



Single Complaint Detail

Complaint Number: 773

Immigration Judge: (b) (6)

Complaint Date: 06/25/13

Current ACIJ
Davis, John W.

Base City
(b) (6)

Status
CLOSED

Final Action
Complaint concluded -- IJ retirement made
action unnecessary

Final Action Date
06/25/13

| Complaint Narrative | | Complaint Source |
|---------------------|------------------|------------------|
| (b) (6) | In-court conduct | BIA |

Complaint Narrative: IJ granted more than 60 days voluntary departure. IJ overstepped bounds of impartiality when questioning respondent.

| | |
|----------|--|
| 06/25/13 | Complaint concluded -- IJ retirement made action unnecessary (b) (6) |
| 06/26/13 | Database entry created |



Detail

Complaint Number: 773

Immigration Judge: (b)(6)

Complaint Received Date: 06/25/13

Current ACIJ
Davis, John W.

Base City
(b)(6)

Status
CLOSED

Final Action
Complaint concluded -- UJ
retirement made action
unnecessary

Final Action Date
06/25/13

Past ACJIS:

| A-Numbers(s) | Complaint Nature(s) | Complaint Source(s) |
|--------------|---------------------|---------------------|
| (b)(6) | In-court conduct | BIA |

Complaint Narrative: UJ granted more than 60 days voluntary departure. UJ overstepped bounds of impartiality when questioning respondent.

Complaint History

06/25/13 Complaint concluded -- UJ retirement made action unnecessary (b)(6)
06/26/13 Database entry created

Sep 11, 2013

1 of 1

Immigration Judge Complaint Intake Form

HQ Use Only:
complaint #: _____
source: first / subsequent

Date Received at OCIJ: 25 June 2013

| complaint source type | |
|---|--|
| <input type="checkbox"/> anonymous <input type="checkbox"/> respondent's attorney <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____ | <input checked="" type="checkbox"/> BIA <input type="checkbox"/> respondent <input type="checkbox"/> OIL <input type="checkbox"/> Circuit <input type="checkbox"/> EOIR <input type="checkbox"/> OPR <input type="checkbox"/> DHS <input type="checkbox"/> OIG <input type="checkbox"/> Main Justice <input type="checkbox"/> media |
| complaint receipt method | |
| <input type="checkbox"/> letter <input type="checkbox"/> fax | <input checked="" type="checkbox"/> IJC memo (BIA) <input type="checkbox"/> unknown <input type="checkbox"/> email <input type="checkbox"/> phone (incl. voicemail) <input type="checkbox"/> in-person <input type="checkbox"/> other: _____ |
| date of complaint source (i.e., date on letter, date of appellate body's decision) | complaint source contact information |
| BIA June 18, 2013 | name: _____ IJC Memo _____ address: _____ _____ _____ email: _____ phone: _____ fax: _____ |
| additional complaint source details (i.e., DHS component, media outlet, third party details, A-number) | |

| IJ name | base city | ACIJ |
|--|--|--|
| (b) (6) | (b) (6) | John W. Davis |
| relevant A-number(s) | date of incident | |
| Matter of (b) (6) Matter of (b) (6) and Matter of (b) (6) | October 13, 2011 | |
| allegations | | |
| IJ granted more than 60 days voluntary departure. IJ overstepped bounds of impartiality when questioning respondent. | | |
| nature of complaint | | |
| <input checked="" type="checkbox"/> in-court conduct <input type="checkbox"/> incapacity | <input type="checkbox"/> out-of-court conduct <input type="checkbox"/> other: _____ | <input type="checkbox"/> due process <input type="checkbox"/> bias <input type="checkbox"/> legal <input type="checkbox"/> criminal |

[illegible]



Memorandum

| Subject | Date |
|---|---------------|
| <i>Matter of</i> (b) (6) <i>Matter</i> <i>of</i> (b) (6) <i>and Matter of</i> (b) (6) (BIA June 18, 2013) | June 25, 2013 |

To

Brian O'Leary, Chief Immigration Judge

MaryBeth Keller, Assistant Chief Immigration Judge

From

David L. Neal, Chairman

Attached please find a copy of the Board's decision dated June 18, 2013, and relevant portions of the record in the above-referenced matter.

The Board asked me to bring this case to your attention.

This case will be held in Suzette Henderson's office for one week. If you wish to review the record, please contact Suzette Henderson.

Thank you for your attention to this matter.

Attachments



U.S. Department of Justice

Executive Office for Immigration Review

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

*5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041*

(b) (6)

DHS/ICE Office of Chief Counsel - (b)(6)&(b)(7)(C)

(b)(6)&(b)(7)(C)

Name: (b) (6)

Riders: (b) (6)

A (b) (6)

Date of this notice: 6/18/2013

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:
Greer, Anne J.**

**schuckec
Userteam: Docket**

10/20



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

DHS/ICE Office of Chief Counsel - (b)(6)&(b)(7)(C)
(b)(6)&(b)(7)(C)

Name: (b) (6)
Riders: (b) (6)

A (b) (6)

Date of this notice: 6/18/2013

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

schuckec
Userteam: Docket

Falls Church, Virginia 22041

Files: (b) (6)

Date:

JUN 18 2013

(b) (6)

In re: (b) (6)

(b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: (b) (6) Esquire

ON BEHALF OF DHS: (b) (6)
Assistant Chief Counsel

APPLICATION: Cancellation of removal; voluntary departure

The respondents (b) (6) a couple, and their adult daughter (b) (6) who are natives and citizens of Mexico, appeal the Immigration Judge's October 13, 2011, decision denying their applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b).¹ The Immigration Judge also granted the respondents voluntary departure. See section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The appeal will be dismissed.²

We review the Immigration Judge's findings of fact and determinations of credibility for clear error, but review de novo questions of law, discretion, and judgment, and all other issues. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). As the applications for cancellation of removal were filed by the respondents (b) (6) after May 11, 2005, they are subject to the REAL ID Act. See section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4); *Matter of S-B-*, 24 I&N Dec. 42, 45 (BIA 2006). The application for cancellation of removal filed by (b) (6) (b) (6) has a date-stamp of April 10, 2001, and thus, we assume this to be her date of filing (Exh. 3A). Accordingly, her application is not subject to the amendments made by the REAL ID Act. See *Matter of S-B-*, *supra*.

¹ The Immigration Judge found that the respondents (b) (6) did not file a frivolous asylum application (I.J. at 16-18). The Department of Homeland Security does not contest this finding. The respondents have waived any claim of relief based on the asylum applications that were filed.

² The Immigration Judge had combined, but not consolidated, the proceedings (I.J. at 1 n.1). On November 4, 2011, the Board granted the respondents' request for consolidation and acknowledged receipt of a single filing fee.

The Immigration Judge found (b) (6) and (b) (6) credible; he found (b) (6) not credible. The respondents assert that (b) (6) is credible. We need not address this issue as the adverse credibility finding did not affect (b) (6) (b) (6) eligibility for relief (I.J. at 32). Rather, the Immigration Judge granted (b) (6) voluntary departure, and found her ineligible for cancellation of removal because she was unable to demonstrate the requisite hardship as discussed infra.

The Immigration Judge found that the respondents' (b) (6) and (b) (6) (b) (6) qualifying relative, their daughter (b) (6) would not suffer exceptional and extremely unusual hardship upon their removal. The Immigration Judge recognized that because (b) (6) was soon graduating from high school³ she would face certain obstacles, but that her hardship was not exceptional and extremely unusual. *See Matter of Andazola*, 23 I&N Dec. 319, 321 (BIA 2002) (holding that an applicant for cancellation of removal under section 240A(b) of the Act must demonstrate hardship to his or her qualifying relatives that is "substantially different from, or beyond, that which would normally be expected" from the removal of a close family member) (quoting *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001)); *see also Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

The respondents argue that given the diminished educational and economic opportunities in Mexico, plus the anticipated increase in (b) (6) anxiety whether she accompanied her parents to Mexico or remained in the United States, they have demonstrated the requisite level of hardship for a grant of relief (Respondents' Br. at 20-21). The Immigration Judge considered whether (b) (6) would face exceptional and extremely unusual hardship if she accompanied her parents to Mexico, and also if she remained in the United States. Under both scenarios, the Immigration Judge found that the respondents did not demonstrate the requisite hardship.

The respondents argue that should they be removed to Mexico, (b) (6) would not be able to afford to go to college (Respondents' Br. at 3-4). If (b) (6) accompanies her parents to Mexico, the Immigration Judge noted that the respondents did not demonstrate that she would not be eligible for Mexican national status, and accordingly, lower tuition rates and financial aid (I.J. at 27 & n. 11). In addition, although the Immigration Judge considered (b) (6) lack of Spanish proficiency at an academic level (I.J. at 23, 26), given her capabilities, (b) (6) found that the respondents did not demonstrate that she could not learn to read and write Spanish to continue her education (I.J. at 30).

If (b) (6) remained in the United States, the Immigration Judge found that she had options available to her (I.J. at 11, 23-24). At the time of the hearing, (b) (6) was pursuing a scholarship to (b) (6) College, and planned on later attending (b) (6) University (I.J. at 25-26; Tr. at 295, 303). Moreover, the Immigration Judge noted that the record did not indicate that other options were unavailable to her given her academic record, age, ability to find employment, and that other relatives were living in the United States (I.J. at 12, 24, 26-27; Tr. at 299-00, 302-04, 307-08).

³ (b) (6) was 17 years old at the time of the hearing in October 2011, and was scheduled to graduate from high school at the end of the 2011-2012 school year (I.J. at 11).

The Immigration Judge also considered the testimony from the psychologist, (b) (6) testified that (b) (6) anxiety pattern fit that of a child whose parents were facing removal, although at a higher than expected level (I.J. at 13, 28). We disagree with the respondents that the Immigration Judge minimized (b) (6) testimony or the level of (b) (6) anxiety (Respondents' Br. at 6, 17). Rather, the Immigration Judge took the testimony into account, including (b) (6) opinion that the move would increase her anxiety (I.J. at 14). The Immigration Judge, however, noted that (b) (6) was able to function, demonstrated stellar academic performance, and she had never received counseling or medication to treat her condition (I.J. at 14, 28-29). In any event, such increased anxiety, although not uncommon for children whose parents are facing removal, does not rise to the level of exceptional and extremely unusual hardship, even when considered cumulatively with other hardships in this case. See *Matter of Monreal*, *supra*, at 65.

