



Detail

Complaint Number: 761

Immigration Judge: (b)(6)

Complaint Received Date: 05/28/13

Current ACIJ
Nadkarni, Deepali

Base City
(b)(6)

Status
CLOSED

Final Action
Oral counseling

Final Action Date
08/22/13

Past ACIJ:

A-Numbers(s)	Complaint Nature(s)	Complaint Source(s)
(b)(6)	Due process	BIA

Complaint Narrative: (b)(6)

Complaint History	
05/28/13	Complaint referred to ACIJ
06/07/13	Database entry created
08/22/13	Oral counseling

Immigration Judge Complaint Intake Form

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

Date Received at OCIJ: 5.28.13

complaint source information	
complaint source type	
<input type="checkbox"/> anonymous <input type="checkbox"/> BIA <input type="checkbox"/> ___ Circuit <input type="checkbox"/> EOIR <input type="checkbox"/> DHS <input type="checkbox"/> Main Justice <input type="checkbox"/> respondent's attorney <input type="checkbox"/> respondent <input type="checkbox"/> OIL <input type="checkbox"/> OPR <input type="checkbox"/> OIG <input type="checkbox"/> media <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____	
complaint receipt method	
<input type="checkbox"/> letter <input type="checkbox"/> IJC memo (BIA) <input type="checkbox"/> email <input type="checkbox"/> phone (incl. voicemail) <input type="checkbox"/> in-person <input type="checkbox"/> fax <input type="checkbox"/> unknown <input type="checkbox"/> other: _____	
date of complaint source (i.e., date on letter, date of appellate body's decision)	complaint source contact information
<u>5.28.13</u>	name: <u>David Neal</u> address: <u>BIA Chairman</u> _____ _____ email: _____ phone: _____ fax: _____
additional complaint source details (i.e., DHS component, media outlet, third party details, A-number)	
(b) (6) In re. (b) (6)	

complaint details		
IJ name	base city	ACIJ
1) (b) (6)		ACIJ Dee Nadkarni
relevant A-number(s)	date of incident	
A (b) (6)	10.13.11 hearing	
allegations		
nature of complaint		
<input checked="" type="checkbox"/> in-court conduct <input type="checkbox"/> out-of-court conduct <input checked="" type="checkbox"/> due process <input type="checkbox"/> bias <input type="checkbox"/> legal <input type="checkbox"/> criminal <input type="checkbox"/> incapacity <input type="checkbox"/> other: _____		

014421

(b) (6)



Memorandum

Subject	Date
Matter of (b) (6) (BIA May 13, 2013)	May 28, 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 May 13, 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

Falls Church, Virginia 22041

File: A (b) (6)

Date: MAY 13 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

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

ON BEHALF OF DHS: (b)(6) & (b)(7)(C)
Assistant Chief Counsel

CHARGE:

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

APPLICATION: Cancellation of removal; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's October 13, 2011, decision, denying her applications for cancellation of removal for certain non-permanent residents of the United States pursuant to section 240A(b) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229b(b), and post-conclusion voluntary departure pursuant to section 240B(b) of the Act, 8 U.S.C. § 1229c(b). Her appeal will be dismissed.

We review factual findings, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. *See* 8 C.F.R. 1003.1(d)(3)(ii).

At the outset, we note that the Immigration Judge identified multiple bases for denying the respondent's application for cancellation of removal (I.J. at 6-23). Specifically, the Immigration Judge found that the respondent did not provide credible testimony in support of her application for relief (I.J. at 6-12). In light of the adverse credibility finding and identified concerns regarding the respondent's illegal entry with the assistance of a smuggler and the manner in which she filed her tax returns, the Immigration Judge further found that the respondent failed to carry her burden of proof in establishing good moral character as defined at section 101(f) of the Act, 8 U.S.C. § 1101(f) (I.J. at 12-14). *See* section 240A(b)(1)(B) of the Act. The Immigration Judge also concluded that the respondent did not merit a favorable exercise of discretion (I.J. at 21-23). Although the respondent contests many of these findings on appeal, we decline to reach these issues (Resp. Brief at 15-16). Instead, we ultimately agree with the Immigration Judge that the respondent has not established that her return to Mexico would result in exceptional and extremely unusual hardship to her qualifying relatives—her lawful permanent

resident husband and two United States citizen children, ages 10 and 13 at the time of her hearing (I.J. at 14-21; Tr. at 34-35, 68-69; Exhs. 2B-D, 3E).

