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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date:

In re: (b) (6)

AUG 24 2007

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alexander E. Eisemann, Esquire

ON BEHALF OF DHS: Susan G. Roy
Assistant Chief Counsel

APPLICATION: Reopening

The parties move to remand the record to the Immigration Judge for consideration of the respondent's existing applications for relief in light of the decision of the United States Court of Appeals for the (b) (6) Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings in accordance with this opinion

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

IN THE MATTER OF:

(b) (6)

RESPONDENT.

CASE NUMBER (b) (6)

IN REMANDED DEPORTATION PROCEEDINGS AT (b) (6)

FOR RESPONDENT/MOVANT:

Regis Fernandez, Esquire
(b) (6)

FOR THE US ICE:

Chief Counsel US DHS Newark
(b) (6)
Attn: Anita C. Snyder, Assistant

ORDER GRANTING RESPONDENT'S MOTION TO TERMINATE
FOR NATURALIZATION

This order does not address the Respondent's I-589 application for protection under Article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment. This order resolves Respondent's Motion to Terminate filed on December 10, 2007, which is opposed by the Department of Homeland Security.

Proceedings have been delayed due to the Department of Homeland Security's delays in locating its administrative record and in determining whether the Respondent is *prima facie* eligible to naturalize.

Respondent moves to terminate proceedings pursuant to 8 C.F.R. §1239.2(f). He is eligible to apply for naturalization; on August 18, 2008, the Department of Homeland Security filed its clear statement that the Respondent is *prima facie* eligible.

Proof that the Respondent has filed Form N-400 is before this court as Exhibit 31, at Tab E, and Exhibit 32, proof of fee payment.

Both parties have rested with regard to the evidence to be considered in determining whether the proceedings should be terminated. Only if the Respondent presents evidence of exceptionally appealing and humanitarian considerations can the Respondent convince the undersigned that he meets the regulatory requirements. The Department of Homeland Security is

opposed to the Respondent's motion, simply stating its conclusion that the Respondent does not present sufficient evidence to qualify his claim without explaining why that is the case.

This court considers Exhibits 1 through 32 in coming to a decision in this case. Respondent was convicted of disorderly conduct in 1988. The evidence establishes that the Respondent was convicted after a guilty plea on March 27, 1990 of possession of five or more ounces of cocaine with intent to distribute on April 27, 1988, in violation of (b) (6) law (Exhibit 3). He was sentenced to serve 10 years in prison, with a mandatory term of 3 1/3 years of parole ineligibility. The Presentence Investigation reveals that the Respondent was actually the seller or supplier of cocaine, and sold, at least in the case summarized, $2,500 worth of cocaine (Exhibit 26). Even in those years, the value of the cocaine was substantial. Also, while out on bond on the drug case, Respondent was arrested in 1989 and convicted on plea of guilty of promoting gambling in the second degree and fined $100, according to the written decision of August 26, 1993 by the previous Immigration Judge (Exhibit 29, at 9).

No violence or use of weapons was involved in Respondent's crime. He was involved in selling drugs to a childhood friend, (b) (6) according to the investigation.

Respondent is a male native and citizen of Colombia born on (b) (6) Respondent has been a lawful permanent resident of this country since September 12, 1968 and has never left this country since that time (Exhibit 33). He has been married to (b) (6) (b) (6) since November 13, 1993, and she is a United States citizen (Exhibits 33 and 34) who was already living with the Respondent and their two sons (Respondent's daughter has a different mother) when the Respondent was arrested in 1988. Her letter to this court is part of the evidence (Exhibit 34). Her letter explains not only that the Respondent and she are paying for their children's education (evidently the eldest graduated from (b) (6) University this year) but she also lost two of her sisters this year, one in an accidental death. She writes about how she depends on the Respondent, with whom she has lived since 1983 and about the (b) (6) she suffers when she contemplates her husband's deportation; her concern is verified with a doctor's letter (Exhibit 31).

He has two United States citizen sons (Exhibit 25), who are in college (Exhibit 31) and one United States citizen daughter, all of whom are adults. His son (b) (6) wrote a very detailed letter to this court and indicates that he studies out of state, at (b) (6) University (Exhibit 34). His father is a citizen of this country (Exhibit 24). He completed his G.E.D. in 1979. While incarcerated, he studied to be a paralegal (Exhibit 19). He is a volunteer basketball coach in his town, (b) (6) now for "several years," according to (b) (6) Superintendent of Recreation (Exhibit 31), and previously coached soccer from 1994-1998. He

has attended the same church for many years (Exhibit 31). His sister also wrote to the court, explaining that the Respondent, who was abandoned by his father at a young age, has been a devoted father to his own children (Exhibit 31).

There is no evidence that Respondent violated any condition of parole after his release from prison. He has been steadily employed as a limo driver since February 6, 2001 with the same firm (Exhibit 31).

Respondent also wrote to this court and explained that he accepts responsibility for the crime that he committed: "The case I committed was of the worst kind. Drugs are truly a cancer on society. I learned this while in prison...I did some wonderful things while in jail and I now preach against drugs to whoever I can." (Exhibit 31).

Respondent fears a return to Colombia that is palpable; the Court of Appeals recognized this when the matter was remanded for further consideration. (b) (6) (b) (6) Respondent presented evidence that, as the Court of Appeals summarized, Colombia is a dangerous country:

> The record before the Board included documentary evidence of the changed country conditions, including extrajudicial killings carried out by the government, kidnapings by paramilitary and guerilla forced, and cooperation or collusion between such groups and the government.