The respondents also argue that country conditions, including the crime rate in Mexico, contribute to the hardship (Respondents' Br. at 4-5). The Immigration Judge recognized the conditions in Mexico (I.J. at 23, 26). But (b) (6) noted that the respondents had not demonstrated an inability to avoid crime-infested regions (I.J. at 30). Despite the educational, economic, psychological, and social issues, all of which the Immigration Judge considered, the respondents did not demonstrate that (b) (6) would suffer exceptional and extremely unusual hardship to warrant relief.⁴

(b) (6) has two qualifying relatives, her minor children, who at the time of the hearing were 2 and 5 years old (I.J. at 12). Upon de novo review, we disagree with the Immigration Judge's decision to afford less weight to the hardship that (b) (6) children might face merely based on when they were born (I.J. at 33). Giving full weight and consideration to the children's hardship, it nevertheless does not rise to the requisite level for statutory relief.

The Immigration Judge's findings of fact on this issue are not clearly erroneous. The Immigration Judge considered the children's young age, the lack of any psychological issues, and the conditions in Mexico (I.J. at 33). The Immigration Judge found that even though they do not speak Spanish, because they are so young, they could learn the language. The Immigration Judge noted that even though they would return to Mexico with their mother, and thus not see their United States citizen father, the impact, if any, would be minimal, as he rarely sees or provides for them (I.J. at 33). The Immigration Judge stated that they could continue to receive the support from their grandparents upon their removal to Mexico. The respondents argue that the grandparents would not be able to provide the same support that they do in the United States because of less economic opportunities (Respondents' Br. at 23). This is not enough, however, to demonstrate exceptional and extremely unusual hardship. See *Matter of Monreal*, *supra*, at 65.

The respondents compare (b) (6) to the alien in *Matter of Recinas*, *supra* (Respondents' Br. at 22). We disagree. Although the children would not see their United States citizen aunt and uncle, they would continue to have the support of their grandparents (I.J. at 33). Finally, the respondents argue that the Immigration Judge failed to consider that (b) (6) would have

⁴ The Immigration Judge distinguished this case from other instances in finding a lack of the requisite hardship (I.J. at 25 n.9 and 27 n.10).

problems adjusting to life in Mexico, and thus would be depressed, which would affect her children (Respondents' Br. at 10). The respondents' argument, however, amounts to speculation and does not demonstrate the requisite level of hardship. Although we recognize that the respondents' qualifying relatives will face hardship upon the respondents' removal, it is not exceptional and extremely unusual to warrant a grant of cancellation of removal.

The Immigration Judge granted the respondents voluntary departure⁵ conditioned upon the posting of a voluntary departure bond in the amount of \$500 to the Department of Homeland Security ("DHS") within five business days from the date of the order (I.J. at 36). Effective January 20, 2009, pursuant to 8 C.F.R. § 1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient proof that the required voluntary departure bond was posted with the DHS, and if the alien does not provide timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order. The record reflects that only (b) (6) submitted timely proof of having paid the voluntary departure bond. Accordingly, the period of voluntary departure will be reinstated only for (b) (6).

The record does not reflect that (b) (6) and (b) (6) submitted timely proof of having paid the voluntary departure bond. The Immigration Judge properly advised them of the need to inform the Board, within 30 days of filing an appeal, that the bond has been paid (I.J. at 36 n. 13). Therefore, the voluntary departure period granted by the Immigration Judge will not be reinstated for them, and the respondents (b) (6) shall be removed from the United States pursuant to the Immigration Judge's alternate order. See 8 C.F.R. §1240.26(c)(3); *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010).⁶

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: The respondents (b) (6) and (b) (6) are removed from the United States to Mexico.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent (b) (6) is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension

⁵ The Immigration Judge's decision of October 13, 2011, granted the respondents until December 27, 2011, to depart. The Act and regulations provide for no greater than 60 days. Section 240B(b)(2); 8 C.F.R. §§ 1240.26(e), (f). Thus, we will reinstate a 60-day voluntary departure period.

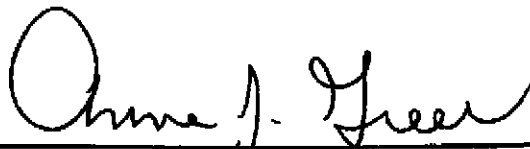
⁶ We note that on June 15, 2012, the Secretary of the DHS announced that certain young people, who are low law enforcement priorities, will be eligible for deferred action. A respondent may be eligible to seek deferred action. Information regarding DHS's Consideration of Deferred Action for Childhood Arrivals may be obtained on-line (www.uscis.gov or www.ice.gov) or by phone on USCIS hotline at 1-800-375-5283 or ICE hotline at 1-888-351-4024.

beyond that time as may be granted by the Department of Homeland Security ("DHS"). See section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent (b) (6) fails to voluntarily depart the United States, the respondent (b) (6) shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent (b) (6) fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent (b) (6) shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

WARNING: If the respondent (b) (6) files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. See 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent (b) (6) files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent (b) (6) files a petition for review and then departs the United States within 30 days of such filing, the respondent (b) (6) will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he remains in the United States while the petition for review is pending. See 8 C.F.R. § 1240.26(i).



FOR THE BOARD

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT**

(b) (6)

| | |
|---|--|
| File Nos: (b) (6) In the Matter of: (b) (6) Respondents. | Date: October 13, 2011 IN REMOVAL PROCEEDINGS WRITTEN DECISION OF THE IMMIGRATION JUDGE DENYING CANCELLATION OF REMOVAL, GRANTING VOLUNTARY DEPARTURE |
|---|--|

| | |
|----------------------|---|
| CHARGES: | Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Alien present in the United States without admission or parole). |
| APPLICATIONS: | Cancellation of Removal and Adjustment of Status for Certain Non-Permanent Residents under Immigration and Nationality Act Section 240A(b)(1); Conclusionary Voluntary Departure under Immigration and Nationality Act Section 240B(b). |

| | |
|--------------------------------------|--|
| ON BEHALF OF THE RESPONDENTS: | ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY: |
| (b) (6) | (b)(6) & (b)(7)(C) Esq. Assistant Chief Counsel (b)(6) & (b)(7)(C) |

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Introduction, Jurisdictional Statement, and Procedural History

The male respondent (b) (6) is a divorced, 50-year-old male.

The older female respondent (b) (6) is a single, 53-year-old female.

(b) (6)

The younger female respondent (b) (6) is a single, 23-year-old female. All 3 respondents are natives and citizens of Mexico.

The former Immigration and Naturalization Service ("INS") brought removal proceedings against the respondents under the authority of the Immigration and Nationality Act ("INA" or "Act"). Proceedings commenced with the filings of Notices to Appear ("NTA") (Form I-862) with the Immigration Court. 8 C.F.R. § 1003.14(a). (See (b) (6) Exh. 1; (b) (6) Exh. 1; (b) (6) Exh. 1.) At an October 23, 2008 hearing, the Court combined, but did not consolidate, the respondents' proceedings.¹

The INS generated an NTA pertaining to (b) (6) on October 30, 1996. (b) (6) Exh. 1.) The INS allegedly served the NTA upon (b) (6) (b) (6) via certified mail at (b) (6) on November 12, 1997. (*Id.*) The INS filed it with the (b) (6) Immigration Court on November 18, 1997. (*Id.*) The NTA set (b) (6) initial master calendar hearing for January 13, 1998. (*Id.*) However, (b) (6) record of deportable/inadmissible alien (Form I-213) indicates the post office returned the NTA to the INS as undelivered, and initial removal proceedings "were closed, due to lack of service and failure of (b) (6) or a representative's appearance at the proceedings."² (b) (6) Exh. 2.) On February 1, 2007, the (b) (6) Immigration Court granted the Department of Homeland Security's ("DHS") motion to recalendar (b) (6) original proceedings and to transfer venue to the (b) (6) Immigration Court.

The former INS alleged (b) (6) was not a citizen or national of the United States, but rather a native and citizen of Mexico. (b) (6) Exh. 1.) It also alleged he entered the United States at or near (b) (6) on or

¹ The Court combined the proceedings into a single hearing because of the similar facts in each case, but did not consolidate proceedings because each respondent still faced legal issues unique to his or her situation.

² An April 21, 1998 decision by (b) (6) Immigration Court administratively closing (b) (6) (b) (6) proceedings was mailed to (b) (6) but returned to the court as "attempted - not known."

(b) (6)

about January 1, 1987, and was not then admitted or paroled after inspection by an immigration officer. (*Id.*) Based on these allegations, the INS charged him as subject to removal under INA § 212(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the country at any time or place other than designated by the Attorney General. (*Id.*)

On February 22, 2001, the INS alleged (b) (6) and (b) (6) were not citizens or nationals of the United States, but rather natives and citizens of Mexico. (b) (6) Exh. 1; (b) (6) Exh. 1.) It also alleged they entered the United States at or near (b) (6) on or about May 10, 1988, and were not then admitted or paroled after inspection by an immigration officer. (b) (6) Exh. 1; (b) (6) Exh. 1.) Based on these allegations, the INS charged them as subject to removal under INA § 212(a)(6)(A)(i). (b) (6) Exh. 1; (b) (6) Exh. 1.)

All 3 respondents admitted the factual allegations in the NTAs and conceded removability. Based on the concessions to the removability charges, the Court found them removable as charged. INA § 240(c)(2). The Court designated Mexico as the country of removal at the respondents' request.

The respondents have the burden of establishing eligibility for any requested benefit or privilege, and that it should be granted in the exercise of discretion. 8 C.F.R. § 1240.8(d). As relief, the respondents seek cancellation of removal and adjustment of status for certain non-permanent residents (Form EOIR-42B). In the alternative, they seek voluntary departure.³ For the reasons discussed below, the Court denies the respondents cancellation of removal but grants them conclusionary voluntary departure.