Without fully crediting their testimony, the Immigration Judge found that the respondent and her husband testified to the following. With respect to the respondent's husband, the couple did not identify any health concerns and noted that he is gainfully employed (I.J. at 15; Tr. at 57-59; Exh. 6). Regarding the couple's children, the respondent indicated that the older son has asthma and the younger child had pneumonia in 2009 and has undergone testicular surgery (I.J. at 16-18; Tr. at 44-45, 47, 52, 72-74; Exh. 5L). The respondent also reported that her younger son is currently being monitored to assess whether he will need further treatment related to the surgery and she submitted documentary evidence indicating that the child saw a urologist in 2009 (I.J. at 16-18; Tr. at 46, 74; Exh. 5L). In light of these medical conditions, the respondent and her husband expressed concerns as to the children's access to medical treatment should they go to Mexico as a family (I.J. at 16; Tr. at 41, 45-46, 74, 87-88; Exhs. 5L, 5R).

The couple also expressed concerns about their ability to financially support their children and the children's access to education in Mexico (I.J. at 18-20; Tr. at 39-44, 50, 57-60, 70-72, 87; Exhs. 5K, 6). In addition, the respondent expressed concerns about her sons' ability to communicate in Spanish, although documents in evidence demonstrate that the children have taken some Spanish language classes at school (I.J. at 6-7; Tr. at 42-44, 81; Exh. 5N). Assuming the truthfulness of this testimony, we do conclude that the respondent has not established exceptional and extremely unusual hardship to her qualifying relatives.

The respondent maintains on appeal that her sons will be deprived of needed medical treatment should they relocate in Mexico with her. Upon *de novo* review, we conclude that the respondent did not present persuasive evidence establishing the extent of her sons' medical conditions, the prognosis, the likelihood that future treatment would be required, any potential future recommended course of treatment, or that any existing conditions would worsen or could not be adequately treated in Mexico (Resp. Brief at 13-15; I.J. at 16-18; Tr. at 41, 44-47, 52, 72-74, 87-88; Exhs. 5L, 5R). Similarly, although the respondent maintains that the children will be deprived of educational opportunities in Mexico, she has not produced persuasive evidence of the extent of educational deprivation that the children may encounter (Resp. Brief at 15; I.J. at 19-20; Tr. at 41-44, 70-72, 87). Thus, contrary to the respondent's arguments on appeal, we conclude that the cited health and educational concerns do not rise to the level of exceptional and extremely unusual hardship should the respondent be removed from the United States (Resp. Brief at 13-15).

We are likewise unpersuaded by the respondent's assertion that her children would suffer "exceptional and extremely unusual" financial and relocation hardship should the family go to Mexico with her (Resp. Brief at 15-16; I.J. at 18-20; Tr. at 39-42, 50, 57-60; Exhs. 4, 5K, 6). While the respondent's family will undoubtedly experience some financial and transitional hardship resulting from their relocation, these hardships are of the type typically associated with the removal of a close family member from the United States and are not substantially different from, or beyond, that which would normally be expected under the circumstances (I.J. at 18-19). See *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001); see also *Matter of Andazola*, 23 I&N Dec. 319, 323 (BIA 2002), citing *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (discussing economic detriment as a hardship consideration and noting that economic detriment alone is


generally insufficient to establish exceptional and extremely unusual hardship). Additionally, we note that the respondent has extensive family support in Mexico, including her mother and siblings, and these resources could ease some of her family's relocation and financial hardship (I.J. at 20; Tr. at 35-36, 51).

Consequently, when medical, educational, economic, and transitional factors are considered collectively, the hardship to the respondent's qualifying relatives does not rise to the required level (I.J. at 14-21). See *Matter of Recinas*, 23 I&N Dec. 467, 472-73 (BIA 2002) (holding that hardship should be considered in the aggregate); *Matter of Monreal*, *supra*, at 65. As a result, the respondent is statutorily ineligible for cancellation of removal. See section 240A(b)(1)(D) of the Act; *Matter of Recinas*, *supra*; *Matter of Andazola*, *supra*; *Matter of Monreal*, *supra*.

Finally, with respect to the respondent's request for voluntary departure, we also agree with the Immigration Judge that the respondent did not demonstrate her statutory eligibility for this form of relief (Resp. Brief at 17; I.J. at 23). Specifically, the Immigration Judge found that the respondent did not have the financial means to pay for her departure to Mexico (Resp. Brief at 17; I.J. at 23; Tr. at 47-48). See section 240B(b)(1)(D); 8 C.F.R. § 1240.26(c)(1)(iv); *Matter of Arguelles*, 22 I&N Dec. 811, 816 (BIA 1999). On appeal, the respondent concedes that she did not have sufficient travel funds at the time of her hearing, but she maintains that she could obtain such funds prior to the expiration of the voluntary departure period (Resp. Brief at 17). Because she testified that she does not presently have the means to depart, we agree with the Immigration Judge's determination that the respondent did not carry her burden of proof in establishing her statutory eligibility for post-conclusion voluntary departure (I.J. at 23). As a result, we decline to address the respondent's additional arguments regarding whether she would otherwise qualify for voluntary departure pursuant to the statute and as a matter of discretion (Resp. Brief at 17).

