



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: [REDACTED]

[REDACTED]

Date of this notice: 3/13/2008

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:

HOLMES, DAVID B.
Kendall-Clark, Molly
MILLER, NEIL P.

Falls Church, Virginia 22041

File: [REDACTED] — El Paso, TX

Date: *MAR 13 2008*

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Iliana Holguin, Esquire

ON BEHALF OF DHS: William M. Hunt
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's decision dated September 19, 2006. The respondent argues that the Immigration Judge improperly found he was not eligible for special rule cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2). The appeal will be sustained.

The Immigration Judge's decision did not include comprehensive findings of fact, but the record reflects the following general chronology of events: The respondent entered the United States in September 1999 on a student visa to attend aviation school in Florida. Shortly thereafter, he transferred to a school in Oklahoma and ultimately completed his studies in that state. The respondent conceded that he was removable for failing to maintain the conditions of non-immigrant status under which he was admitted to this country.

While the respondent was attending college in Oklahoma, he met his now ex-wife, a United States citizen, at her father's church. Her parents opposed their relationship and physically abused their daughter to discourage her from seeing the respondent. On March 27, 2001, the couple married. The respondent was 19 years old and his wife was 18. As her family was opposed to the marriage, they married first and informed her parents after the fact. The respondent's father, who is a also pastor, attempted to mediate on behalf of the couple with his son's father-in-law. Two United States citizen children, currently ages 4 and 5, were born of their marriage.

The respondent did not engage in employment before the couple married. He testified that after they were married, his wife refused to work, demanded that he do so, but did not submit the applications that would have allowed him to seek work authorization. He ultimately engaged in unauthorized employment to support his family, giving false information to employers to obtain employment. The respondent also testified that he applied for a Social Security card without making any false representations, but received an unrestricted card in the mail. The couple lived in various locales, including for a time with the respondent's in-laws.

[REDACTED]

The respondent related that his wife and her family continually berated and insulted him throughout the course of the marriage, and that his wife was both verbally and physically abusive to him. On one occasion, his wife slapped him so hard that her nails left a scar on his face from the force of the blow. On another occasion, she broke off a table leg with a nail in it and threw it at him causing bleeding and a scar on his leg. The respondent testified that his wife regularly used his Jack of status as means to threaten him. He stated that his wife and her family insulted and berated him because of his African ethnicity, and frequently accused him of marrying her for immigration purposes even though the couple had lived in a marital union for years and had two children born of the marriage. The respondent testified that he worked to sustain the marriage because of his religious faith and his love of his children, and he presented evidence in support of his testimony in his regard. Ultimately, in March or April 2004, his wife did file a concurrent visa petition and adjustment of status application on his behalf.

In July 2004, however, the respondent returned from work one day to find that his wife had left him and taken their children with her. Shortly thereafter, the couple was legally separated. The respondent testified that his attempts to see his two young children and exercise his visitation rights were repeatedly thwarted by his wife and her family. On one occasion when the respondent was at his wife's parents' home visiting his children, his wife encouraged one of her brothers to physically assault him. The respondent, who was holding his son, was pushed into a door by his brother-in-law with such force that it broke the door. The respondent called the police and filed a police report, which was submitted into evidence, but his wife convinced him not to pursue the charges by promising him greater access to his children. On another occasion, during a visit with his children, the respondent's wife grabbed him by the arm and shoved him violently into a car. This incident occurred in view of their children and led to domestic violence charges being filed against his wife. The respondent ultimately withdrew the charges for the sake of the children at the urging of his pastor, who corroborated his testimony in this regard.

The respondent also related that at one point he became concerned that his father-in-law was physically abusing his young son and he contacted Child Protective Services to investigate. Within days of this report, and prior to the scheduled interview with the state agency, the respondent was arrested by Immigration and Customs Enforcement officers. The respondent believed that his wife or her family contacted the officers in retaliation for the report filed with Child Protective Services. The couple's marriage ended in December 2005, and the respondent received joint custody of the children.

