

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: - Oklahoma City, OK

Date: JAN 13 2014

In re:

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kelli J. Stump, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled (conceded)

APPLICATION: Special rule cancellation of removal; voluntary departure

This case was last before the Board on September 9, 2011. At that time, we remanded the record to the Immigration Judge for further consideration of the respondent's application for special rule cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229b(b)(2), reserved for certain victims of domestic violence in accordance with the provisions of the Violence of Against Women Act (VAWA), enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1786, 1902. Specifically, we asked the Immigration Judge to clarify the portion of his decision finding that the respondent lacks good moral character during the requisite statutory period as required by section 240A(b)(2)(A)(iii) of the Act, and as defined at section 101(f) of the Act, 8 U.S.C. § 1101(f). On October 25, 2012, in the course of remanded proceedings, the Immigration Judge found that the respondent did not provide false testimony pursuant to section 101(f)(6) of the Act but reaffirmed his prior denial of the respondent's application based on his conclusion that she does not otherwise possess the requisite moral character or warrant relief in the exercise of discretion.¹

The respondent, a native and citizen of Mexico, then filed this timely appeal. The Department of Homeland Security (DHS) has not filed any opposition. The respondent's request for oral argument is denied. See 8 C.F.R. § 1003.1(e)(7). Her appeal will be sustained and the record will be remanded for further proceedings consistent with this decision.

We review findings of fact, including credibility findings, for clear error. See 8 C.F.R. § 1003.1(d)(i); see also *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. See 8 C.F.R. § 1003.1(d)(ii). The respondent filed her application for special rule cancellation of removal after May 11, 2005, such that the amendments to the act brought about

¹ The Immigration Judge's March 2, 2010, decision will be referred to hereinafter as I.J.1, and his October 25, 2012, decision, as I.J.2.

by the REAL ID Act apply (I.J.1 at 21; Exh. 2). See REAL ID Act § 101(h)(2); *Matter of S-B-*, 24 I&N Dec. 42, 44-45 (BIA 2006).

At the outset, we note that continuous physical presence, criminal statutory bars to relief, the existence of battery or extreme cruelty by the respondent's former lawful permanent resident spouse, and extreme hardship to the respondent and her qualifying relatives are not at issue (I.J.1 at 21-22, 27-32). See sections 240A(b)(2)(A)(i), (ii), (iv), (v) of the Act. As a result, the issues on appeal are whether the respondent (1) has been a person of good moral character during the requisite statutory period and (2) merits relief in the exercise of discretion (I.J.1 at 22-27; I.J.2 at 3-6). See section 240A(b)(2)(A)(iii) of the Act.

In support of his good moral character determination, the Immigration Judge made an adverse credibility finding with respect to the respondent's testimony, concluding that she had not been truthful with the Immigration Court about with whom she entered the United States (I.J.1 at 6, 14, 25-27; I.J.2 at 1, 3-4). In addition, the Immigration Judge concluded that the respondent was not a person of good moral character because in 1997 she filed a fraudulent asylum application in order to obtain employment authorization when she was not legitimately eligible for this benefit (I.J.1 at 2, 6, 23-25, 27; I.J.2 at 3; Exh. 8). He also relied on the foregoing factors in concluding that negative considerations in the respondent's case outweigh the positive discretionary factors, including the respondent's lengthy residence of more than 20 years in the United States; extensive family ties in this country, including her six United States citizen children; and the fact that the respondent is a good mother to her children and daughter to her lawful permanent resident parents (I.J.1 at 2, 6, 23-27; I.J.2 at 5-6). In addition, he found that a weighty negative consideration in this case was the fact that the respondent divorced her abuser in June 2001 and had moved on from the abusive relationship, as she subsequently had a long-term relationship and three children with another man (I.J.2 at 6). See *Matter of A-M-*, 25 I&N Dec. 66, 77-78 (BIA 2009) (explaining that whether the respondent is still in the abusive relationship, the length of time out of the relationship, and her ability to avoid future abuse in subsequent relationships, if any, are relevant considerations in determining whether she merits relief in the exercise of discretion).

On appeal, the respondent contends that the Immigration Judge erred in making an adverse credibility finding (Notice of Appeal; Resp. Brief at 10). Additionally, although she maintains that the Immigration Judge did not adequately explain his decision with respect to good moral character, assuming that he relied on the adverse credibility finding and her 1997 asylum application, she asserts that this determination was in error (Notice of Appeal; Resp. Brief at 7-8, 10-11). Additionally, she claims that the Immigration Judge erred in finding she does not merit relief in the exercise of discretion (Notice of Appeal; Resp. Brief at 9, 13-17). Specifically, she asserts that the Immigration Judge did not fully consider all of the relevant positive considerations in her case and he did not adequately consider the differences between her case and the respondent in *Matter of A-M-*, *supra*, in denying her application in the exercise of discretion (Resp. Brief at 13-15). Finally, she asserts that she was denied a fair hearing during the course of remanded proceedings in that the Immigration Judge indicated that he would accept additional testimonial and documentary evidence but then did not consider any such evidence prior to rendering his second decision in this matter (Notice of Appeal; Resp. Brief at 7-10).