Accordingly, the following order shall be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

(b) (6)

File A (b) (6)

In the Matter of

(b) (6)

Respondent

)
)
)
)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), as amended, in that you are an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than designated by the Attorney General.

APPLICATIONS: Request for cancellation of removal for certain non-permanent residents under Section 240A(b)(1) of the Immigration and Nationality Act, as amended.

In the alternative, request for voluntary departure pursuant to Section 240B of the Immigration and Nationality Act, as amended.

ON BEHALF OF THE RESPONDENT:

(b) (6)

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

(b)(6) & (b)(7)(C) Esquire
Assistant Chief Counsel

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

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of Mexico. She entered the United States at or near an unknown place on or about an unknown date. At that time, she was not admitted or paroled

after inspection by an immigration officer. Consequently, the Department of Homeland Security (hereinafter referred to as the Government) charged respondent with removal pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that she is an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than designated by the Attorney General. See Exhibit 1.

On April 12, 2010, the respondent via counsel acknowledged receipt of the Notice to Appear and it was placed in the record as Exhibit Number 1. Also on April 12, 2010, the respondent via counsel admitted to the factual allegations contained in the Notice to Appear and conceded to the charge of removal. Therefore, removal was established. In case removal became necessary, respondent designated Mexico.

Initially, the respondent sought two forms of relief. The first form of relief was adjustment of status pursuant to Section 245(i) of the Act. The Court requested that both parties brief the respondent's eligibility for adjustment of status pursuant to Section 245 of the Act. The Court received briefs from both parties and the respondent's then-counsel along with the Government Counsel acknowledged that respondent was not eligible for adjustment of status pursuant to Section 245(i) of the Act.

The respondent alternatively is seeking cancellation of

removal for certain non-permanent residents pursuant to Section 240A(b)(1) of the Act. To support application for relief, the respondent has submitted an application for cancellation of removal for certain non-permanent residents, Form E-42B.

See Exhibit 4.

This hearing was held on May 17, 2011. The following witnesses testified in this case, the respondent, her husband (b) (6), and (b) (6). Their testimony will not be recited here and because it is part of the record of proceedings. However, the Court has considered the testimony of all the witnesses who testified and will analyze their testimony and evidence in reaching this decision.

DOCUMENTARY EVIDENCE

The following documents are in the record of proceeding and have been considered by the Court even if not specifically mentioned.

Exhibit 1, the Notice to Appear.

Exhibit 2, respondent's prima facie showing adjustment of status eligibility.

Exhibit 3, respondent's prima facie showing of eligibility for cancellation of removal and adjustment of status for certain non-permanent residents.

Exhibit 4, respondent's application for cancellation of removal and adjustment of status certain non-permanent residents, the Form E-42B and the fee receipt.

Exhibit 5, respondent's supporting documents for her application for cancellation of removal and adjustment of status for certain non-permanent residents.

Exhibit 6, respondent's 2010 1040 Federal income tax returns filed with the Internal Revenue Service.

LEGAL STANDARDS AND ANALYSIS

To be eligible for cancellation of removal for certain non-permanent residents under Section 240A(b)(1) of the Act requires the alien to establish (1) being physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application; (2) establishing good moral character for ten years during such period; (3) having a qualifying relative who would experience exceptional and extremely unusual hardship if the respondent were required to depart the United States; and (4) being deserving of relief in the exercise of the Court's discretion.

CREDIBILITY OF WITNESSES

The REAL ID Act credibility framework found at Section 240(c)(4)(C) applies to applications for relief from removal made on or after May 11, 2005. An application is made on the date it is initially filed. Matter of S-B-, 24 I&N Dec. 42 (BIA 2006). Presently, the respondent filed her cancellation application for certain non-permanent residents on July 16, 2010. Therefore, since respondent filed her application for relief from removal after May 11, 2005, the REAL ID Act's credibility framework

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applies to her application for cancellation of removal under Section 240A(b)(1) of the Act.

