

BOARD DECISION



U.S. Department of Justice

Executive Office for Immigration Review

***Board of Immigration Appeals
Office of the Clerk***

*5167 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041*

**ROSSATY, GILBERTO G
1115 N. IMPERIAL AVENUE
EL CENTRO, CA 92243**

**U.S. DHS - Trial Attorney Unit/ELC
1115 N. Imperial Ave.
El Centro, CA 92243**

Name: (b) (6)

(b) (6)

Date of this notice: 3/14/2008

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**

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - El Centro, CA

Date: MAR 14 2008

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: John J. Yap
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent, a native of Guatemala, has appealed the Immigration Judge's December 26, 2007 decision finding him removable and denying his application for cancellation of removal for certain lawful permanent residents under section 240A(a) of the Immigration and Nationality Act. The Department of Homeland Security (DHS) has filed a motion for summary affirmance. We will dismiss the appeal.

This Board reviews an Immigration Judge's findings of fact under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(1). Under this standard, the Board may not reverse an Immigration Judge's fact-finding unless we determine that the Immigration Judge committed clear error. See *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error).

We find no clear error in the Immigration Judge's factual findings. We agree with the Immigration Judge that the respondent's negative equities, including his criminal history, outweigh his family ties and other positive equities. See *I.J.* at 5-10; *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). Specifically, the respondent has been convicted of grand theft auto, theft, driving while under the influence, possession of drug paraphernalia, possession of a controlled substance, petty theft with priors, and violating his probation. Additionally, although the respondent has had various types of gainful employment, as noted in his application for cancellation of removal, he has failed to file income tax returns since 1994. These numerous crimes were committed over a period of some 20 years, from 1986 to 2006. We agree with the Immigration Judge that the record shows recidivist behavior over a lengthy period of time.

(b) (6)

On appeal, the respondent argues various Constitutional issues, including an allegation that the Immigration Judge denied his right to due process by requiring him to proceed without counsel. We disagree based on the record which clearly shows that the Immigration Judge provided the respondent with an opportunity to obtain counsel and the respondent stated his wish to not have more time to get an attorney but to proceed with the hearing (Tr. at 4). In regard to the claimed denial of equal protection under the Fourth, Fifth and Fourteenth Amendments, alleging that the Immigration Judge ordered him removed "based on a trial court charging document and nothing more," we find this argument without merit. The record contains numerous criminal court documents in addition to charging documents. On appeal, the respondent also claims that he has "a colorable citizenship claim." However, the evidence of record does not demonstrate that he is a United States citizen, only that he obtained status as a lawful permanent resident.

Additionally, the respondent argues in the Notice of Appeal that the Immigration Judge ignored the fact that he did not commit any crime that was a "deportable crime" or an aggravated felony or a crime involving moral turpitude. However, contrary to this argument, the Immigration Judge specifically found that none of the respondent's criminal convictions constitutes an aggravated felony and that the issue is whether the respondent deserves relief as a matter of discretion (I.J. at 5).

The respondent further argues that the Immigration Judge abused his discretion and that he has strong family ties in the United States, including his 17 year old and 18 year old sons who are United States citizens. We disagree and find that the Immigration Judge thoroughly considered the positive and negative factors. In regard to the respondent's United States citizen children, they are both almost adults, the evidence indicates that the respondent has not provided them with very much support, and they live with their mother in Iowa, indicating that the respondent, who lives in California, does not spend much if any time with them.

We agree with the Immigration Judge's determination that the respondent's numerous criminal activities, as noted above, outweigh any positive equities. The Immigration Judge's conclusions were reasonable and we find no reason to overturn them. Accordingly, the appeal is dismissed.


FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
El Centro, California

File No.: A (b) (6)

December 26, 2007

In the Matter of

(b) (6)

Respondent

)
)
) IN REMOVAL PROCEEDINGS
)
)

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, an alien who, at any time after admission, has been convicted of a violation of a law of a state relating to a controlled substance.