Starting with the respondent's challenge to the Immigration Judge's credibility finding, we note that, under the REAL ID Act, an adverse credibility finding may permissibly be based on internal inconsistencies within the respondent's testimony and inconsistencies between her testimony and that provided by other witnesses. *See* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C); *see also* *Wang v. Holder*, 569 F.3d 531, 538 (5th Cir. 2009) (noting with approval the Second Circuit's conclusion that any inconsistency may be relied upon under the REAL ID Act to support an adverse credibility finding so long as the lack of credibility is established by the totality of the circumstances).

Here, the Immigration Judge based his adverse credibility finding on discrepancies between the respondent's testimony and that provided by her father regarding with whom the respondent entered the United States (I.J.1 at 6, 14, 25-27; I.J.2 at 1, 3-4; Tr. at 85-87, 241-46). Specifically, the respondent testified she entered the United States with one man and one woman who were not related to her and she was not accompanied by any family members (I.J.1 at 6; Tr. at 85-87). However, her father testified that she entered the United States with him, her five siblings, and either one additional man or one man and one woman, both unrelated to the family (I.J.1 at 14; Tr. at 241-46). When viewing the foregoing discrepancy that is supported by the record, we discern no clear error in the Immigration Judge's adverse credibility determination, as it is supported by specific and cogent reasons. *See Wang v. Holder, supra*, at 538; *Zhang v. Gonzales*, 432 F.3d 339, 344-45 (5th Cir. 2005). Accordingly, we decline to disturb the adverse credibility determination.

Turning to the issue of good moral character, we agree with the respondent that any relevant good moral character considerations need to fall within the 3-year period preceding the entry of an administratively final order (Resp. Brief at 8). *See* section 240A(b)(2)(A)(iii) of the Act (establishing the 3-year good moral character period); *see also* *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007) (explaining that an application for cancellation of removal is a continuing one, such that the good moral character period runs backwards from the entry of an administratively final order). As a result, we decline to consider the respondent's 1997 asylum application in determining whether she can satisfy the non-discretionary good moral character requirement (I.J.1 at 22-23; I.J.2 at 3; Tr. at 88, 91-92, 105-06; Exh. 8). Moreover, because the Immigration Judge determined during the course of remanded proceedings that the respondent did not provide false testimony for an immigration benefit, there are no identified statutory bars to a favorable good moral character determination (I.J.2 at 4). Additionally, although the adverse credibility finding and the 1997 conviction are relevant to whether the "catchall" provision at section 101(f) of the Act is triggered, we conclude that these factors alone are not so significant as to prevent the respondent from carrying her burden of proof in establishing good moral character (I.J.1 at 24-27; I.J.2 at 4).

With respect to the issue of discretion, we note (1) the respondent's lengthy residence in the United States of more than 20 years; (2) family ties in this country, including her six United States citizen children and lawful permanent resident parents; (3) the hardship that the respondent, her children, and her parents would experience should she be removed from the United States; (4) the absence of any criminal record; and (5) the fact that the respondent has not ever worked in the United States without authorization (I.J.1 at 1, 4-6, 6A, 7-8, 11-14, 22; I.J.2 at 5; Tr. at 24, 43, 62-74, 77-79, 81-82, 85-87, 107-12, 125, 135-41, 143-48, 173, 188-95, 201-04, 207-12, 219-20, 223-27, 241, 246-49; Exh. 3). With respect to the negative

discretionary considerations, we conclude that the Immigration Judge properly considered the adverse credibility determination and the respondent's fraudulent asylum application, filed in 1997 in an attempt to obtain employment authorization as relevant negative considerations (I.J.1 at 2, 6, 22-27; I.J.2 at 6; Tr. at 85-88, 91-92, 105-06, 241-46; Exh. 8).

In addition, we disagree with the respondent's assertion that ending her abusive relationship in 2001 is not a relevant consideration in the discretionary analysis, as a purpose of VAWA relief is to empower aliens to leave abusive relationships (Resp. Brief at 14-15; I.J.2 at 6). See *Matter of A-M-*, *supra*, at 77-78. However, we agree with the respondent that her case is distinguishable from *Matter of A-M-*, *supra*, and specifically, we note that in our precedent we found the respondent ineligible for VAWA cancellation in the exercise of discretion because, among other things, the respondent in that case had previously obtained her lawful permanent residence through a VAWA provision. See *id.* at 78. As a result, we held in that case that VAWA "should not be invoked *again* to benefit an alien when the past abusive relationship has ended and the abusive spouse no longer poses a threat." See *id.* at 78. Here, however, we note that the respondent, although she is no longer in the abusive relationship, has not previously received immigration benefits through VAWA nor does she have any other currently available path for regularizing her status (I.J.1 at 4, 6A, 7; I.J.2 at 6; Tr. at 44-45, 113-14; Exhs. 3A:2-5, 3A:8-10, 3E:5). Accordingly, although the respondent's ability to leave the abusive relationship and the length of time she has been out of the relationship weigh against a favorable exercise of discretion in this case, we ultimately conclude that this and the other negative discretionary considerations are outweighed by the positive factors presented in this case.

As a result, we disagree with the Immigration Judge's determination that the respondent is statutorily and discretionarily ineligible for VAWA cancellation in this case (I.J.2 at 3-6). In light of our disposition in this matter, we find it unnecessary to consider the respondent's due process challenges or her arguments regarding her eligibility for voluntary departure (Resp. Brief at 1, 7-10).

Accordingly, the following orders shall be entered.

ORDER: The respondent's appeal 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 DHS 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