Under Section 240(c)(4) of the Act, a credibility determination by an Immigration Judge concerning an application for relief from removal is based on the following criteria. Considering the totality of the circumstances and all relevant factors, the Immigration Judge may base a credibility determination on demeanor, candor or responsiveness of the applicant or witnesses, inherent plausibility of the applicant's or witnesses' account, the consistency between the applicant's or witnesses' written and oral statements (whether made and whether or not under oath and considering the circumstances under which the statements were made), the internal consistency of each such statements, the consistencies of such statements with other evidence of record (including the reports of the Department of State on country conditions), 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 claim or any other relevant factor. There is no presumption of credibility. However, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. Therefore, this Court will evaluate the credibility of the respondent and the witnesses who testified.

First, the Court finds that the witness, (b) (6),

is a credible witness. The Court finds that his testimony was candid and forthright.

However, the Court finds that the respondent and her husband, (b) (6), are not credible witnesses.

Prior to beginning the respondent's hearing on May 17, 2011, the respondent was given the opportunity to make changes to her cancellation application. The respondent made changes to her application as identified in red ink and initialed by the respondent and dated May 17, 2011. After the respondent was given the opportunity to make any changes to her application, the respondent indicated that she had reviewed her application with her present attorney, (b) (6) also indicated that she had reviewed the respondent's application with the respondent. The respondent then signed her application under penalty of perjury declaring that all the information on her application as well as any amendments that were made to the application were complete and true. See Exhibit 4, page 8.

According to the respondent's cancellation application, she has no social security number. See page 1, question 11 on application. However, the respondent testified on cross-examination that she has used the social security number of (b) (6)

(b) (6)

The respondent also testified that her children have no formal training in the Spanish language. She further claimed that her children would talk to her in Spanish, but did not

understand. She further claimed that her children do not read and write the Spanish language. However, the respondent's own evidence impeaches her credibility. Her own evidence is inconsistent with her testimony. The respondent submitted her children's school records which are part of Exhibit Number 5. According to school records for her son, (b) (6) he received formal training in the Spanish language at grade 6, year 2010 to 2011. According to his school progress report, he received a 99 grade in the Spanish language. See Exhibit 5, tab N, page 92. Other evidence also indicates that the respondent's son, (b) (6) receives formal training in the Spanish language. See Exhibit 5, tab N, page 97. The evidence in the record also includes a student progress report for her son (b) (6) in grade 4 for school year 2010 to 2011. According to his school records, he also received a 98 grade in the Spanish language. See Exhibit 5, tab N, page 98.

The Court finds that the respondent's claim that her children have no formal training in the Spanish language when the school records submitted by the respondent as part of Exhibit Number 5 are for the purpose of deceiving the Court to believe that it would be an exceptional and extremely unusual hardship to her children if they had to return to Mexico with her. In other words, to establish the hardship requirement by claiming that her children receive no formal training in the Spanish language. The respondent would have the Court to believe the increased

difficulty they would have if they relocated to Mexico with their mother. Also, the difficulty that the respondent's children would have in adjusting to life in Mexico. As previously mentioned, the evidence in this case, that is respondent's own evidence, impeaches her testimony regarding a lack of formal training in the Spanish language of her children.

According to the respondent's cancellation application, Exhibit 4, signed under penalty of perjury, the respondent claims that she has never filed income tax returns. According to her application, page 3 of her application, question number 42, when asked please list each of the years in which you have filed an income tax return with the Internal Revenue Service, respondent claims none. However, the respondent has submitted a copy of her 2010 Federal tax returns, Exhibit 6. Although the respondent has not signed the tax returns, there is a date where the preparer is to sign of May 28, 2011. Her claim on her application that she has never filed Federal income tax returns is inconsistent with Exhibit Number 6. The Court also notes that it is inconsistent with respondent's testimony. The respondent testified during her hearing that she has filed tax returns with the Internal Revenue Service. She stated that she has filed tax returns with her husband. The Court notes that the respondent, again, signed her cancellation application for non-permanent residents under penalty of perjury indicating that all the information on the application was complete and true when, in fact, it is not.

Another factor adversely affecting the respondent's credibility are the Federal income tax returns for 2010 she submitted. According to the respondent's 2010 1040A individual income tax returns, she lists for exemptions (b) (6), nephew, and (b) (6), her niece. The Court takes administrative notice of the 1040 instruction booklet relating to tax credit. According to 1040 tax requirements, a qualifying child for child tax credit is one who the tax preparer claim as his or her dependent, was under the age of 17 during the tax year, and is the tax preparer's son, daughter, adopted child, grandchild or step-child or foster child, and is a citizen of the United States or resident alien. In this case, (b) (6) and (b) (6) on the 2010 tax returns, respondent claims a child tax credit. However, the respondent testified that (b) (6) and (b) (6) are her nephew and niece and live in Mexico.

