over the previous year because of the injury (IJ at 6; Tr. at 79). The respondent's then 9-year-old stepson has Attention Deficit/Hyperactivity Disorder (ADHD), for which he takes medication (IJ at 6; Tr. at 52-53).

However, we conclude that the Immigration Judge did not engage in adequate fact finding to allow for us to fully and properly consider all relevant hardship factors in the aggregate upon de novo review (IJ at 4-6). See *Matter of A-P-*, 22 I&N Dec. 468, 476-77 (BIA 1999) (explaining that an Immigration Judge's decision must be supported by sufficient findings of fact and conclusions of law to put the parties on notice regarding the basis for the decision and to allow for the Board to conduct appellate review of any appellate challenges raised). Moreover, as a matter of law, the Immigration Judge did not apply the relevant authorities for conducting the hardship analysis (IJ at 4-6). See *Matter of Monreal*, 23 I&N Dec. at 63; see also *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002).

For example, with respect to discrete hardship considerations, the Immigration Judge did not acknowledge the potential family separation and international custody considerations involving

the respondent's stepchildren and their biological fathers that may arise should the respondent and his wife relocate in El Salvador together (Respondent's Br. at 12). Further, although the Immigration Judge made some findings on the wife's health condition, he did not fully consider the educational, cultural, and medical adjustments that the respondent's stepson, who has ADHD, may experience should the child relocate to El Salvador with the respondent (IJ at 6; Respondent's Br. at 11-13). *See generally Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020) (outlining a framework for evaluating medical hardship in conducting an overall exceptional and extremely unusual hardship analysis).

Moreover, the Immigration Judge did not adequately consider all seven of the respondent's qualifying relatives in his hardship determination (IJ at 4-6). The Immigration Judge must consider the hardship to qualifying relatives in the aggregate, including the respondent's wife and all six children. *Matter of Monreal*, 23 I&N Dec. at 63; *see also Matter of Portillo-Gutierrez*, 25 I&N Dec. at 149 (stating that stepchildren who qualify as children under the Act are qualifying relatives and must be considered in the hardship determination).

Thus, we conclude that remand of the record is appropriate to allow the Immigration Judge to reconsider the respondent's eligibility for the requested relief or any other relief for which he may now be eligible.¹ We express no opinion about the appropriate outcome in these proceedings. However, we conclude that remand of the record is appropriate given the inappropriate focus on factors outside the hardship factors outlined in relevant Board precedent in the Immigration Judge's opinion and only limited factual findings precluding us from evaluating hardship *de novo*.

Based on the foregoing, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

¹ The respondent states on appeal that a Petition for Alien Relative (Form I-130) was filed on his behalf by his United States citizen wife on April 4, 2017, and approved December 20, 2018, providing him with potential eligibility for a provisional waiver of inadmissibility sought in conjunction with advance permission to reapply for admission before U.S. Citizenship and Immigration Services as part of consular processing of an immigrant visa (Respondent's Br. at 4). 8 C.F.R. § 212.7(e)(3). In order to qualify for a provisional waiver, these proceedings would need to be administratively closed. 8 C.F.R. § 212.7(e)(4)(iv). During the pendency of this appeal, the Attorney General held that administrative closure is potentially available to a respondent pursuing this collateral form of relief. *Matter of Cruz-Valdez*, 28 I&N Dec. 326, 328-29 (A.G. 2021).