

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Portland, Oregon

File No.:72 212 639

Date: March 8, 2002

In re: GUILLEN- Martinez, Maria)
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)
Respondent)
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_____)

IN REMOVAL PROCEEDINGS

Category: Alien present, not admitted or paroled

Charge(s): INA §212(a)(6)(A)(1) - present without being admitted or paroled

Applications: INA § 240A(b) - cancellation of removal for nonpermanent residents

ON BEHALF OF RESPONDENT:
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I. Procedural Background

Respondent in this case is not a native or citizen of the United States. She is a native and citizen of Mexico.

Respondent entered the United States on or about July 1, 1990 at or near San Ysidro, California. Her entry was made without inspection. Since that time, Respondent has lived in the United States and had not normalized her status.

Respondent and Mr. Ruiz, the father of her three United States citizen children, were arrested in April of 2001. Respondent and Mr. Ruiz were charged with drug charges and child neglect. Charges against Respondent were dismissed in June of 2001. Mr. Ruiz appears to have been convicted and is

still in custody awaiting sentencing.

These proceedings were commenced on June 27, 2001 when the Service served Respondent with a notice to appear (NTA). The NTA charged respondent as removable as an alien present in the United States without being admitted or paroled under INA §212(a)(6)(A)(1).

At her master calendar hearing on July 5, 2001, Respondent conceded proper service of the NTA. She admitted all factual allegations and conceded the charge of removability. She requested relief in the form of cancellation of removal under INA §240A(b).

II Statement of the Law

INA §240A(b) provides for cancellation of removal and adjustment of status for certain nonpermanent residents. The following eligibility requirements must be met: 1) The alien must have been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application; 2) the alien has been a person of good moral character for those ten years, 3) the person must not have not been convicted of an offense under INA §§212(a), 237(a)(2) or 237(a)(3); and (4) the person must establish that removal would result in exceptional and extremely unusual hardship to his or her spouse, parent, or child, who is a United States citizen or lawful permanent resident. *INA §240A(b), 8 CFR §240.20.*

The term “exceptional and extremely unusual hardship” requires a showing of hardship to the alien’s relatives that is “substantially” beyond the ordinary hardship that would be expected when a close family member leaves this country but the applicant need not show that the hardship would be “unconscionable.” *Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).* The Court will consider the ages, health, and circumstances of qualifying lawful permanent resident and United State citizen relatives. *Id.* Merely, a lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but by themselves, will generally be insufficient to support a finding of exceptional and extremely unusual hardship. *Id.* Importantly, the hardship to the applicant is irrelevant.

A non-permanent resident applicant is barred from the grant of cancellation of removal and adjustment of status if he or she entered as a crewman subsequent to June 30, 1964; was admitted on J to receive graduate medical training whether or not she received a waiver or was on J with a two year foreign residency requirement and never fulfilled the requirement or received a waiver; was inadmissible under INA §212(a)(3) or deportable under INA §237(a)(4); persecuted others under INA §241 (b)(3)(B)(i); previously received suspension, INA §212(c) relief or cancellation of removal; was served with NTA or committed an offense referred to in INA §§212(a), 237(a)(2) or 237(a)(4) prior to the ten year continuous physical presence requirement being reached, whichever is earliest; or departed the United States for any period greater than ninety days or for any periods in the aggregate exceeding 180 days during the ten year period. *INA § 240A(d)(2).*

An applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation hearings involving the extreme hardship standard. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). However, the case law for the former criteria of “extreme hardship” provides guidance to this court. The Ninth Circuit and BIA have established hardship factors. In *Matter of Anderson*, the court considered the age of the subject, family ties in the U.S. and abroad, length of residency in the U.S., conditions of health, conditions in the country to which the alien is returnable, the possibility of other means of adjustment of status, whether the subject is of special assistance to the United States or community, the immigration history and the person’s position in the community. *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

Separation from family may be the most important single [hardship] factor. *Salcido-Salcido v. INS*, 138 F. 3d 1292 (9th Cir. 1998), *Arrozal v. INS* 159 F. 3d 4.29 (9th Cir. 1998), *Opoka v. INS*, 94 F. 3d 392 (9th Cir. 1996). But, birth of a U.S. ‘child or “second class” medical facilities in foreign country is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984).