Furthermore, there is no evidence that either (b) (6) or (b) (6) is either a citizen of the United States or resident alien. As such, the Court finds that the respondent provided false information on her Federal income tax returns for the tax year when she claimed (b) (6) and (b) (6) as exemptions as a child tax credit.

Finally, all of this is a minor inconsistency in conjunction with the other inconsistencies as stated above, the Court finds a pattern of inadequate inconsistencies between the respondent's application and testimony. According to her

application, Exhibit 4, page 6 of application, question 60, respondent is to provide her past or present membership and/or affiliation with every political organization, association, fund, foundation, party, clubs, or similar group in the United States or any other place since her 16th birthday. According to her application, Exhibit 4, page 6, question 60, respondent claimed none. However, during her testimony, respondent claimed that she is a member of a church and regularly takes her children to church.

For all of the above-stated reasons, based on the totality of the circumstances, the Court finds that the respondent is not a credible witness. The respondent's testimony is inconsistent with her application as well as other evidence in the record as indicated above. As such, the Court finds respondent is not a credible witness and the Court will render an adverse credibility finding as to respondent.

The Court also finds that (b) (6), respondent's husband, is not a credible witness. The Court finds that he is not a credible witness because the Court finds that when he took the Fifth Amendment right against self-incrimination, the Court draws an adverse inference. This witness took the Fifth Amendment against self-incrimination because the respondent testified that a smuggler was used to smuggle her into the United States and the smuggler was paid \$2500 by her husband, (b) (6). According to the respondent's

testimony, while in Mexico, the respondent looked for a smuggler to smuggle her into the United States. She found the smuggler and then contacted her husband who provided the smuggler with the money in order to illegally smuggle the respondent into the United States. The Court draws an adverse inference from the respondent's husband taking the Fifth Amendment right against self-incrimination. Moreover, the Court also finds adversely affecting his credibility is the fact that he broke the law when he smuggled his wife into the United States illegally.

The Court also finds his credibility is adversely affected by the Federal income tax returns submitted as part of respondent's evidence, Exhibit Number 6. (b) (6) along with respondent, filed joint returns with the Internal Revenue Service for the year 2010. There, they claim that (b) (6) and (b) (6) their niece and nephew, as exemptions and child tax credit. However, as previously mentioned, (b) (6) and (b) (6) are neither his or the respondent's children, grandchildren, step-children or foster children, and there is no evidence in the record that they are either citizens or residents of the United States. Therefore, the Court finds that he, too, provided false and misleading information on his Federal income tax returns when he submitted them to the Internal Revenue Service.

The Court also finds adversely affecting his credibility is that he used a false social security card when he did not have work authorization in order to work in the United

States.

For the above-stated reasons, the Court finds and renders an adverse credibility finding against (b) (6).

CONTINUOUS PHYSICAL PRESENCE

Although the Court has found that the respondent is not a credible witness, based on the corroborating evidence, Exhibits 5 and 3, the Court finds that the respondent has met her burden of proof that she has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application. In addition, the Government has not in any meaningful way challenged respondent's continuous physical presence. Therefore, the Court finds that respondent has established the required ten years of continuous physical presence pursuant to Section 240A(b)(1)(A) of the Act.

GOOD MORAL CHARACTER

Good moral character is defined under Section 101(f) of the Act and includes eight enumerated actions and traits that disqualify an individual for eligibility for cancellation of removal. Additionally, the Court also has the ability to exercise its discretion in evaluating respondent's good moral character.

The respondent has submitted documentary evidence relating to her good moral character. She has submitted a letter from Reverend (b) (6), a letter from her son, (b) (6)

letters from (b) (6)

(b) (6) who also testified during these proceedings with respect to her good moral character, (b) (6)

(b) (6) The Court finds that these letters positively reflected the respondent's good moral character. The respondent also has never been arrested in the United States. The Court also finds that these are positive factors relating to the respondent's good moral character. The respondent is working in the United States with authorization which the Court also finds to be a positive factor relating to respondent's good moral character. However, the Court finds that the respondent is not a person of good moral character (1) because the Court has rendered an adverse credibility finding, as stated above; (2) the respondent has provided testimony that is inconsistent with the statements in her application such as her claim that her children have no formal training in the Spanish language when her own evidence states otherwise, see Exhibit 5, her failure to disclose on her application that she has used a social security number when she testified that she has used a social security number of (b) (6), her claiming as child tax credit on her 2010 tax returns her nephew and niece, (b) (6) and (b) (6), when in fact they do not qualify as exemptions as child tax credit according to the Internal Revenue service's guidelines. Given the fact of the identified factors that the Court has determined to adversely affect the respondent's good

moral character, the Court finds that during the period required for good moral character, respondent has failed to meet her burden of proof that she is a person of good moral character. Therefore, based on the totality of circumstances, the Court finds that the evidence in the record does not establish that the respondent has met her burden of proof that she is a person of good moral character.