And the Court of Appeals noted Respondent's documented concerns that he would be more vulnerable to torture because he would be perceived to be a foreign national. The undersigned makes no finding and enters no conclusions about whether Respondent is eligible for protection under the United Nations Convention Against Torture, but it is clear that the Court of Appeals does not believe Respondent's claim to be trivial or frivolous. The humanitarian concerns that result from the status of the Respondent's application for protection are profound; the Court of Appeals specifically rejected the conclusion by the Board of Immigration Appeals and remanded this case for further consideration.

This court finds that the Respondent has presented exceptionally appealing or humanitarian factors. He is a long-term resident of this country who has not left this country since he entered as a resident in 1968. Respondent is the father of three United States citizens, husband of a United States citizen with whom he has had a relationship for more than 25 years, and he has been law abiding for more than a decade. He is remorseful about his serious criminal infraction and evidently accomplished positive work while in prison. In addition, he volunteers

in his community in which he has been a steady resident for decades and he is steadily employed at this time. His sons are scholars, and his wife is of tender emotional status at this time. Finally, he has expressed a genuine fear of returning to a country where he fears that he will be subjected to torture and where he has not been since he came to this country as a child of 9 years old.

ORDER

IT IS ORDERED that notice of hearing scheduled on September 9, 2008 is VACATED.

IT IS FURTHER ORDERED that the Respondent's Motion to Terminate for Naturalization pursuant to 8 C.F.R. §1239.2(f) is GRANTED and these deportation proceedings are TERMINATED.

Signed on August 20, 2008 at (b) (6)

Annie S Garcy

ANNIE S. GARCY,
Immigration Judge

File: (b) (6) Date: MAR 31 2010

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Regis Fernandez, Esquire

ON BEHALF OF DHS: Anita Claire Snyder
Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination

The Department of Homeland Security (the "DHS") is appealing from the August 20, 2008, decision of the Immigration Judge terminating removal proceedings without prejudice. The appeal will be dismissed.

On appeal, the DHS alleges that the Immigration Judge erred in terminating proceedings as the respondent failed to show exceptionally appealing or humanitarian factors pursuant to 8 C.F.R. §1239.2(f).

We concur with the Immigration Judge's determination. An Immigration Judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established *prima facie* eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors. *See* 8 C.F.R. §1239.2(f). In *Matter of Hidalgo*, 24 I&N Dec. 103 (BIA 2007), the Board held that removal proceedings may be terminated pursuant to 8 C.F.R. §1239.2(f) where the DHS has presented an affirmative communication attesting to an alien's *prima facie* eligibility for naturalization. In the present case, the DHS acknowledged that the respondent is statutorily eligible for naturalization. While the DHS has raised some valid concerns relating to the Immigration Judge's finding that the respondent established exceptionally appealing or humanitarian factors for terminating proceedings, we do not find them sufficient to reverse the Immigration Judge's determination. Accordingly, the following order will be entered.

(b) (6)

ORDER: The DHS' appeal is dismissed.

FOR THE BOARD

File: (b) (6) [redacted]

Date: MAR 31 2010

In re: (b) (6) [redacted]

DISSENTING OPINION: Roger A. Pauley

I respectfully dissent. The applicable regulation, permitting termination of removal proceedings where an alien has established *prima facie* eligibility for naturalization, requires that the matter be shown to involve "exceptionally appealing or humanitarian factors." 8 C.F.R. § 1239.2(f). Although we have never opined as to how this phrase should be applied, it appears that the inclusion of "exceptionally" before "appealing" should also carry over to the interpretation of the term "humanitarian" such that a case would need to present exceptional humanitarian considerations to qualify for termination (otherwise the term "humanitarian" would subsume and render the phrase "exceptionally appealing" redundant). *See Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (dissenting opinion of Board Member Filppu noting "I have no quarrel with a rule that would restrictively apply the regulation").

Here, the salient facts (which the majority opinion fails to set forth) include, *inter alia*, the circumstance that the respondent was convicted in 1990 of possession of five or more ounces of cocaine - a very substantial amount - with intent to distribute, an aggravated felony, and was sentenced to ten years in prison; that he was found ineligible for 212(c) relief and while under a final administrative order of removal failed to comply with a bag and baggage letter in 2000. While it is true, as the Immigration Judge recounted, that the respondent appears to have led a crime-free life for the past twenty years, appears remorseful, has been a resident of this country for over forty years, has a stable work history, has a United States citizen wife and three United States citizen children, and his current case is pending as a result of a circuit court remand to reexamine his eligibility for 212(c) relief and to determine whether he is eligible for CAT as regards his home country of Colombia, his equities nearly all arose as a consequence of his failure to abide by the terms of his removal order. Indeed, we have held that disobedience of a bag and baggage letter is grounds for denial of a motion to reopen, *see Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985), yet the majority find that, notwithstanding this fact, the respondent qualifies for termination of proceedings as presenting "exceptionally appealing or humanitarian factors." *See also Matter of K-A*, 23 I&N Dec. 661, 666 (BIA 2004)(noting that "even nonviolent aggravated felonies will generally constitute significant negative factors militating strongly against a favorable exercise of discretion"). I cannot agree, especially in light of the grave nature of his conviction and his disregard of the bag and baggage letter, that the respondent's circumstances fall within the contemplation of the regulation.

Accordingly, I would sustain the Department of Homeland Security's appeal.

Roger A. Pauley

BOARD MEMBER