Other factors include economic hardship when it causes psychological problems to the respondent by severely frustrating his or her ability to support family members. *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995). The Immigration Judge also must consider medical hardship. *Biggs v. INS*, 55 F. 3d 1398 (9th Cir. 1995). The Ninth Circuit has also considered persecution, community assistance, and acculturation to be factors in determining whether there is extreme hardship. *Ordonez v. INS*, 137 F. 3d 1120 (9th Cir. 1998), *Urbina-Osejo v. INS*, 124 F. 3d 1314, 1319 (9th Cir. 1997).

Only the hardship to the qualifying relatives, not to the applicant himself or herself, may be considered, and hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to the qualifying relative. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

In addition to satisfying the three statutory eligibility requirements an applicant must also demonstrate that he or she warrants such relief as a matter of discretion. *Matte; of C-V-T-, Int. Dec. 3342 (BIA 1998)*. The general standards developed for *Matter of Marin*, 16 I. &N. Dec. 581, 584-585 (BIA 1978), for the exercise of discretion under INA §212(c) are applicable to the exercise of discretion under INA §240A. *Matter of C-V-T-, Int. Dec. 3342 (BIA 1998)*. The IJ must make a “complete review of all favorable factors”. *Matter of Edwards*, 20 I. &N. Dec. 191 (BIA 1990); see *Georgiu v. INS*, 90 F. 3d 3 74 (9th Cir., 1996).

Positive Factors include: family ties within the United States; residency of long duration in this country; evidence of hardship to the Respondent and family if deportation occurs; service in armed forces; history of employment; existence of property or business ties; existence of value or service to the

community; proof of genuine rehabilitation if a criminal record exists; and other evidence attesting to a respondent's good moral character. Negative Factors include: the nature and underlying circumstance of exclusion ground; additional significant violations of INA; existence of criminal record; and other evidence of bad character or undesirability.

If Cancellation is granted it is granted indefinitely, 8 CFR §2 12.3(h), and adjusts the alien to the status of an alien lawfully admitted for permanent legal residence. Once granted, absent fraud or error, it cannot be revoked. *Matter of Gordon, 20 I.&N. Dec. 52 (BIA 1989)*.

III Statement of Facts

At her hearing on November 30, 2001, Respondent testified as follows:

She entered the United States in July of 2001 at the age of 23. She was already pregnant with her oldest child, Cesar Rafael Ruiz-Guillen, at the time of her entry. Cesar is now eleven. She entered the country without inspection accompanied by Rafael Ruiz, the father of her children. She has resided in the United States since that time. She and Mr. Ruiz have had two more children - Yara Ruiz-Guillen, age 10, and Samantha Ruiz-Guillen, age 5. Respondent resided with Mr. Ruiz and her children in the United States until her arrest.

She came to the United States because she was pregnant and wanted to escape the poverty of her life at home. Her hometown in Mexico is very poor. They only have primary education and their teachers do not have degrees. Most children do not finish school and most begin working at an early age. The majority of people in her age group have left the town to come to the United States. Respondent believes that if she is forced to return to Mexico she will need to live in this town on her parent's small ranch.

In her hometown, families must pay for their children's education. They must pay for books, supplies, and uniforms. Families were expected to contribute to school maintenance and students were required to provide their own chairs. Respondent testified that these were the conditions when she was a child and that her parents and siblings back home confirm that this is still the case.

Respondent supplied letters from teachers in Mexico attesting to conditions in her hometown. The court found these letters to be of limited value.

Respondent completed nine years of education in Mexico. She testified that the quality of education was poor and that she was beaten. She showed the court a scar she has from one such beating. She expressed concern that her children might be beaten in school in her hometown. She also concedes that nine years of school is a relatively long education for someone living in Mexico. She testified that her siblings have not been able to afford to go to school for so long.

Her parents and some siblings still live in her hometown in Mexico. Her father does not work because he is ill. Her mother earns a living making meals for other families in town. Her sister works at a mill and earns approximately \$100 a month.

When she lived in Mexico she assisted her mother in making meals for other families. She originally did this to assist in paying for school. Eventually she did it full time and could not afford to go to school any longer.