EXCEPTIONAL AND EXTREMELY UNUSUAL
HARDSHIP TO A QUALIFYING RELATIVE

To establish exceptional and extremely unusual hardship, an alien must show his relatives or her relatives would qualify, would suffer hardships substantially beyond that which would ordinarily result from an alien's removal. Matter of Monreal, 23 I&N Dec. 56 (BIA 2001). The alien need not show that such hardship would be unconscionable. Only hardship to the alien's qualifying relative is considered. However, hardship to the alien may be evaluated insofar as it affects her qualifying spouse, parent or child. See Matter of Monreal, 23 I&N Dec. at 63.

Factors to be considered in determining the level of hardship include the age and health of the qualifying relative, length of residency in the United States, and family and community ties in the United States and abroad. See Matter of Monreal, see also Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). A lower standard of living, diminished educational opportunities,

poor economic conditions and other adverse country conditions in the country of removal also are relevant factors. However, such factors will generally be insufficient inandof themselves to support a finding of exceptional and extremely unusual hardship. Instead, all hardship factors should,be considered in the aggregate to determine whether the qualifying relative would suffer hardship that is exceptional and extremely unusual.

See Matter of Kao and Lin, 23 I&N Dec. 45 (BIA 2001).

With regard to her qualifying relatives, the Court finds that the respondent has failed to prove that her qualifying relatives would suffer exceptional and extremely unusual hardship if the respondent were removed from the United States. Presently, the respondent's qualifying relatives consist of her husband who is a permanent resident and her two United States citizen children, ages 10 and 13.

With respect to the respondent's husband, the Court finds that the evidence does not reveal that he suffers from any medical condition. It appears that he is in good health and employed, and it appears that he is working and can support the family, his children. The evidence reveals that he would suffer hardship that would normally be expected as a result of the consequences of a person's deportation or removal from the United States. Matter of Pilch, Int. Dec. 3298 (BIA 1996). See (b) (6)

(b) (6)

(b) (6)

Respondent has not provided

A (b) (6)

persuasive evidence to establish that her husband would suffer financial hardship or emotional hardship that is substantially different from or beyond that which would normally be expected from the removal of an alien who has lived, worked and has close family in the United States.

The respondent has testified about the hardship that would occur to her two children if she had to depart the United States. The respondent testified about the general health of her children. Respondent claimed that her 13-year-old has asthma, and her ten-year-old has had surgery on his testicles and that he is receiving follow-up treatment, and the respondent believes that her children could not receive the same medical treatment, hospital treatment if they return to Mexico with her. However, the Court finds that the respondent has failed to present evidence that her two children suffer from any incapacitating illness or could not receive similar medical treatment if they return to Mexico with her. The respondent has submitted documents relating to the medical condition of her children. However, this evidence fails to meet the respondent's burden that her children have any serious health issues that would rise to the level of exceptional and extremely unusual hardship if the respondent had to depart the United States. For example, the respondent has submitted a document relating to patient rights and responsibilities. This in no way explains the medical conditions of her children. The respondent has also submitted a

document from (b) (6) Medical Center relating to a 2009 treatment for pneumonia for her son. However, this document does not indicate that her son has an ongoing medical condition that would require him to receive treatment in the United States and that treatment being unavailable in Mexico.

The Court would also note that several of the respondent's documents at Exhibit 5, pages 66 through 86, are in the Spanish language and fail to comply with the regulation at 1103.33. In other words, they have not been translated from Spanish to English and there is no certification of translation. So the Court is not able to determine whether these documents would assist the respondent in meeting her burden of proof that her removal would result in exceptional and extremely unusual hardship because of the medical condition of her children. The respondent has also submitted documents relating to medical that her children may be receiving. However, again, these documents are in the Spanish language and have not been translated into the English language. For example, see pages 76, 77 of Group Exhibit Number 5. The respondent has also submitted a document from (b) (6) Medical Center indicating that (b) (6) has submitted on his behalf an application for Medicaid. However, this document does not explain the medical conditions under which (b) (6) allegedly has or suffers from. The respondent has submitted a document related to an appointment that (b) (6) has with a urologist in August 20, 2009, and a surgery date of September 22,

2009. However, the evidence does not establish the diagnosis or any future treatment. The respondent has failed to produce any evidence that is reliable or persuasive that either of her children have any serious medical condition. Although the Court concludes that asthma can be a serious medical condition, the respondent failed to demonstrate to the Court that her son could not receive appropriate treatment in Mexico if he returned to Mexico with her.