II. Summary of Evidentiary Record

The record of proceeding ("ROP") in (b) (6) case is comprised of

³ At a June 20, 2001 hearing before the (b) (6) Immigration Court, (b) (6) and (b) (6) former counsel requested voluntary departure as an alternative to cancellation of removal. The Court assumes the male respondent, (b) (6) also requests the same so that he may depart the United States with his long-term partner, (b) (6) and his daughter, (b) (6)

(b) (6)

10 exhibits. The ROP in (b) (6) case is comprised of 9 exhibits. The ROP in (b) (6) case is comprised of 4 exhibits. Further, all 3 respondents, (b) (6) (b) (6) and expert witness Doctor (b) (6) testified.

A. Documentary Evidence Considered

The DHS objected to the submission of undated photographs of Mexican shanty-towns at (b) (6) Exhibit 4, Tab Y, due to a lack of foundation. It also objected to the submission of a June 8, 2002 United Nations press release at Exhibit 8, Tab D because it failed to represent current conditions in Mexico. The Court admitted all documentary exhibits into evidence, despite objection, to determine whether the respondents met their burden of proof for relief.

I. (b) (6) Documents

Regarding (b) (6) documents, Exhibit 1 is the NTA originally filed with the (b) (6) Immigration Court on November 18, 1997. Exhibit 2 is a December 8, 2006 Form I-213 pertaining to him. Exhibit 3 is (b) (6) May 27, 1997 application for asylum and for withholding of deportation (Form I-589). Exhibit 3a is a May 27, 1997 application for employment authorization (Form I-765). Exhibit 4, tabs A through Y, consists of (b) (6) June 19, 2007 Form EOIR-42B and supporting documentation. Exhibit 5 consists of instructions for submitting certain applications in immigration court and for providing biometric and biographic information to United States Citizenship and Immigration Services ("USCIS"). Exhibit 6, tabs Z through HH, consists of (b) (6) pre-hearing statement. Exhibit 7 is a pre-hearing brief. Exhibit 8, tabs A through D, consists of another pre-hearing statement and further supporting documentation. Exhibit 9, tabs A through L, is yet another supplemental pre-hearing statement. Exhibit 10, submitted after the respondents' June 30, 2011 hearing, is a concluding brief addressing the respondents' cancellation of removal eligibility based on credibility, continuous physical presence, good moral character, and hardship.

II. (b) (6) Documents

(b) (6)

Turning to (b) (6) documents, Exhibit 1 is the NTA filed with the (b) (6) Immigration Court on March 8, 2001. Exhibit 2 is a Form I-589 received by USCIS on January 18, 2001. Exhibit 3 is an unsigned April 10, 2001 Form EOIR-42B. Exhibit 3a, tabs 8 through 12,⁴ is an updated Form EOIR-42B with supporting documentation. Exhibit 4, pages 1 through 100, is documentation supporting (b) (6) Form EOIR-42B, filed with the (b) (6) Immigration Court on November 6, 2003. Exhibit 5, pages 145 through 172, is supplemental evidence in support of (b) (6) Form EOIR-42B, filed with the (b) (6) Immigration Court on April 2, 2004. Exhibit 6 consists of further evidence supporting her Form EOIR-42B, and was filed with the (b) (6) Immigration Court on November 17, 2005. Exhibit 7 is additional documentation supporting (b) (6) Form EOIR-42B, filed with the (b) (6) Immigration Court on September 7, 2006. Exhibit 8 consists of biometrics instructions. Exhibit 9 is a June 30, 2011 signature provided by (b) (6)

III. (b) (6) Documents

Concerning (b) (6) documents, Exhibit 1 is the NTA filed with the (b) (6) Immigration Court on March 8, 2001. Exhibit 2 is an undated and unsigned Form EOIR-42B, with supporting documentation. Exhibit 2a, tabs 4 through 5, is an updated Form EOIR-42B with supporting documentation. Exhibit 3 consists of further documentation supporting (b) (6) Form EOIR-42B. Exhibit 4 consists of biometrics instructions.

B. Testimony Considered

Although the transcript contains the entire testimony, in light of the Court's frivolous asylum, credibility, good moral character, and hardship concerns, this decision provides a summary below.

I. (b) (6) Testimony

⁴ The Court notes there are two tabs at exhibit 8 both marked as tab 11. One is comprised of medical and academic records for (b) (6) and (b) (6). The other is comprised of undated, Xeroxed photographs of Mexican shanty-towns.

At an October 23, 2008 and June 30, 2011 individual hearing, (b) (6) testified he illegally entered the United States in 1986 or 1987⁵ by crossing the U.S.-Mexican border at (b) (6). In either 1990 or 1991, while at an airport in (b) (6), a law enforcement officer asked him for immigration documentation. When (b) (6) failed to produce it, the officer arrested and detained him in a room at the airport for approximately 5 hours. At that point the officer transferred (b) (6) to a (b) (6) detention facility. (b) (6) could not remember whether officers took his photograph or fingerprints, or whether he signed any paper. However, officers asked him whether he wanted to see an immigration judge, which (b) (6) declined because the officers informed him he would be detained for a long time if he chose that option. The next day, immigration authorities drove him to the (b) (6) border on a bus. Once at the border, he had to walk into (b) (6) Mexico. (b) (6) illegally crossed back into the United States 1 to 5 days later.

In 1997, (b) (6) consulted a woman named (b) (6) whom he believed to be an attorney, to legalize his immigration status. During their interview, she asked about his identification documents, the length of his U.S. residency, his criminal record, and his employment status. Although (b) (6) never signed a contract with (b) (6) he understood she would file an immigration application on his behalf based on the length of time he lived in the country. To that end, he provided her his Mexican birth certificate, Mexican passport, a copy of his (b) (6) identification, and a pay stub.

(b) (6) never mentioned the option of filing for political asylum, never warned (b) (6) about the consequences of filing a frivolous asylum application, and he never instructed her to file such an application. Furthermore, due to his inability to read, write, or type English, he never filled out, signed, or submitted an asylum application on his own behalf. As such, he never knew (b) (6) filed

⁵ At the 2008 hearing, (b) (6) testified to entering in 1987 but at the 2011 hearing, he testified to entering in 1986.

an asylum application on his behalf, and he never attended an asylum interview. In fact, he stated he never lived at the address listed on the asylum application submitted by (b) (6). Rather, he testified this was (b) (6) office address. Furthermore, he surmised the application erroneously failed to list his 3 children because he never told (b) (6) (b) (6) about them.

Regarding the hardship his United States Citizen ("USC") daughter (b) (6) (b) (6) would suffer upon his removal, (b) (6) testified she has always lived with him and he has always financially supported her. If removed, (b) (6) would accompany him to Mexico. He does not believe she could stay with his undocumented brothers in (b) (6) because they have "their own lives." However, in Mexico, (b) (6) does not know where the family would live. Although his parents live in Mexico, he would be unable to live with them as they currently share a home with numerous other extended family members. Furthermore, given his lack of special job skills, (b) (6) does not believe he could earn enough in Mexico to pay for (b) (6) college education.

I. (b) (6) Testimony

Because of the Court's credibility and moral character concerns with (b) (6) (b) (6) testimony regarding a previously filed Form I-589 and Form EOIR-42B, as well as signatures that appear on numerous forms within the ROP, and her attendance at past removal proceedings, the Court recites her testimony here.

Concerning her asylum application, at the October 23, 2008 hearing, (b) (6) testified that sometime after her 1988 illegal U.S. entry, a co-worker referred her to a (b) (6) immigration attorney. (b) (6) believed the attorney would file an immigration application on her behalf based on the time (b) (6) lived in the United States. She never realized the attorney planned to use the information (b) (6) provided to submit a Form I-589. Nevertheless, she conceded the accuracy of the information in the asylum application in her ROP. On cross-

(b) (6)

examination, she did not deny attending an asylum interview, but instead indicated she never received a frivolous asylum warning.

At the June 30, 2011 hearing, (b) (6) testified she never hired anyone to complete an asylum application for her, she never personally submitted such an application, and she had never before seen the asylum application filed on her behalf. She conceded the photograph attached to the Form I-589 in the ROP belonged to her, but originally denied signing the application. She later wavered regarding the signature and stated "I'm confused. Maybe it [the signature] would have been the one before, but it [the signature] might not be now because my signature is different now." She remained extremely non-responsive when again asked whether the signature belonged to her by answering "[p]robably, I don't know." She also denied receiving a letter asking her to attend an asylum interview, and vehemently denied ever attending such an interview.

Instead, (b) (6) testified she hired the (b) (6) attorney, named (b) (6) to fix her immigration status based solely on her "time" in the United States. To do this, she gave (b) (6) her Mexican birth certificate and voter registration card. On cross-examination, she repeated she only gave (b) (6) her passport and voting card, and denied providing (b) (6) with documents related to her children. However, moments later she admitted she gave (b) (6) (b) (6) birth certificate at their second meeting. Later during cross-examination, she also acknowledged giving (b) (6) office her tax returns, earnings statements, and copies of her children's school grades.

When confronted with birth certificates, social security cards, and school identification cards for her children (b) (6) and (b) (6) attached to the Form I-589, (b) (6) failed to explain their presence. She instead inexplicably stated "I don't know. I didn't give her (b) (6) those documents," "I don't know where they came from," and "I wouldn't know what to tell you."

Turning to her cancellation of removal application, despite being confronted

(b) (6)

with a 2001 Form EOIR-42B in her ROP. (b) (6) denied filing the application, and claimed to not know who filed it on her behalf. She could not explain how her son (b) (6) immunization records appeared attached to the application because she earlier denied providing (b) (6) any medical documents. In addition, she failed to satisfactorily explain why the application included the affidavits of two women named (b) (6) and (b) (6). She denied knowing (b) (6). Although she acknowledged knowing (b) (6) as a neighbor, and stated (b) (6) gave her a letter, she denied providing the letter to her attorneys. Instead, she somewhat bizarrely speculated that someone living in her house possibly passed the letter on.