The respondent both submitted documentary evidence and presented witnesses to corroborate his testimony. The witnesses included two friends who testified to the severe effects the respondent's wife's conduct had on him, including discussions of his depression and contemplation of suicide. The attorney who represented the respondent in his domestic relation proceedings testified regarding the belligerence of the wife and her family and related an incident when she (the attorney) was intimidated by the family's "physical posturing" and had to interact with the courthouse staff to ensure nothing happened. The respondent's pastor's stipulated testimony reflected his unsuccessful attempts to help the couple reconcile and confirmed various aspects of the respondent's narration of events, including the pastor's "spiritual advice" to the respondent not to pursue the domestic violence charges against his wife. The Department of Homeland Security did not present any witnesses or any other evidence that brought the respondent's testimony and factual claims into question.

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As noted, the respondent conceded that he was removable as charged, but applied for special rule cancellation. In support of his application, the respondent claimed that he had been battered and subjected to extreme cruelty at the hands of his United States citizen wife. The Immigration Judge ultimately denied the respondent's application on a number of bases, which we will address below. We first note, however, that the Immigration Judge did not make separate, clear, and comprehensive findings regarding the credibility of the respondent and his witnesses; rather, he included limited findings in this regard during his discussion of the application of the law to the facts. There is nothing in the nature of the respondent's testimony itself or in the testimony of his corroborating witnesses that would give cause to doubt its truthfulness, and various of the significant claimed events most pertinent to his application for relief are supported by contemporaneous documentary evidence. Accordingly, as will be further discussed, we accept the truth of the respondent's factual claims.

In denying the respondent's application, the Immigration Judge suggested, without ultimately making a specific finding, that the respondent failed to establish a "good faith" marriage. The Immigration Judge noted the timing of the marriage, that it was held in secret from the respondent's in-laws, that the respondent's wife and her family had accused him of having married for immigration purposes, and that the respondent fathered two children during a one-year period even though the marriage "began to crumble within weeks after consummation." He also noted the respondent's relationship with two girlfriends after the marriage had ended. However, the respondent provided detailed, reasonable explanations for the circumstances of the marriage, provided supporting documentary evidence, and presented witness testimony and affidavits regarding the couple's relationship, including evidence from the pastor who provided him spiritual advice and counseling. Albeit a troubled marriage, there is no adequate basis to support a finding, implicit or otherwise, that it was not a "good faith" marriage within the meaning of the immigration laws, particularly considering that this couple parented two children and cohabited for years.

The Immigration Judge explicitly found that the respondent had not credibly established that he was either battered or subjected to extreme cruelty. Regarding credibility, the Immigration Judge cited the respondent's illegal employment in the United States, his possession of a restriction-free Social Security card, and lack of definitive proof of filing income taxes in 2001 and 2005, even though the respondent provided proof of filing tax returns for the years 2002, 2003, and 2004. These acts, however, do not relate to the respondent's testimony and the objective evidence of record he presented in support of his claim of extreme cruelty. The respondent's testimony about how his spouse treated him was detailed, consistent, plausible, and supported by corroborative evidence. Further, the Immigration Judge clearly erred in finding an inconsistency with the respondent's statements in a police report from October 2004 (regarding an assault by the spouse's brother while respondent was holding his son), based on his confusion with the police report from April 2005 (regarding refusal to permit visitation to his children). The record before us does not support a finding that the respondent was not credible regarding the events underlying his application for relief. That, however, does not answer the question whether these facts, even if true, satisfy the requirements for special rule cancellation. And, this is the closest question presented in this case.

"Battered" and "extreme cruelty" are not defined for purposes of § 240A(b)(2) special rule cancellation; however, there is some regulatory authority defining appropriate standards. Specifically, 8 C.F.R. § 204.2(c)(1)(vi) defines battering for purposes of adjudicating visa petitions

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filed by an alien spouse (i.e., a "self-petition") who is battered by a United States citizen. Section 204.2(c)(1)(vi) states that "the phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to, being the victim of any act or threatened act of violence ...which results or threatens to result in physical or mental injury." Given that § 204 of the Act (governing self-petitions for victims of battering) and § 240A(b)(2) contain virtually identical statutory language--discussing victims of "battering" or "extreme cruelty" at the hands of a United States citizen--we find that the above regulatory definition of "battering" is instructive for purposes of this case, as is unlikely that Congress would intend different definitions of "battering" or "extreme cruelty" to apply to these related sections of the Act.