APPLICATIONS: Cancellation of removal for certain permanent residents.

ON BEHALF OF RESPONDENT:
HOMELAND SECURITY:

Pro se

ON BEHALF OF DEPARTMENT OF

John Yap
Assistant Deputy Chief Counsel
Immigration and Customs
Enforcement
1115 North Imperial Avenue
El Centro, California 92243

DECISION AND ORDER OF THE IMMIGRATION JUDGE

On July 9, 2007, the Department of Homeland Security filed a Notice to Appear against the above named respondent. The filing of this charging document vested jurisdiction with this Court. The Notice to Appear has been admitted into evidence as Exhibit No. 1.

In this proceeding, the respondent conceded proper service of the Notice to Appear. Based upon his admissions and the

certificate of service, the Court finds that the charging document has been properly served.

In this proceeding, the Department of Homeland Security bears the burden of proving by clear and convincing evidence that the respondent is removable as charged.

In this proceeding, the respondent has admitted factual allegations 1, 2, 3, and 4 of the Notice to Appear. The respondent conceded the sole charge of removability. There is accordingly no issue as to whether the factual allegations or removal charge is true. The Department of Homeland Security, to corroborate the respondent's admissions, has offered into evidence documentary Exhibit No. 2. Documentary Exhibit No. 2 includes a record of conviction for the crime contained in allegation 4 of the Notice to Appear.

This Court finds that the evidence of record consisting of the respondent's admissions to factual allegations 1, 2, 3, and 4, the record of conviction admitted as Exhibit No. 2, and the respondent's testimony regarding the Immigration status of his parents which establishes that he has no claim to acquired, derived, or otherwise obtaining citizenship through the parents, establishes by clear and convincing evidence that each factual allegation is true. And based on this evidence and a finding that the factual allegations are true by clear and convincing evidence, the Court concludes as a matter of law that the removal charge has been proven by evidence that is clear and convincing.

The respondent has designated Guatemala as the country of removal and same was directed by this Court.

The respondent bears the burden of proving eligibility for relief in lieu of removal. The respondent has represented that he has just got out of serving a nine month prison sentence. That would make the respondent statutorily ineligible for the reliefs of cancellation of removal for non-permanent residents and post conclusion voluntary return. The respondent testified that his first time in the United States was in 1978, which makes him ineligible for the relief of registry. The respondent does not qualify for a 212(c) waiver as that form of relief was repealed prior to his last conviction. The respondent does not qualify for asylum, withholding of removal, a refugee waiver, or torture convention protections, as he has no fear of persecution or torture upon return to Guatemala and he has testified he has no problems with the government in that country. The respondent has indicated that he is not aware of anybody who would want to persecute him or torture him, upon return to that country. Respondent does not qualify for a 212(h) waiver as he does not have an application for admission, adjustment of status, or a visa and that, in any event, would not waive all grounds of inadmissability in his case. The respondent does not qualify for adjustment of status as he does not have a visa immediately available to him, but in any event, he has non-waivable grounds of inadmissability. Respondent does not qualify for

pre-conclusion voluntary departure as he has sought another form of relief in the form of cancellation of removal for certain permanent residents.

The issue before the Court is the respondent's eligibility for cancellation of removal for certain permanent residents.

The respondent bears the burden of proving that he qualifies for cancellation of removal as a matter of statute and discretion. To qualify for cancellation of removal, the respondent must prove that he has been a permanent resident for five years, that he has been present in the United States for seven years after a lawful admission, that he has not been convicted of an aggravated felony, and that he deserves this relief as a matter of discretion.