Regarding (b) (6) signatures, in addition to wavering about signing her asylum application, (b) (6) denied the signature appearing on 1998 federal and (b) (6) state tax returns attached to her 2001 Form EOIR-42B belonged to her. She conceded "it looks like my signature" but could not specifically remember signing the returns. She subsequently confirmed "it's not my signature. That's a nice handwriting." She further denied she signed every single notice of entry of appearance as attorney or representative before the Immigration Court (Form EOIR-28), other than the one pertaining to her current counsel.⁶ She also denied signing the alien's change of address form (Form EOIR-33/IC) updating her address from (b) (6) to (b) (6) in (b) (6) even though she admitted moving from the (b) (6) address to the (b) (6) address.⁷ She stated the signature on the forms looked like hers "but I do not sign this way."

At this point, the Court, concerned (b) (6) did not understand the

⁶ Several Form EOIR-28s bearing the signature of someone claiming to be (b) (6) appear on the left hand side of the ROP: (1) a November 10, 2003 Form EOIR-28 listing (b) (6) as (b) (6) attorney; (2) a December 29, 2001 Form EOIR-28 listing (b) (6) and (b) (6) as (b) (6) attorneys; and (3) a June 20, 2001 Form EOIR-28 listing (b) (6) as (b) (6) attorney. Based on the recorded hearings in (b) (6) ROP, these attorneys did in fact physically appear at (b) (6) Immigration Court proceedings.

⁷ This Form EOIR-33/IC also appears on the left hand side of the ROP.

difference between her signature and the act of signing a document, asked (b) (6)

(b) (6) to explain the difference in her mind. She described how when she signs something with her "signature" "I do my full name and then I go like this," gesturing with her writing hand. The Court instructed her anytime she signs a document, the document then contains her signature, regardless of the type of signature used, whether it be the letter "X" or "fancy" writing.

Despite the Court's clarification, on re-direct, (b) (6) still refused to confirm she signed the aforementioned documents. She explained she had earlier denied the signatures belonged to her because "they're different, they don't look alike, and because probably now I sign differently." However, she again failed to confirm signing the forms, claiming she "wanted to say that the signature that I have now, well I *might* have signed them but maybe the signature I have now is not the same as the one I had before." When directly asked whether she had earlier denied signing her 1998 tax returns, she stated, "I do remember having said that but because when I saw the signatures and because I'm nervous of the signature that you showed me."

Concerning her removal proceedings, (b) (6) first claimed she never received notice of her (b) (6) Immigration Court proceedings, and that before attending her (b) (6) removal proceedings, she "never had been to immigration."⁸ On re-direct, (b) (6) contradicted her earlier testimony and admitted attending Immigration Court proceedings in (b) (6). She claimed her earlier denial stemmed from confusion between the terms "immigration" and "court," and that while she had never seen an "immigration official," she had been to "court." However, this explanation blatantly contradicts DHS counsel's earlier questioning, when he specifically asked (b) (6) whether she had "been to immigration court," not whether she had seen an "immigration official."

⁸ The first 7 exhibits in (b) (6) ROP were marked into the record by the (b) (6) Immigration Court, and hearing tapes in the ROP confirm (b) (6) appearance at various hearings before the (b) (6) tribunal, spanning from 2001 to 2006.

Turning to possible hardship her daughter (b) (6) would suffer, (b) (6) testified (b) (6) has always lived with her, and the two have a "very good relationship" characterized by sharing and talking about everything in (b) (6) life. Upon removal, (b) (6) would follow (b) (6) to Mexico. However, (b) (6) does not know where the family would live in Mexico - they could not stay with her parents because they are deceased, and they could not stay with (b) (6) siblings because she lost contact with them after her mother's passing.

iii. (b) (6) Testimony

At the June 30, 2011 hearing, (b) (6) age 17, testified about the educational hardship she would face upon her parents' removal. She attributed her past academic success to the support her parents provided her. Regarding her future academic plans, after graduating from high school at the end of the 2011-2012 school year, she plans to attend (b) (6) College, in (b) (6) under a possible scholarship. Her parents plan to pay for her room and board at (b) (6) College. Without the scholarship, a semester of studies would cost \$2,000, in addition to room and board fees. After 2 years, she plans to transfer to (b) (6) (b) (6) University, in (b) (6). She stated her parents' removal from the United States would force her to put these academic dreams on hold.

Although (b) (6) acknowledged she could attend (b) (6) College without her parents' financial support by covering the costs with an on-campus job, she refused to consider doing so because she wants to focus solely on her education. Furthermore, although several of her relatives live in the United States, she refused to consider staying with them upon her parents' removal to save costs. She would not stay with her 22-year-old USC brother (b) (6) despite the fact he is employed, because in her opinion, he "wastes" his money on himself and stays out late a lot. She would not stay with her half-sister in (b) (6) because the sister "has her own life." She would not live with her half-brother or aunts and uncles in (b) (6) because she considers the area unsafe, and does not believe she could live there without her

(b) (6)

parents. She gave little thought to living on her own because she did not believe she could pay her living costs given her lack of job experience.

In addition, despite her past ability to achieve academic success, as well as being mere months away from legal adulthood and living away from her parents at (b) (6) College, (b) (6) testified she would not remain in the United States without her parents because they are her foundation, provide her with a sense of protection, and she does not know if she could accomplish anything without them. As such, she would follow them to Mexico, despite being unable to read or write Spanish, never traveling there before, being afraid of the crime, and having no place to live.

In Mexico, she believes her academic dreams will be difficult if not impossible to achieve because a semester at the University of the Americas in Puebla for a non-Mexican citizen costs about \$5,000 for 30 units - the maximum one may take. Because Mexico does not offer financial aid to non-Mexican citizens, (b) (6) does not believe her parents could afford to pay such tuition costs. She acknowledged taking 18 units, the minimum for matriculation, would make tuition more affordable. However, she refused to consider taking less than 30 units because she simply would not "settle" for fewer units, and is the type of person who goes for the maximum units.

iv. (b) (6) Testimony

(b) (6) testified to illegally entering the United States as an infant in 1988. After being placed in removal proceedings in 2001, she gave birth to her USC daughter, (b) (6) in 2006, and her USC son, (b) (6) in 2008. If removed, she would not leave her 5-year-old daughter and 2-year-old son with their USC father, who lives in (b) (6) because he has failed to financially support them in the past, sees them only about 4 times a year, and lacks a sense of responsibility. Although neither child has ever traveled to Mexico, neither understands nor speaks Spanish, and she does not know where in Mexico she would live, (b) (6) testified she would bring her children to Mexico if removed.

(b) (6)

v. Doctor (b) (6) Testimony

At the outset, the Court notes (b) (6) did not consider himself an expert on conditions in Mexico, and never mentioned a specialized knowledge of Mexico's educational system. Rather, (b) (6) testified as an expert witness solely in licensed clinical psychology. At the October 23, 2008 individual hearing, he admitted: (1) he regularly conducted psychological interviews of individuals involved in immigration proceedings; (2) 90% of individuals interviewed showed a "disorder," and (3) he provided "hundreds" of psychological evaluations in removal proceedings for such individuals. In this case, he specifically testified about the hardship Herlinda would suffer upon her parents' removal based on her psychological "disorder," and the hardship (b) (6) children would suffer upon her removal.

With respect to (b) (6) after conducting a psychological test and clinical interview with the girl, (b) (6) concluded she suffered from generalized anxiety disorder - a condition characterized by fears, expectations of harm, instability, nervousness and distress. However, (b) (6) only demonstrated fear revolved around her parents' removal, and her only expectation of harm turned around what would happen to her upon their removal. She suffered no instability, although anxiety about what would happen to her family supposedly debilitated her by distracting her from her work.

Overall, (b) (6) conceded (b) (6) anxiety pattern fit her life situation as a child facing her parents' removal, although her anxiety level was higher than generally expected. While she employed repression as a defense mechanism, she possessed a very positive attitude, and tested as "functioning" well. To that end, she never received any other formal diagnosis or counseling for her condition.

Despite these seemingly mild to moderate symptoms, (b) (6) indicated (b) (6) scored high for psychotic behavior, even though she was not, in his opinion, psychotic. He surmised the test results indicated the level of suffering caused by her anxiety disorder rose to the level of suffering expected from one

(b) (6)

undergoing a psychotic breakdown.

(b) (6) did not believe (b) (6) would remain in the United States upon her parents' removal because such separation would be "devastating." If (b) (6) followed her parents to Mexico, (b) (6) speculated the move would exacerbate her anxiety because the educational opportunities she created for herself as a high achieving U.S. student would disappear.

At the June 30, 2011 hearing, (b) (6) testified he conducted several more interviews with the (b) (6) family after their 2008 hearing to prepare for their 2011 hearing. Based on his past clinical analysis and interviews, he continued to diagnose (b) (6) with generalized anxiety disorder. She demonstrated anxiety symptoms such as muscle tension, irritability, and her mind "going blank." In addition, her disorder "debilitated" her, although (b) (6) failed to describe how. Despite all of this, (b) (6) conceded (b) (6) anxiety failed to affect her stellar academic performance, it had in fact decreased from 2008 to 2011, and she seemed more positive than before.

If (b) (6) remained in the United States without her parents upon their removal, (b) (6) conjectured she would be unable to duplicate her past academic success because she identifies her parents as the basis of the emotional security facilitating her success. On the other hand, moving to Mexico would psychologically impact (b) (6) in a "terrible" way, even though she would receive the support and security of her family. Specifically, she would suffer educational impairment because her educational plans and potential would be denied in Mexico. (b) (6) speculates being asked to perform academically in an unfamiliar language (Spanish), and in a foreign environment allegedly marred by crime and violence, would cause (b) (6) repressed anxiety to manifest clinically. Once manifested, (b) (6) testified her anxiety would impede her studies, as well as impair her personal, social, psychological and vocational abilities.

With respect to (b) (6) testified that although her younger

(b) (6)

USC child shows some signs of anxiety such as nail biting, such habits could be attributed to age, and it was simply "too early to tell" whether either child suffered a disorder. Nevertheless, he testified the children would lose their "opportunities" in the U.S. if (b) (6) took them to Mexico upon her removal, and that if removal psychologically impacted (b) (6) such an impact could adversely affect her children.