The respondent has failed to submit evidence of the lack of medical facilities or the lack of medical treatment in Mexico for her children. The respondent did submit evidence related to the conditions in Mexico and that is the violent conditions in Mexico. However, this evidence does not persuade the Court that her children would be unable to receive similar medical treatment in Mexico for their health concerns or conditions.

Therefore, for the above-stated reasons, the Court finds that the health conditions of the two children do not rise to the level of exceptional and extremely unusual hardship if the respondent had to depart the United States.

The respondent, furthermore, has not provided persuasive evidence to establish that her two sons would suffer financial hardship that is substantially different from or beyond that which would normally be expected from the removal of an alien such as respondent who has lived and worked in the United

States for a significant period of time. The Court notes that financial detriment is a common result of removal and this factor inandof itself is insufficient to prove the hardship requirement. Moreover, this Court has not been provided with a clear record of the financial obligations of the respondent and her family, in other words, a detailed breakdown with corroborating evidence of their assets and liabilities, rather, the Court did receive some evidence such as the statements on her application with respect to the property and assets they have in the United States. But this evidence does not show and does not establish a financial hardship. Again, as stated, the record is devoid of the financial obligations respondent and her family has and what her departure would mean to those financial obligations.

Both the respondent and her husband discuss the educational opportunities that the respondent's children would be deprived of if the respondent returns to Mexico. The Court has considered the educational opportunities the respondent would suffer if she had to depart the United States. However, the Court finds that the mere fact that educational opportunities for the respondent's children might be better in the United States than respondent's homeland of Mexico does not give rise to the level of exceptional and extremely unusual hardship. The Court recognizes that the respondent's children would suffer some hardship and likely will have fewer opportunities should they go to Mexico. Those hardships may have met the prior standard of

extreme hardship, but they do not rise to the level of exceptional and extremely unusual hardship.

Moreover, the record is absent of corroborating evidence such as an evaluation of the Mexican educational system to support a claim that the educational opportunities in Mexico or lack thereof would rise to the level of exceptional and extremely unusual hardship. As such, the Court cannot find that educational opportunities in Mexico would be fewer since the respondent has failed to present sufficient evidence that the educational opportunities in Mexico are significantly lower than will rise to the level of exceptional and extremely unusual hardship.

The Court also notes that the respondent has the majority of her family in Mexico. She has approximately ten siblings living in Mexico and her mother also resides in Mexico. The Court finds that these individuals could help the respondent as well as her children if they return to Mexico with her to adjusting to live in Mexico. The Court recognizes the difficulty that they will have, but this difficulty does not rise to the level of exceptional and extremely unusual hardship.

The hardships identified by the respondent to her qualifying relatives, emotional and financially, are not unique or unusual to the extent that removal of the respondent would rise to the level of exceptional and extremely unusual hardship. Rather, hardships that have been identified is that which would

normally be expected upon required departure of the parent or wife who resided in a home and provided financial and emotional support to her family.

The Court has weighed all the evidence of record, both individually and cumulatively, on the issue of exceptional and extremely unusual hardship and finds that respondent has failed to establish exceptional and extremely unusual hardship to her qualifying relatives. The availability in truly exceptional cases of relief under Section 240 has not been met here. That is, the Court finds that the respondent's qualifying relatives would not suffer unique or uncommon hardship that is extremely uncommon or extremely extraordinary.

Thus, on the balance of all the factors of record, both individually and cumulatively, the Court finds the respondent has failed to establish exceptional and extremely unusual hardship to her qualifying relatives.

DISCRETION

Presently, the Court notes that respondent is not eligible for cancellation of removal under Section 240A(b)(1) since the Court has found that she has not shown and met her burden that she is a person of good moral character and because the respondent has failed to show that her qualifying relatives would suffer exceptional and extremely unusual hardship. However, the Court also finds that it would deny the respondent's application for cancellation of removal in a matter of

discretion. Presently, the respondent has not been deemed to be a credible witness. In addition, respondent has not demonstrated that she is a person of good moral character for the reasons stated above. There are other factors that the Court has considered that would lead the Court to deny the respondent's application as a matter of discretion. The respondent's illegal entry into the United States in approximately 1996. Her illegal entry is compounded by the fact that the respondent obtained and found a smuggler to smuggle her into the United States illegally. As previously mentioned, the respondent providing false and misleading information on her tax returns when she claimed her nephew and niece as tax credit when, in fact, they do not qualify under the Internal Revenue Service's guidelines.