The Court finds that the respondent qualifies for cancellation of removal as a matter of statute. The respondent does have the requisite five years of lawful permanent residence. The respondent was admitted into the United States in 1996 as a permanent resident. The Court finds that the respondent does have the seven years of presence necessary to be granted cancellation, although it appears that the respondent may have a drug conviction that potentially could cut off the seven years. The Court finds under the decision in the Ninth Circuit Court of Appeals in Cuevas-Gaspar that he does have the seven years, based upon the fact that he came to the United States when he was 12 years old and his mother became a U.S. citizen in 1986. The

Court also in this case finds that none of the respondent's criminal convictions constitute aggravated felonies.

The issue in this case is whether the respondent deserves relief as a matter of discretion. The evidentiary record of this proceeding consists of documentary Exhibits Nos. 1, 2, and 3. Documentary Exhibit No. 1 is the Notice to Appear. Documentary Exhibit No. 2 is a Government pre-hearing submission which contains records of convictions. Exhibit No. 3 is the respondent's cancellation of removal application.

The Court asked the respondent on numerous times whether he had any additional evidence he wished to offer in support of his application, and the respondent had none.

To determine whether the respondent deserves relief is a matter of discretion. The Court weighs all the favorable factors in his case against the adverse factors. The Court considers all the factors cited by the Board of Immigration Appeals in Matter of Marin. Even though that was a case relating to 212(c) relief, the Court finds that it is applicable in identifying factors that are considered as a matter of discretion in all applications for relief.

The respondent in this case came to the United States when he was 12 years old. The respondent is 41 years old now. The respondent picked up his first conviction when he was 20 years old in 1986. This was eight years after the respondent's arrival in the United States. The respondent, at the time, had entered

the United States without inspection. The respondent indicated that that was a conviction for stealing a car. He testified he was sent to jail for six months. When inquired by the Court as to whether respondent had any additional criminal convictions, other than those listed by the Court, the respondent failed to reveal this conviction, as he did not recall it.

The respondent, however, did acknowledge a number of other convictions. The respondent admitted that he was convicted on May 5, 2005 for violation of Section 11377 of the California Health and Safety Code for possession of methamphetamine for which he was sentenced to 16 months incarceration. The respondent admitted that he was granted probation for this offense. The respondent admitted that he violated probation, however, when he was convicted on November 1, 2006 for petty theft with priors. The respondent's petty theft conviction was as a result of taking personal property from Home Depot. The respondent also admitted that his prior conviction was a conviction from the year 2001 for unlawfully taking money and personal property of a value exceeding \$400, which was jewelry, from (b) (6). When the respondent committed that offense, he, again, violated his probation on the drug charge. The Court finds that the fact that the respondent committed this offense while he was on probation to be a significant adverse factor. Exhibit No. 2 contains the record of this conviction, which also shows that the respondent pled guilty at the same time to a

violation of Section 23152(a) of the California Vehicle Code for driving under the influence.

The record of conviction also includes a conviction for violation of Section 11364 of the California Health and Safety Code for possession of drug paraphernalia. The record not only shows that the respondent has been convicted and committed numerous criminal offenses since soon after his arrival in the United States, but also shows that his ability to comply with the sentences and punishment ordered is less than impressive. The respondent testified that in 2002, when he was convicted for the possession of drug paraphernalia, that he failed to pay the Court fees that were ordered, resulting him to ultimately being sentenced to jail. As noted above, when the respondent was granted probation for drugs, at the present time, the respondent failed to comply with probation. The record therefore shows that even when the respondent is sentenced, his ability to comply with his sentences as ordered with the Court is less than impressive.

The Court finds that the respondent's criminal record deserves heavy weight as an adverse factor in his case, as it shows recidivist behavior over a lengthy period of time. The respondent has testified today that he last received a paycheck in October of 2006. He testified that he earns approximately two to \$300 a month. The respondent's relief application, which has been admitted as Exhibit 3, shows that the respondent has failed to pay any income tax to the United States in the last 12 to 13

years. The respondent explained that he failed to pay taxes because he was paid in cash.