III. Statement of Law and Analysis

A. Frivolous Asylum

i. Frivolous Asylum Law

An alien may "file" an asylum application, after completing and signing it, by mailing it to USCIS or presenting it before an immigration judge. (b) (6) (b) (6) (finding an asylum application "was filed at the time [the alien] signed and submitted it). At the time the alien "files" the application, the Attorney General must warn him of the consequences of knowingly filing a frivolous asylum application after receiving such a warning - permanent ineligibility for any INA benefit. INA §§ 208(d)(4), (6). A frivolous asylum application contains deliberately fabricated material elements. 8 C.F.R. § 1208.20. A material, deliberate fabrication entails "a knowing and intentional misrepresentation of the truth," *Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007) with "a natural tendency to influence ... the decision of the decision making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988). The DHS bears the "ultimate burden of proof" to demonstrate a frivolous asylum filing. *Y-L-*, 24 I&N Dec. at 157; *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010).

The written notice provided on the asylum application itself provides a sufficient frivolous asylum warning. (b) (6) In addition, notice provided by an immigration judge, either at the time the alien files the application before the court, or prior to the alien's merits hearing, also suffices. *B-Y-*, 25 I&N Dec. at 236, 242.

(b) (6)

If after receiving the warning, the alien proceeds with his application, the immigration judge must provide "cogent and convincing reasons," relying on "sufficient evidence in the record," that a "preponderance of the evidence" demonstrates deliberate fabrication of a material element, i.e. a frivolous asylum application. *Y-L-*, 24 I&N Dec. at 151, 155. However, an immigration judge must refrain from finding a frivolous filing until "satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." 8 C.F.R. § 1208.20.

Notably, recanting from or withdrawing an asylum application *after* receiving and "acknowledging" the required warning does not preclude a frivolousness finding. *Matter of X-M-C-*, 25 I&N Dec. 322, 322 (BIA 2010) ("Allowing the preemptive withdrawal of an application to prevent a finding of frivolousness would undermine both the plain language of, and the policy behind, [INA §] 208(d)(6)—as well as the potency of the required warnings.") *Id.* at 325-26.

II. Frivolous Asylum Analysis

a. (b) (6) Bravo Did not File a Frivolous Asylum Application

The former INS received an asylum application for (b) (6) on May 27, 1997. (b) (6) Exh. 3. (b) (6) credibly testified the Form I-589 lists an inaccurate address and educational history, fails to list his children, and provides a completely false account of persecution suffered on account of political activities in Mexico. (*Id.*) This false persecution claim clearly constitutes a deliberate, material fabrication worthy of a frivolous asylum finding. However, (b) (6) credibly testified he never completed nor submitted the Form I-589 as he was incapable of reading, writing, or typing English. He also credibly testified he never instructed (b) (6) (b) (6) the "attorney" he hired, to file the application on his behalf, and that he never signed it. Under these circumstances, this Court does not find the DHS established he "filed" the application.

Furthermore, the 1997 version of the submitted Form I-589 does not contain a

(b) (6)

frivolous asylum warning that meets the notice requirements set forth at INA §§ 208(d)(4) or (d)(6). The portion of the application to be filled out at an interview with an asylum officer capable of providing the warning also remains blank. (*Id.* at 7.) No Immigration Court ever provided (b) (6) a frivolous asylum warning because no court ever adjudicated the 1997 Form I-589. As such, this Court finds the DHS has failed to establish, by a preponderance of the evidence, that (b) (6) (b) (6) knowingly filed a frivolous asylum application after receiving the required warnings. Therefore, he remains eligible to file a Form EOIR-42B.

II. (b) (6) did not File a Frivolous Asylum Application

The former INS received an asylum application for (b) (6) on January 18, 2001, and referred it to Immigration Court on March 8, 2001. (b) (6) (b) (6) Exh. 2.) Her photograph, and numerous supporting documents, such as her birth certificate, as well as her children's birth certificates, social security cards, and school identification cards all appear attached to the Form I-589. At an April 4, 2001 hearing before the (b) (6) Immigration Court, the immigration judge discussed the economic persecution claim contained in the Form I-589 directly with (b) (6) (b) (6) who never denied filing the application. At a June 20, 2001 hearing before the (b) (6) Immigration Court, (b) (6) former counsel, (b) (6) (b) (6) withdrew the Form I-589 without (b) (6) objection or comment. At her October 23, 2008 hearing, (b) (6) conceded the accuracy of the information in the application, and never denied attending an asylum interview regarding the Form I-589.

In contrast, at her June 30, 2011 hearing, (b) (6) denied she submitted the application or instructed someone to do it on her behalf. She wavered on whether she signed the application, provided no explanation for how the aforementioned documents appeared attached to the application, and claimed she never attended an asylum interview with an immigration officer, despite an asylum officer's signature and the signature of someone claiming to be (b) (6)

(b) (6)

appearing on the Form I-589. (b) (6) Exh. 2 at 8.) Under these circumstances, the Court finds (b) (6) did in fact "file" the 2001 Form I-589 with the former INS.

However, the Court does not find the DHS has established, by a preponderance of the evidence, that the application includes a deliberately fabricated material element worthy of a frivolous asylum finding. Rather, the Form I-589 indicates (b) (6) fled Mexico because as a single mother she had a difficult time finding employment to support her children. (b) (6) Exh. 2 at 4.) This claim does not contradict her June 30, 2011 testimony about leaving Mexico with her child, (b) (6) in order to rejoin (b) (6) in the United States. In short, the Form I-589 contains no material misrepresentation permitting this Court to find a frivolous filing. As such, (b) (6) remains eligible to file a Form EOIR-42B.

B. Cancellation of Removal for Certain Non-Permanent Residents

I. Cancellation of Removal Statement of Law

Under INA § 240A(b)(1), the Attorney General may cancel the removal of, and adjust to the status of lawful permanent resident, an alien who is inadmissible or deportable from the United States, if the alien: (1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding service of the charging document and up to the time of application; (2) has been a person of good moral character for the 10 years prior to a final administrative order; (3) has not been convicted of an offense under certain specified sections of the Act (INA §§ 212(a)(2), 237(a)(2), or 237(a)(3)); and (4) establishes that removal would result in exceptional and extremely unusual hardship to the applicant's USC or lawful permanent resident ("LPR") spouse, parent, or child.

The applicant bears the burden to prove he or she satisfies the applicable eligibility requirements and merits a favorable exercise of discretion under INA § 240(c)(4)(A), and must provide corroborating evidence (documentary or otherwise)

(b) (6)

requested by the immigration judge pursuant to INA § 240(c)(4)(B), unless it cannot be reasonably obtained. See *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); see also (b) (6)

(holding it is within a judge's discretion to require an applicant to corroborate "otherwise credible testimony" including evidence from family members living illegally in the United States who are available).

The Board has addressed what constitutes exceptional and extremely unusual hardship in *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 (BIA 2001), *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002), and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). *Matter of Monreal* involved a 34-year-old Mexican national who had been in the United States for 20 years. He had come to the United States at the young age of 14. He had 3 USC children ages 12, 8, and an infant. His wife's application for cancellation had been denied, and she had returned to Mexico with the infant. The respondent was gainfully employed, supporting his children here as well as his wife and child in Mexico. His parents were LPRs. There was no question that the children had a close relationship with these grandparents and with other family members in the United States. However, the BIA agreed with the immigration judge's conclusion that the requisite hardship had not been established notwithstanding the respondent's lengthy residence in the United States, loss of long-standing employment, and the negative effects which were to fall upon his children and his parents as a result of his removal from the United States. The BIA found it significant that the two oldest children would likely go to Mexico with the applicant. It was also significant that the applicant was relatively young and in good health such that he could likely find work in Mexico. Also, the children were all in good health.

Notably in that case, the BIA stated that the applicant must demonstrate that the qualifying relative or relatives would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the applicant's deportation. 23

(b) (6)

I&N Dec. at 58-64. In this regard, the applicant must demonstrate hardship beyond that which has historically been required in suspension of deportation cases involving the "extreme hardship" standard, but need not show that such hardship would be "unconscionable." *Id.* at 60. Also worthy of note is the BIA's statement that ordinarily, and without more, a lower standard of living or adverse country conditions in the country of return generally will be insufficient to support a finding of exceptional and extremely unusual hardship. *Id.* at 63-64. Of course, such conditions are only relevant as they may affect any qualifying relative. *Id.*

On the other hand, the BIA noted, but did not create any sort of presumption, that "an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school." *Id.* at 63. In any event, the ages, health, and circumstances of any qualifying relative are relevant to the determination of whether the requisite hardship has been established. *Id.* Clearly, however, each case must be considered on its own facts and the hardship alleged should be considered in the aggregate. *Id.* at 64.

Matter of Andazola involved a 30-year-old female citizen of Mexico. She was not married, but she was living with the father of her children who was likewise in the United States without permission. She had entered the United States at age 14 and had been in the country for approximately 16 years. She had two USC children, ages 11 and 6. She was employed and was receiving the benefits of a 401K plan as well as medical insurance through her employment. In addition, she had purchased a home, had two automobiles and about \$7,000 in cash. In her case, she claimed that she had no close relatives in Mexico. She admitted that her mother and siblings were in the United States, but they were not present under any lawful status. The respondent had a 6th grade education, so she was concerned that she would not be able to obtain adequate employment were she to return to Mexico. The respondent had asthma, although her children's health was fine. The BIA, which sustained the

(b) (6)

appeal of the immigration judge's decision granting relief, found that there would be reduced economic and educational opportunities for the children in Mexico, but concluded that the respondent had failed to establish exceptional and extremely unusual hardship to either of her two children. 23 I&N Dec. at 323.

In so doing, the BIA found it significant that although it was likely that Mexico could not provide the type of education the applicant's children would receive in the United States, she did not show that her children would be deprived of all schooling or of an opportunity to obtain any education at all. *Id.* It was also significant that there was an absence of evidence that the applicant's family members could not assist her financially if needed. *Id.* Relatedly, evidence that the father of the applicant's children continued to meaningfully contribute to the children's upbringing was important as well. *Id.* Finally, the Board found it significant that the applicant had some financial resources that would help her establish a life in her home country. *Id.* at 324.