Since coming to the United States, Respondent has been a stay at home mom. She has not worked outside the home or pursued any additional education. Mr. Ruiz was the family's sole bread winner. He worked as a tree planter, mechanic, and logger. She depended upon him for money. He did not want her to work or go to school.

Since coming to the United States, Respondent has been active in her community and church. She plans events for Mexican holidays. Her children are active as well.

She remained unsure during the hearing about whether she would take her children with her to Mexico. She originally testified that she would take them with her. After discussing the prospects for their future there she became very emotional, began to cry, and decided that she would leave her children in the United States with an uncle. Later, when she was calmer she reasserted her intention to take her children with her if she was removed. It is not yet certain what she would do but this court is inclined to believe that she would take her children with her.

She testified that she did not know that Mr. Ruiz was dealing drugs. She testified that their relationship was not good for the year or year and a half before his arrest. He often went out alone. They lived in the same house but did not usually sleep in the same room. She suspected that he might be having an affair. She testified that he has been a good provider and was good to the children. Even when they were having problems they did not argue in front of the children. She testified that she never saw him with drugs or large amounts of cash. She did all the cleaning, cooking and housework in addition to watching the children. She also claimed that she was unaware of the guns, drugs, cash, and tally sheets that the police found in her home. She testified that she was aware that Mr. Ruiz kept some pornography in the house but was not aware of the extent.

She testified that Mr. Ruiz did not like her to ask questions and she did not see bills or know about the family finances.

Her contact with Mr. Ruiz is now limited to taking her children to visit him in jail. She testified that she was not sure it was right to take them but that they missed their father and cried when they could not see him.

Her children are all relatively healthy but her youngest daughter has anemia and has been very upset

since her father's arrest.

The court also heard from Rosa Erica Hoffman, a character witness who testified that:

Ms. Hoffman is a legal permanent resident and has lived in the United States since she was six years old. She has known the Respondent for 11 years. They met when Respondent first came to the United States because Ms. Hoffman's mother and Respondent's aunt have a god mother relationship. At first she saw Respondent once a week. For the last year and a half she has seen her almost daily.

Respondent babysits Ms. Hoffman's children while she is working. Respondent can not drive and so Ms. Hoffman drives her to church and on errands. Their children play together.

Ms. Hoffman teaches at Headstart. Both Cesar and Yara attended Headstart to help them to learn English. Cesar can speak Spanish and does at home but does not read or write well. Respondent and Ms. Hoffman had hoped that Cesar could do his communion in Spanish but he had been unable to read well enough and they had to have the ceremony performed in English. Yara also speaks Spanish but her reading and writing skills are lower than Cesar's. She cannot read any words in Spanish with more than three letters.

Ms. Hoffman testified that she came to the Ruiz-Guillen house nearly daily and was unaware of any criminal activity. She never saw any illegal drugs being used. Mr. Ruiz never appeared to have large amounts of cash and could often not cover family expenses. Respondent had little money and could not buy groceries without coupons. She testified that everyone in the community was shocked by the arrests and no one had suspected. In her observation, Respondent's relationship with Mr. Ruiz had not been good in the year proceeding the arrest. Before that she thought their relationship had been good. Mr. Ruiz had stopped doing activities with the family. She knew Respondent was concerned he might be having an affair.

In her opinion, Respondent loves her children very much. Respondent has a reputation in the community for being truthful and law abiding. She is active in her church planning events and helps others in the community to celebrate religious and cultural events.

She testified that Respondent's children were traumatized by the separation from their mom during the arrest. The youngest daughter was abused at her first foster home and the children had to be relocated. She testified that all of the children wish to go to Mexico with their mother if she has to leave but are worried about their lives in Mexico. She knows that Cesar wishes to go to the University of Oregon and to play football. Yara wants to go to college and become an astronaut. She is hoping to earn an scholarship if her family can not afford to send her to college.

She also testified that the children have been traumatized by the loss of their father. They continue to cry frequently and continue to visit him in jail.

All the children like school and their mom encourages their education. All children are also active in church. Their mother encourages this but does not force it. Cesar is an alter boy.