The respondent bears a burden of proving eligibility for relief in lieu of removal. The respondent must show equities or favorable factors that outweigh the adverse factors. The Court finds that, as stated above, that the respondent's lengthy criminal record and his failure to pay any income taxes in the last 12 years constitutes significant adverse factors. The Court gave the respondent ample opportunity to show outweighing favorable factors. The Court inquired as to the respondent could he identify one positive thing that he had done in the United States since his arrival. The respondent delayed significantly and, ultimately, said he did not know. The Court finds that the respondent's inability to identify one favorable factor demonstrates the significant degree to which the adverse factors outweigh the equities in this case. Even the respondent could not come up with a favorable equity in this case. The Court finds that the respondent does have certain equities in the country. The respondent has been in the United States since 1978. His criminal record, however, began approximately eight years after his arrival in this country when he was about 20 years old. The respondent is now 41 years old. Twenty years have passed since his first conviction and he is still having problems with the law. The respondent has expressed remorse and indicated that he wishes an opportunity to prove to the

Government and to his family the kind of person he really is. The Court, however, finds that the respondent has come far from proving to the Court that he is rehabilitated and finds that his words and promises must be weighed against his actions and his lack of compliance with court punishments in the past. In fact, the respondent has had numerous opportunities to comply with the laws in the past and has failed to do so. The Court finds that it is not convinced that the respondent has the ability or would in fact comply with the laws of this country if he was to be granted this relief. The respondent's equities include two U.S. citizen children. The respondent, however, does not live with these children and is only providing minimal support. Respondent indicates that when he does get paid, he does provide some money to the children, however, the most that he has provided, per his testimony, in recent times is approximately \$300 a month or \$3,600 a year. The respondent's parents are deceased. The respondent has other equities, including employment, however, the Court notes as above, when the respondent has been employed, he has failed to pay any taxes to the Government, as a result, and has been paid in cash. The respondent also has some siblings in the United States who have legal status. The respondent also has not been in his country and is not particularly familiar with it.

The Court finds that these equities of the respondent deserve significant weight in his case but are insufficient to outweigh the adverse factors of his lengthy criminal record in

the United States and the fact that he has not paid any taxes to this country in over 12 years.

The respondent has had ample opportunity since his arrival in the United States to comply with the laws of this country and to prove to the country that he is able to comply with its laws. The Court finds that the respondent has demonstrated that he is unable to comply with the laws of this country and finds that the adverse factors in this case consisting of the significant criminal record and his failure to pay taxes and comply with the laws of this country outweigh the equities in this case. The Court therefore finds that the respondent's application for relief is not warranted, as a matter of discretion. The respondent indicated to the Court that he wants an opportunity to prove to his children the kind of person he really is. The respondent has had the opportunity and has proven to the country and to the children the kind of person he really is.

Based upon this demonstration, the Court finds that relief is not warranted, as a matter of discretion.

Based upon the above, the Court will deny the respondent's application for cancellation of removal, as a matter of discretion. The Court concludes as a matter of law that the respondent has failed to prove eligibility for any other form of relief in lieu of removal and, accordingly, the Court went to the following orders:

Order: The respondent is ordered removed and deported to

(b) (6)

Guatemala.

Order: The respondent's application for cancellation of removal for certain permanent residents is denied.

JACK H. WEIL
Immigration Judge

(b) (6)

CERTIFICATE PAGE

I hereby certify that the attached proceeding before
JUDGE JACK H. WEIL, in the matter of:

(b) (6)

El Centro, California

is an accurate, verbatim transcript of the cassette tape as
provided by the Executive Office for Immigration Review and that
this is the original transcript thereof for the file of the
Executive Office for Immigration Review.

Debbie Courville /SKO
Debbie Courville, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

February 13, 2008
Date

By submission of this CERTIFICATE PAGE, the Contractor certifies
that a Sony BEC/T-147, 4-channel transcriber or equivalent, as
described in Section C, paragraph C.3.3.2 of the contract, was
used to transcribe the Record of Proceeding shown in the above
paragraph.