Matter of Recinas involved a 39-year-old single mother with 6 children to care for, 4 of whom were USC's aged 12, 11, 8, and 5. All of her remaining immediate family members were in the United States legally including her LPR parents and 5 USC siblings. She had no family remaining in Mexico. The BIA granted the case finding it to be on the "outer limits" of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met. 23 I&N Dec. at 470. In this regard, it clarified that the hardship standard "is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Id.* In granting the application for relief, the BIA found that the hardship to the applicant's children included the heavy burden imposed on her to provide the sole financial and familial support for her 6 children if she was deported to Mexico, the lack of any family in her native country, her children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country was sufficient to meet the standard.

(b) (6)

Id. at 471-72.

II. (b) (6) Cancellation of Removal Application

Neither party claims (b) (6) lacks statutory eligibility for INA § 240A(b) relief due to lack of good moral character or criminal convictions. Rather, the only issues impacting his eligibility involve 10 years physical presence and the exceptional and extremely unusual hardship his removal would cause his 17-year-old USC daughter, (b) (6). Based on the discussion below, this Court finds (b) (6) established 10 years physical presence but failed to meet his burden of proof for hardship.

a. 10 Years Physical Presence

The 10 years continuous physical presence period for cancellation purposes ends when "an alien is compelled to depart the United States under threat of the institution of deportation or removal proceedings." *Matter of Romalez-Alcaide*, 23 I&N Dec. 423, 423 (BIA 2002) (indicating "a departure [of less than 90 or 180 days] following an arrest by the Border Patrol with the threat that formal proceedings will be commenced absent the alien's voluntary return" is not forgiven by INA § 240A(d)(2)). *Id.* at 426. The continuous physical presence period also ends "when the alien is served a notice to appear." INA § 240A(d)(1).

Here, (b) (6) entered the United States on or about January 1, 1987 (b) (6) Exh. 1), and filed for cancellation 20 years later on June 19, 2007. (b) (6) Exh. 4). The Court does not believe (b) (6) broke his continuous physical presence for cancellation purposes when immigration officials detained him in 1990 or 1991 and took him to the U.S.-Mexico border by bus. Simply put, the DHS failed to provide any documentation showing (b) (6) suffered a formal removal, voluntary departure, or even a voluntary return in "lieu of" removal at that time. See *Romalez-Alcaide*, 23 I&N Dec. at 429. Rather (b) (6) credibly testified he could not recall being fingerprinted, photographed, or signing any documentation during his brief detention before being bussed to the border and walking into (b) (6).

(b) (6)

Although (b) (6) testimony about being given the chance to see an immigration judge concerns the Court, his inability to remember the details of the incident, combined with a dearth of documentary evidence about the event, lead the Court to conclude he did not break his continuous physical presence in 1990 or 1991. His 1 to 5 day absence in Mexico before re-entering also failed to break presence under INA § 240A(d)(2) as this absence fell far short of 90 or 180 days.

Furthermore, although the former INS mailed him an NTA on November 12, 1997, the Court finds (b) (6) was never "served" with the NTA because he credibly testified he never resided at the mailing address, his Form I-213 indicates the post office returned the NTA to the INS as undelivered (b) (6) Exh. 2), and the (b) (6) Immigration Court administratively closed his initial proceedings due to lack of service. Therefore, the 1997 NTA did not break (b) (6) (b) (6) 10 years continuous physical presence for cancellation purposes.

b. Exceptional and Extremely Unusual Hardship

In analyzing (b) (6) hardship, this Court considers, among other things, her age, circumstances (especially her academic needs as an exceptional student), and health. See *Monreal-Aguinaga*, 23 I&N Dec. at 63. At the outset the Court notes (b) (6) turns 18-years-old in 8 weeks. (See (b) (6) Exh. 3a, Tab 11 at 9) (listing her birth date as December 7, 1993.) As a USC just shy of adulthood, she faces no obligation to follow her parents to Mexico the same way a young child, completely dependent on its parents for financial support and nurturing, would. If she chooses to move to Mexico, the Court would not consider the admittedly lower living and employment standards alone present an exceptional and extremely unusual hardship to (b) (6) especially because she testified she would remain with her parents, and all 3 able-bodied adults would presumably be able to support themselves through some sort of employment. See *Andazola-Rivas*, 23 I&N Dec. at 323 ("[I]t has long been settled that economic detriment alone is insufficient to support even a finding of extreme hardship.")

The Court notes (b) (6) may avoid economic based hardship in Mexico by

(b) (6)

remaining legally in the United States to complete her last year of high school, to attend college, and to secure gainful employment to support herself along the way. Although she testified she could not financially support herself due to a lack of job experience, this inexperience does not preclude her from finding employment; it simply makes the prospect more difficult.

As an alternative to self-support, (b) (6) could finish her last year of high school and attend college while living with her employed, 22-year-old USC brother (b) (6). Her choice to forgo this option because (b) (6) "wastes" money and stays out late is just that – a choice. Although living with a carefree older brother may not be ideal, as a young woman fast approaching adulthood, she would not rely on him to cater her every need like a young child would. Indeed, the arrangement would allow her to remain in this country with an immediate relative who could provide her housing and presumably some financial support. In the same vein, (b) (6) may live with half-siblings or aunts and uncles residing in the United States while finishing school, but refuses to because they have their "own lives" and she finds living conditions in (b) (6) where her aunts and uncles reside, unsuitable.

The Court sympathizes with (b) (6) potential difficulties living alone or moving in with relatives who likely cannot provide her the same financial security and emotional support as her parents. However, given her near adult status, the Court does not believe the prospect of residing alone or with relatives in the U.S. presents a hardship greater than that faced by any other USC teenager facing her parents' removal.

Turning to (b) (6) academic circumstances, the Court commends her on her stellar academic performance, ((b) (6) Exh. 3a, Tab 10 at 104-113), and recognizes her academic achievement situates her somewhat near the realm of children with "compelling special needs in school." *Monreal-Aguinaga*, 23 I&N Dec. at 63. However, the Court refuses to find (b) (6) possesses the type of compelling

(b) (6)

educational needs specifically referred to in *Monreal-Aguinaga*.⁹ Unlike young USC children receiving special education services for learning disabilities or academic talents at the primary school level, (b) (6) merely faces prospective obstacles to obtaining an adult, collegiate education. For this, and for the reasons discussed below, the Court finds her parents' removal will not cause exceptional and extremely unusual hardship to her academic needs – whether she stays in the United States or moves to Mexico.

While (b) (6) attributes her academic success to her parents' "support," and worries she cannot achieve similar future success without their presence, nothing in the record indicates (b) (6) parents would stop supporting her upon their removal should she stay in the U.S. To the contrary, her parents' testimony demonstrates their deep love for (b) (6) and their desire for her to excel. Presumably, (b) (6) could continue seeking her parents' emotional support after their removal through letters, telephone calls, and visits to Mexico. In addition, given that neither of her parents completed junior high school, and neither can read, write, or speak English, this Court cannot imagine (b) (6) parents provide her substantive support with school assignments, or would be capable of doing so once she begins advanced college courses.

To the extent (b) (6) would rely on her parents' financial support to pay college costs, she testified to pursuing a scholarship to (b) (6) College, which would eliminate her parents' tuition responsibilities. Assuming no scholarship grant, the Court recognizes (b) (6) parents would struggle to pay (b) (6) College's \$2,000

⁹ The Court gives almost no weight to the respondents' reliance on an unpublished immigration court decision finding requisite EOIR-42B hardship to an alien couple's 2 educationally gifted USC children. (b) (6) Exh. 10, Tab D) (citing (b) (6) (b) (6) (I.J. Jan. 8, 2007) (unpublished).) In (b) (6), the aliens' 2 USC daughters, aged 15 and 13, took part in specialized education programs at their schools necessary to nurture their talents. Furthermore, the immigration judge found requisite hardship by combining the educational hardship to the children with hardship to the female alien's medically disabled mother, who completely depended on the aliens for financial assistance. Here, (b) (6) as the only qualifying relative, is nearly 18-years-old, in her last year of high school, and not subject to any sort of specialized high school education services. In fact, the crux of her hardship stems from pursuing a college education.

(b) (6)

per semester tuition costs as well as room and board fees from Mexico. However, many families, regardless of immigration status, struggle to pay for their children's college educations. This situation presents an everyday reality rather than an exceptional and extremely unusual hardship.

In addition, (b) (6) acknowledged she could financially support herself through college, at least partially, by working. She testified she would refuse to work because she wants to focus on her education, but this is once again (b) (6) intransigent choice rather than a real educational barrier. Given her past drive to excel academically, this Court does not believe she would sacrifice a U.S. college education just because she had to work to subsidize the costs. In addition, nothing in the record indicates (b) (6) as a USC with an excellent high school GPA, would be unable to pursue other financial aid options such as grants, scholarships, and student loans to help her cover the costs for (b) (6) College, and eventually, (b) (6) (b) (6) University, to which she intends to transfer.

In short, the removal of her parents will not create an extremely unusual and exceptional hardship to (b) (6) educational opportunities if she remains in this country – her parents will almost certainly continue to provide her emotional support, and scholarship as well as work options would permit her to pursue a U.S. college education. Although her college journey will undoubtedly be more difficult without her parents' financial assistance, it is by no means an impossible journey, and is in fact one many U.S. college students pursue on a daily basis.