An offer of proof was made to the court from the two oldest children in lieu of testimony. It included the information that: they have poor language skills in Spanish and can read and write at a first grade level at best. They want to go with their mother if she is forced to leave. They both want to go to college in the United States and are worried about educational opportunities in Mexico. They are involved in their church. They never saw drugs. The Service did not object to this offer of proof.

IV Legal Analysis

There is no dispute that Respondent in this case has the necessary ten years of residence required by statute.

The Service also concedes that, despite her arrest, the evidence supports a finding that she has good moral character.

Nor does the record indicate that she has any convictions or prior applications for relief that would make her statutorily ineligible for cancellation of removal.

Therefore the only issues in this case are whether Respondent has demonstrated sufficient hardship and whether she is entitled to relief as a matter of discretion.

In *Matter of Monreal*, the Board set a high threshold on the hardship needed to make one eligible for Cancellation of removal. Only a showing of hardship to the alien's qualifying relatives that is "substantially" beyond the ordinary hardship that would be expected when a close family member leaves this country will be sufficient. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). However, the applicant need not show that the hardship would be "unconscionable." *Id.*

In *Matter of Monreal* the court found that the diminish economic opportunities in Mexico were insufficient to support a finding of exceptional and extremely unusual hardship. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). However, the situation facing this Respondent's children is substantially different than the situation facing the children of the respondent in that case.

In *Matter of Monreal*, the respondent had a long work history. The court found that there was nothing to show that he would be unable to work and support his children. *Matter of Monreal*, 23 I&N Dec. 56, 64 (BIA 2001). Respondent in this case has virtually no work experience outside the home. In addition, she has lived an extremely subservient lifestyle. She speaks no English. She does not know how to drive a car. She did not even participate in areas of household management as basic as paying bills. It is unclear that she has the education, experience, or skills to support her family in Mexico. While a mere lower standard of living in the country of return may not be sufficient to warrant relief, this

court believes that in this case there is a genuine risk that Respondent will not be able to support her United States citizen in Mexico.

The children in the *Matter of Monreal* case, testified that they were able to read and write in Spanish. *Matter of Monreal*, 23 I&N Dec. 56, 64 (BIA 2001). In this case, Respondent's children speak Spanish but do not have the reading and writing skills in Spanish to perform at grade level if they returned with their mother. Both of the older children have expressed an interest in pursuing college in the United States. Their lack of language skills in Spanish would likely make it difficult for them to succeed in school in Mexico and that may create a fairly permanent barrier to both their pursuing higher education in the United States if they chose to return later in life or pursuing education opportunities in Mexico.

In addition, in *Matter of Monreal*, the respondent's removal would result in his children being reunited with his wife, who had been previously removed and the children's infant sibling. *Matter of Monreal*, 23 I&N Dec. 56, 64 (BIA 2001). In this case, Respondent's children would be separated from a parent since Mr. Ruiz is expected to spend a great deal of time in jail here in the United States.

It is clear from the language of the statute that congress intended to limit this form of relief to compelling cases. This court finds this case to be sufficiently compelling to warrant such relief. While the Board in *Matter of Monreal* found that the diminished economic opportunities in Mexico were not alone enough to create the sort of exceptional and extremely unusual hardship needed to qualify for cancellation of removal, *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001), in this case these children face more than a risk of diminished opportunity. In this case there is a real risk that these children will not be adequately provided for in Mexico, will not have access to meaningful education, and would face long term separation from their father. This court fears that these children might therefore suffer hardship that is substantially beyond what would normally be expected from the deportation of an alien with close family here.

This court thereby finds Respondent statutorily eligible for cancellation of removal.

This court also finds that this Respondent is entitled to such relief as a matter of discretion. While the court is not entirely convinced that Respondent knew nothing of Mr. Ruiz criminal activity, it does not believe that she was materially involved in any criminal activity herself. Furthermore, her long residence in the United States, good moral character, and involvement in her community are all positive factors that lead the court to believe that discretion is warranted in this case.

ORDER

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal is GRANTED.

March 8, 2002
Date

Michael S. Bennett
Michael Bennett
Immigration Judge

An Appeal is reserved for the Immigration and Naturalization Service until April 7, 2002.

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