The Immigration Judge dismissed much of the respondent's claim regarding extreme cruelty as simply being the product of a bitter divorce and custody battle. However, accepting the truth of the respondent's claims, we are ultimately persuaded that the evidence does support a finding of extreme cruelty. His wife assaulted him resulting in physical injury on a number of occasions throughout the course of the marriage. After they separated, but while still married, she incited her brother to assault the respondent while he was holding their 2-year-old son. On another occasion, she physically assaulted him in front of their of their children and other witnesses. During the course of the marriage, the respondent's wife and her family subjected him to threats and mental cruelty that led to his depression and contemplation of suicide, facts which were corroborated by unchallenged supporting evidence. Particularly as there is no question on this record regarding the respondent's love of his children and their central importance in his life, an added dimension in this case was the respondent's wife's threats that he would be reported to Immigration authorities so he could never see his children again. Therefore, although a close question, we conclude that the respondent has established "extreme cruelty" within the meaning of that term in § 240A(b)(2) of the Act.

The Immigration Judge also ruled that the respondent had not established the requisite good moral character, principally because the respondent provided false information on I-9 Forms for employment eligibility and had a Social Security card that did not reflect that he was restricted from employment. The Immigration Judge, however, did not reference any of the significant positive evidence presented regarding the respondent's character and did not specify whether the respondent's acts were encompassed by any of the specified legal bars to finding good moral character under section 101(f) of the Act, 8 U.S.C. § 1101(f), or the catch-all provision of section 101(f). *See Beltran-Resendez v. INS*, 207 F.3d 284 (5th Cir. 2000) (holding that false attestations under penalty of perjury on I-9 Forms were not tantamount to false testimony under section 101(f)(6)). The respondent has not been convicted of any crimes related to these acts, and the facts are not sufficient to support a finding that the respondent received the Social Security card as a result of providing false information. We do not find an adequate basis set forth in the Immigration Judge's decision to support a finding that the respondent lacks good moral character.

Further, section 240A(b)(2)(C) of the Act provides that a person's act that does not otherwise bar the granting of cancellation may be waived where it was "connected" to the alien's having been "battered" or "subjected to extreme cruelty." The respondent did not engage in any unauthorized employment prior to his marriage and he only worked after his separation from his wife to meet her demands, particularly while striving to maintain contact with his children. The respondent's wife threatened him with deportation and separation from his children if he did not do as she said. Given the evidence that the respondent's wife refused to work, insulted him for not being able to support his family, yet refused over a period of years to submit the applications that would have permitted

him to file for employment authorization, we are not persuaded in the specific context of this case that the respondent's acts related to his employment were not "connected" to the "extreme cruelty."

Given the evidence of his close relationship with his children, the order of joint legal custody, and the affidavits and witness testimony corroborating the relationship with his children, the respondent has adequately shown that his removal would result in extreme hardship to himself and his two young United States citizen children. *See* section 240A(b)(2)(A)(v) ("extreme hardship" rather than 240A(b)(1) standard of "exceptional and extremely unusual hardship" applies in special rule cancellation cases.).

There being no doubt with regard to the respondent's continuous physical presence, the issue remains whether he merits a favorable exercise of discretion. There is evidence that the respondent for at least a time was working and receiving income (on which he paid taxes) by filing false I-9 forms. The respondent did this to support his family. There is no other meaningful adverse information of record. The respondent submitted significant evidence regarding his good character, and included a positive reference letter from a United States Army recruiter. Particularly considering his close and loving relationship with his United States citizen children, we conclude that the respondent merits a favorable exercise of discretion on his application for special rule cancellation under section 240A(b)(2) on the record before us. Accordingly, the following orders will be entered.

ORDER: The respondent has established eligibility for cancellation of removal under section 240A(b)(2) of the Act, and his appeal from the Immigration Judge's denial of this relief 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). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).



FOR THE BOARD