As it relates to (b) (6) educational opportunities should she follow her parents to Mexico, the Court recognizes Mexico's lower economic standards make pursuing and paying for a quality college education more difficult. However, such lower standards are generally "insufficient in themselves to support a finding of exceptional and extremely unusual hardship." *Monreal-Aguinaga*, 23 I&N Dec. at 63-64 (recognizing an alien's children "will suffer some hardship, and likely will have fewer opportunities, should they go to Mexico," but refusing to equate this to

(b) (6)

exceptional and extremely unusual hardship). *Id.* at 65; see also *Andazola-Rivas*, 23 I&N Dec. at 323 (conceding "economic conditions in Mexico are worse than those in this country," but finding this alone did not constitute exceptional and extremely unusual hardship). Outside inconveniently lower living conditions, nothing in Mexico will bar (b) (6) from pursuing some sort of college education. See *Andazola-Rivas*, 23 I&N Dec. at 323 ([W]e recognize that Mexico likely will not provide the respondent's children with an education equal to that which they might obtain in the United States. However, the respondent has not shown that her children would be deprived of all schooling or of an opportunity to obtain any education."),¹⁰

(b) (6) and (b) (6) greatly emphasize the cost for 30 units per semester at the University of the Americas in Puebla in Mexico equates to \$5,000 U.S. dollars for a non-Mexican citizen, that Mexico offers no financial aid to non-Mexican citizens like (b) (6) and that under such circumstances, they could not afford to send her to college in Mexico. However, nothing in the record indicates the University of the Americas in Puebla is the only university (b) (6) is eligible to attend, rather than a less expensive school in another part of Mexico. Furthermore, other than (b) (6) desire to "load" herself with the maximum number of units at the university, nothing would prevent her from taking fewer units in order to lessen the cost of attendance to a level her parents could potentially afford. Finally, given (b) (6) status as the child of 2 Mexican nationals, she may potentially apply for Mexican national status in order to qualify for lower tuition rates and financial aid.¹¹

¹⁰ The Court gives little weight to the respondents' reliance on an unpublished BIA decision finding requisite EOIR-42B hardship to an alien's 15-year-old USC twins and 13-year-old USC daughter where the children faced educational difficulties in Mexico due to their inability to read or write Spanish. (b) (6) (b) (6) Exh. 10, Tab C) (citing (b) (6) (BIA Sept. 30, 2002) (unpublished).) Simply put, the Court finds (b) (6) hardship, as the sole qualifying relative, distinguishable from that faced by the 3 (b) (6) children. Unlike those younger children, who still had several years of high school ahead of them, (b) (6) is in her last year of high school, and faces future educational hardship at the collegiate level. Furthermore, in (b) (6), the BIA relied on the cumulative hardship to the alien's 3 USC children, and his LPR wife, who would lose her legal status upon returning to Mexico with the alien, to sustain the cancellation grant.

¹¹ The Court asked the respondents to brief (b) (6) eligibility for Mexican national status but they failed to do so in their closing brief. (See *Limias Bravo* Exh. 10.)

Assuming (b) (6) could afford Mexican college attendance, the Court recognizes she will encounter academic hurdles because she never bothered learning how to read or write Spanish, and although she speaks it, she does not converse at an academic level. However, (b) (6) testimony that learning to read and write Spanish would be "impossible" is simply not convincing. As an extremely intelligent young woman capable of understanding and speaking Spanish proficiently enough to communicate with her parents, the Court does not believe it would be "impossible" for (b) (6) to master the Spanish language at a level necessary to get through Mexican university classes, especially if she immerses herself in the language once in Mexico. While the language barrier will undoubtedly complicate her academic pursuits, it will not deprive her of all Mexican educational opportunities or schooling.

Turning to (b) (6) health, nothing in the record demonstrates physical impairment. Rather, (b) (6) formally diagnosed her with generalized anxiety disorder, which he testified will be exacerbated by her parents' removal. (b) (6) (b) (6) Exh. 8, Tab C) ("This condition renders (b) (6) highly emotionally vulnerable to severe emotional stress, such as the major stress inherent in the devastation created in [her life] if [her] parents are removed."). In the Court's opinion, (b) (6) testimony reveals (b) (6) anxiety symptoms revolve almost entirely around the fear and uncertainty caused by her parents' looming removal, rather than some underlying, pre-existing psychological condition. To this end, (b) (6) conceded her anxiety pattern, although higher than expected, matches her situation in life as one facing her parents' removal.

As to the "higher" level of her anxiety, (b) (6) testified (b) (6) anxiety debilitates her by distracting her from work and by preventing her from enjoying things. She represses and minimizes her illness, even though the emotional distress it causes rises to the level of a psychotic disorder. Despite this alleged debilitation and high level of suffering, she has never received further clinical evaluation, and

(b) (6)

has never received counseling or medication to treat her condition. Rather, (b) (6) testified her supportive family's presence provides the least intrusive and therefore most appropriate treatment.

However, considering her condition has persisted for 3 years between her 2008 and 2011 evaluation despite her family's presence, and the potential her support system could be taken from her upon her parents' removal, the Court finds the respondents' decision to forgo other treatment options for (b) (6) disorder undercuts their hardship claim. Furthermore, (b) (6) evaluation and testimony demonstrate (b) (6) suffering and debilitation have not prevented her from "functioning" well, experiencing an overall anxiety decrease from 2008 to 2011, having a more pronounced positive attitude, and experiencing greater academic success since her parents' placement in proceedings.

Based on the analysis above, the Court does not feel it must accept (b) (6) (b) (6) statements about the devastation (b) (6) will experience if she stays in the U.S. after her parents' removal at face value. This is especially so regarding his speculation about her inability to achieve academic success without her parents' "emotional security." Nothing in the record suggests (b) (6) parents will stop providing her emotional security just because of their physical presence in Mexico. In fact, (b) (6) planned on living away from her parents when she matriculated to (b) (6) College. This strongly implies she planned to rely much less on her parents' physical presence for any sort of future emotional security, even if they remained in the U.S.

To the extent (b) (6) testified moving to Mexico would exacerbate (b) (6) condition, the Court finds these conclusions based more on his personal speculation about educational and living conditions in Mexico than his professional, psychological expertise. He testified the move would exacerbate (b) (6) anxiety because she would lose her U.S. educational opportunities, face educational impairment due to unfamiliarity with the Spanish language, and encounter Mexican

(b) (6)

crime. These problems would in turn impair her psychological, personal, social, and vocational abilities.

(b) (6) lacks expertise about the criminal and educational situation in Mexico, and as such the Court gives his speculations little weight. At any rate, the respondents have not argued they will be unable to avoid crime-infested regions in Mexico upon their removal. The Court also refuses to blindly accept as fact (b) (6) self-serving testimony that learning to read and write Spanish at an academic level would be "impossible" for her, despite her proven scholastic aptitude and current ability to speak Spanish. Likewise, the Court does not believe she would lose *all* educational opportunities in Mexico simply because the maximum load of units at a single Mexican university costs more than her parents can afford. In addition, any increased anxiety (b) (6) would face in Mexico would be lessened by her parents' physical presence and support – something (b) (6) currently considers a form of treatment for her anxiety symptoms. See *Monreal-Aguinaga*, 23 I&N Dec. at 64 (refusing to recognize exceptional and extremely unusual hardship where USC children in good health would be "reunited" with their Mexican national parents in Mexico).

To find requisite hardship to (b) (6) if she moved to Mexico, the Court essentially must assume she would; (1) be exposed to criminal activity; (2) never learn how to read or write Spanish; and (3) truly lose all educational opportunities. Next, the Court must assume these combined factors would actually cause her anxiety to "manifest" to such an extent as to seriously impair her psychological, social, educational, and vocational abilities. The Court refuses to take such conclusionary hops, skips, and jumps based on poorly founded evidentiary assumptions. See *Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002) (finding Nigerian's claim he would be arrested and tortured based on Nigerian law purportedly permitting prosecution for drug crimes committed in the United States insufficient to establish arrest and torture was "more likely than not" because of a "chain of

(b) (6)

assumptions and a fear of what might happen"; and instead holding the applicant must provide "some current evidence, or at least more meaningful historical evidence, regarding the manner of enforcement [] on individuals similarly situated.").

In sum, although the Court concedes (b) (6) will face real disadvantages upon her parents' removal, the Court does not find these disadvantages rise to the level of exceptional and extremely unusual hardship required to grant (b) (6) (b) (6) cancellation of removal.

III. (b) (6) Cancellation of Removal Application

Neither party claims (b) (6) lacks statutory eligibility for INA § 240A(b) relief due to lack of 10 years physical presence or criminal convictions. Rather, credibility, good moral character, and exceptional and extremely unusual hardship to her USC daughter (b) (6) pose eligibility concerns. The Court finds it unnecessary to deny relief for lack of credibility or good moral character, as it denies (b) (6) cancellation application for failure to show requisite hardship to her daughter.

a. Credibility

An alien requesting removal relief must satisfy applicable relief eligibility requirements, and demonstrate she deserves relief in a favorable exercise of discretion. INA § 240(c)(4)(A). To sustain this relief burden, an applicant may rely, in part, on her credible testimony. *Id.* § 240(c)(4)(B). An immigration judge, considering the totality of the circumstances, and all relevant factors:

[M]ay base a credibility determination on the demeanor, candor, or responsiveness of the applicant . . . , the inherent plausibility of the applicant's . . . account, the consistency between the applicant's . . . written and oral statements . . . , the internal consistency of each statement, the consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's credibility.

Id. § 240(c)(4)(C).

(b) (6)

In this case, (b) (6) testimonial demeanor, lack of candor and responsiveness, as well as her inconsistent statements regarding: (1) previously filing a Form I-589 and Form EOIR-42B; (2) the signatures appearing on numerous immigration forms; and (3) her past attendance at removal proceedings before the (b) (6) Immigration Court, lean this Court towards an adverse credibility determination. The court finds that (b) (6) testimony lacks credibility, and further will deny her application on hardship grounds as well. See discussion *infra* Part II.B.ii.

b. Good Moral Character

INA § 101(f)(6) states an alien lacks good moral character when such an alien gives "false testimony for the purpose of obtaining any benefits under" the INA. The Supreme Court has found false testimony demonstrates bad moral character even where the testimony relates to "the most immaterial of lies with the subjective intent of obtaining immigration and naturalization benefits." *Kungys v. U.S.*, 485 U.S. 759, 780 (1988). In turn, a lack of good moral character bars a cancellation of removal grant under INA § 240A(b)(1)(B).

The same issues underlying (b) (6) credibility problems also trouble the Court in its good moral character determination. Nevertheless for the reasons discussed hereafter, the court finds that the lack of credibility would not bar her from either cancellation of removal or voluntary departure.

c. Lack of Hardship

For the same reasons discussed above in (b) (6) denial, see discussion Part III.B.ii.b, the Court likewise denies (b) (6) Form EOIR-42B because she failed to demonstrate her removal would cause exceptional and extremely unusual hardship to her USC daughter, (b) (6)

iv. (b) (6) Cancellation of Removal Application

Neither party claims (b) (6) lacks statutory eligibility for INA § 240A(b) relief due to lack of 10 years physical presence, lack of good moral

(b) (6)

character, or criminal convictions. Rather, her only eligibility issue stems from the exceptional and extremely unusual hardship her removal would cause her 2 USC children – a 5-year-old daughter and 2-year-old son. Based on the analysis below, this Court finds (b) (6) has failed to meet her burden of proof for hardship, and therefore denies her application.

At the outset, the Court notes (b) (6) gave birth to her qualifying relatives after her placement in removal proceedings, and therefore after recognizing the serious threat of removal she faced. As such, the Court gives somewhat less weight to hardship the children might face since she created such hardship after initiation of proceedings. Furthermore, (b) (6) testified neither child currently demonstrates symptoms of psychological impairment. (b) (6) also testified both USC children would accompany her to Mexico upon removal because their irresponsible USC father refuses to support them.

Although the Court concedes such children will face some hardship in Mexico due to lower living and education standards, such conditions fall short of an exceptional and extremely unusual hardship under the relevant case law. In addition, although neither child speaks nor understands Spanish, given their very young age, this Court has little doubt they will learn the language. Furthermore, moving to Mexico would not impact their relationship with their biological father, who rarely sees them or provides for them. Rather, the move will permit both children to remain with their primary care-taker mother, and to continue receiving additional support from their removed grandparents, (b) (6) and (b) (6).

C. Voluntary Departure

At the conclusion of removal proceedings, the Court may grant voluntary departure in lieu of removal. INA § 240B(b). The alien bears the burden to establish both that he is eligible for relief and that he merits a favorable exercise of discretion. *See Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972); *see also Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). To establish eligibility, the alien must prove he: (1)

(b) (6)

has been physically present in the United States for at least one year immediately preceding service of the Notice to Appear; (2) is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure (including evidence that the alien, whether inadmissible or not, is not included among the class of persons described at INA §§ 212(a)(2)(A) (CIMT or controlled substance offense), (B) (multiple criminal convictions), or (C) (controlled substance traffickers)); (3) is not removable under INA § 237(a)(2)(A)(iii) (aggravated felony) or INA § 237(a)(4) (security and related grounds); and (4) has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. See INA § 240B(b)(1); *Arguelles*, 22 I&N Dec. 811.

The Board has held a grant of voluntary departure is a matter of discretion, requiring a respondent to establish not only that he is statutorily eligible but also that he is worthy of discretionary relief. See *Matter of Thomas*, 21 I&N Dec. 20, 22 (BIA 1995). In exercising discretion with respect to a voluntary departure application, an immigration judge must carefully weigh both favorable and unfavorable factors. See *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991). Relevant to this determination are such adverse factors as: (1) the nature and underlying circumstances of the exclusion or deportation ground at issue; (2) additional violations of immigration laws; (3) the existence, seriousness, and recency of any criminal record; and (4) other evidence of bad character. See *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980), modified on other grounds, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). Favorable factors to be considered include: (1) close family ties in the United States as well as business and other societal ties; (2) residence of long duration in this country; (3) humanitarian needs; and (4) other evidence attesting to good moral character. See generally *Lemhammad*, 20 I&N Dec. 316; *Gamboa*, 14 I&N Dec. 244.

Here, all 3 respondents have proven physical presence in the United States

(b) (6)

for more than 1 year preceding the service of their 1997 and 2001 NTAs. (See

(b) (6) Exh. 1; (b) (6) Exh. 1; (b) (6) Exh. 1) (indicating the respondents admitted to entering the U.S. in 1987 and 1988, respectively). None of the respondents committed disqualifying actions or convictions under INA § 240B(b)(1)(C). All 3 demonstrated means and intent to depart the United States through proof of employment, tax returns, and credible testimony. (See (b) (6) Exh. 9, Tabs J-L) (indicating (b) (6) earned \$25, 399 in 2010 while (b) (6) earned \$19, 278); (see also (b) (6) Exh. 4 at 3; (b) (6) Exh. 3A, Attachment; (b) (6) Exh. 2a at 3) (noting (b) (6) and (b) (6) steady employment since 2006, and (b) (6) employment since 2007). Neither party contends (b) (6) or (b) (6) lack good moral character.

Although the Court does not condone (b) (6) testimonial non-responsiveness and denials about filing a Form I-589 and a previous EOIR-42B, as well as signing various forms, and attending (b) (6) proceedings,¹² it does not believe her actions justify a bad moral character finding by "clear, unequivocal, and convincing evidence." See *Kungys*, 485 U.S. at 781. Simply put, this Court cannot imagine a scenario in which (b) (6) subjectively believed denying the aforementioned things would increase her chances of receiving an immigration benefit. To the contrary, she denied submitting a previous Form EOIR-42B and signing tax returns attached to that application, both of which support her eligibility for the immigration benefit of cancellation of removal. Under such circumstances, the Court believes (b) (6) testimonial denials likely stemmed from "other reasons, such as embarrassment, fear," or confusion, rather than a subjective intent to procure an immigration benefit. *Id.* at 780.

In sum, the Court finds all 3 respondents statutorily qualify for INA § 240B(b) conclusionary voluntary departure. Given their long U.S. residence, steady work

¹² (b) (6) wavering testimony at the June 30, 2011 hearing caused all parties concerned great delay and consternation.

(b) (6)

history, and lack of criminal activity, the Court likewise finds the respondents deserve such relief in an exercise of discretion.

Consequently, the following orders shall issue:

ORDERS

IT IS HEREBY ORDERED that the respondents' requests for cancellation of removal for certain non-permanent residents be **DENIED**.

IT IS FURTHER ORDERED that, in lieu of an order of removal, the respondents be **GRANTED** voluntary departure without expense to the government on or before December 27, 2011, or any extension as may be granted by the Department of Homeland Security and under such conditions as the Department of Homeland Security may impose. The respondents shall each post a voluntary departure bond to the Department of Homeland Security in the amount of \$500 by November 3, 2011.

IT IS FURTHER ORDERED that if the respondents fail to post that bond or fails to depart as required, the privilege of voluntary departure shall be *withdrawn without further notice or proceedings*; and the following order shall become effective immediately: The respondents shall be removed from the United States to Mexico on the charges contained in their Notices to Appear.¹³

WARNING TO THE RESPONDENTS: Failure to depart as required means you could be removed from the United States, you may have to pay a civil penalty of \$1000 to \$5000, and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for 10 years to come.

Any appeal of this decision must be filed by November 14, 2011/

Oct. 13, 2011
Date

(b) (6)

Immigration Judge

¹³ The conditions and warnings related to voluntary departure are contained in the summary order and attached "Notice to Respondents Granted Voluntary Departure." This includes an advisal that they must provide proof within 30 days of filing any appeal that the bond has been posted and, absent such, the Board will not reinstate voluntary departure in its final order. 8 C.F.R. § 1240.26(c)(3)(ii). It further describes that if no appeal is taken but, instead, a motion to reopen or reconsider is filed, the order of voluntary departure will not be stayed, tolled, or extended, and the grant of voluntary departure will be automatically terminated. 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1).

(b) (6)

cc: (b) (6) for the respondents.
(b)(6) & (b)(7)(C) for the DHS.

(b) (6)

1 fat that --

2 Q. But you knew that you were in removal
3 proceedings?

4 A. I didn't even know that until I turned 17, 18.

5 Q. But you were put in removal proceedings in 2001.

6 A. Yeah.

7 Q. You went to an Immigration Judge in (b) (6)
8 and if I recall from the tape, the Judge excused you from the
9 hearings.

10 A. Yeah. He did. So we weren't, well, we had so
11 many.

12 Q. The first one was a she.

13 A. Uh-huh.

14 Q. And you went through several hearings down there.

15 A. Yes, we did.

16 Q. Some of them you were required to attend and some
17 you were not required to attend because you were in school.

18 A. Actually we were all there, but due to the fact
19 that they had, because the room was full with people, they would
20 just leave us outside.

21 Q. Okay. Well, I notice that the first master
22 calendar hearing the Judge excused you because you were in
23 school for the next master calendar hearing. But your mother
24 and older brother were there.

25 A. Yes they were.

1 Q. So you knew you were illegally here?
2 A. Yes.
3 Q. And in spite of that you had children?
4 A. Yes, I did.
5 Q. The father of the children is a United States
6 citizen?
7 A. Yes, he is.
8 Q. And do you know if you marry the father of the
9 sick child, that you can become a lawful permanent resident?
10 A. I do know that.
11 Q. Okay. Do you love (b) (6)
12 A. See, that's where it's tricky. Not no.
13 Q. Tricky?
14 A. I have love for him --
15 Q. You have two children with him.
16 A. Yeah, I have love for him but then again it comes
17 back to where his family starts talking negative and then he
18 starts thinking like his family, that I'm just going to marry
19 him to become a resident. And I don't want that.
20 Q. Well, you know, in this life, (b) (6) we can't
21 have everything.
22 A. Oh I know that.
23 Q. There's some things that we've got to do in order
24 to get things that we want and if we're not willing to do them,
25 we're not going to be able to get the things we want. That's

1 just life, isn't it?

2 A. It is.

3 Q. Okay. I don't have anything further.

4 JUDGE TO COUNSEL

5 Q. Does anybody else?

6 A. (No audible response.)

7 JUDGE TO (b) (6)

8 Q. All right. You may sit down in the court.

9 JUDGE FOR THE RECORD

10 I can't make a decision on this case until after
11 October 1st, I don't have any basis and I can't either accept or
12 deny or grant.

13 JUDGE TO (b) (6)

14 Q. Frankly, I don't want to give even a hint of what
15 an order may be, but frankly, (b) (6) you understand you've
16 got credibility issues before the Court today, significant
17 credibility issues with the mother. You've got the hardship
18 issues with (b) (6) and (b) (6) doesn't have any hardship issues
19 if her children go with her, other than just what's normal. And
20 I think we've got some significant problems here that need to be
21 address. The main issue that I have is the assumption by
22 (b) (6) that she has to pay non-resident tuition in Mexico.
23 I'm not sure, I don't know what the law is. I think that a
24 person who is born of two Mexican citizens who live in another
25 country is not considered to be a non-Mexican. I think they