The Court recognizes that the respondent has presented positive factors. Those positive factors include her marriage to a lawful permanent resident, her children who were born here in the United States, that she takes care of her family and is a loving mother and husband, that she does provide some financial support to her family, that she has other family and friends in the United States who have submitted letters on her behalf. However, the Court finds that the adverse factors cited above outweigh any of the positive factors presented in her case and, therefore, the Court finds that it would deny the respondent's application for cancellation of removal for non-permanent residents as a matter of discretion.

In the alternative, the Court considered respondent for voluntary departure. The respondent indicated that she would obey an order granting her voluntary departure. However, the respondent indicated that she is financially unable to depart the United States. As such, the Court finds the respondent has failed to meet her burden of proof that she has the means to depart the United States and, therefore, the Court will deny the respondent voluntary departure because she could not demonstrate that she has the means to depart the United States at her hearing.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED the respondent's application for cancellation of removal for certain non-permanent residents pursuant to Section 240A(b)(1) of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that respondent's request for voluntary departure pursuant to Section 240B of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED respondent shall be removed and deported from the United States to Mexico based on the charge contained in the Notice to Appear.

(b) (6)

Immigration Judge

(b) (6)

NOT-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

(b) (6)

In the Matter of:

(b) (6)

In Removal Proceedings

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File No.

A (b) (6)

MOTION TO REOPEN RECORD FOR ADDITIONAL TESTIMONY

(b) (6)

2011 JUN 28 PM 2:26

RECEIVED
EXECUTIVE OFFICE OF IMMIGRATION REVIEW

A (b) (6)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

(b) (6)

IN THE MATTER OF

(b) (6)

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IN REMOVAL PROCEEDINGS

No. A (b) (6)

MOTION TO REOPEN THE RECORD FOR ADDITIONAL TESTIMONY

NOW COMES, Respondent, (b) (6) through her undersigned counsel, and hereby requests the Honorable Immigration Judge to reopen the record, for the purposes of taking additional testimony, on the following grounds:

1. On or about May 17, 2011, Respondent, through counsel, appeared before this Court for her individual hearing on the merits.
2. Respondent is seeking cancellation of removal for nonpermanent residents, pursuant to 240A(b) of the Immigration and Nationality Act.
3. Respondent testified at the May 17, 2011 hearing. This court also received the testimony of Respondent's husband, who is a lawful permanent resident of the United States, and Respondent's two friends.
4. Respondent was the first witness to testify and after the Respondent testified, the Court indicated he had issues with Respondent's credibility. The Court called a recess and instructed counsel to speak with Respondent regarding her options for pre-trial voluntary departure.

5. The Court allowed Counsel to meet with her client outside the court room to discuss a possible settlement in her case.
6. Counsel talked to Respondent outside the courtroom and fully advised her client of voluntary departure. Counsel further explained to Respondent the consequences of each decision. Respondent decided she did not want to ask for pre-conclusion voluntary departure and wanted to continue the cancellation of removal application. Counsel called her supervisor who recommended to continue the cancellation of removal application instead of taking pre-conclusion voluntary departure and to rehabilitate her by offering additional testimony.
7. Counsel went back in the court room and informed the Immigration Judge about her client's decision to continue with her 42B case and offered additional testimony from Respondent to rehabilitate her client.
8. The Immigration Judge had an issue with the length of time Counsel spent outside the courtroom with her client. When she returned, the Immigration Judge insinuated that Counsel had done something inappropriate due to the length of time she remained outside the courtroom. However there was no misconduct on Counsel's part. Unfortunately, counsel was intimidated, and did not call Respondent back to the stand to explain the apparent inconsistencies. Testimony was taken from Respondent's husband and the two other witnesses.
9. Respondent is now respectfully requesting this Honorable Court reopen the record of proceedings to allow Respondent to conclude her testimony and clear up the issues expressed by the Immigration Judge.

10. It would be unfair and unjust to not allow Respondent an opportunity to present additional testimony in her case which is material in that the Immigration Court has been left with the impression that Respondent is not credible.

WHEREFORE, Respondent moves that her proceedings be reopened to allow additional testimony in her Cancellation of Removal for Nonpermanent Residents.

Sincerely,

(b) (6)

A (b) (6)

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STATE OF (b) (6) }

COUNTY OF (b) (6) }

Before me, a notary in and for the State of (b) (6) did appear before me, (b) (6) who after being duly sworn, did depose the following information:

- ❖ My name is (b) (6) and I presently reside at (b) (6)
- ❖ On May 17, 2011 I appeared before the Immigration Court for an Individual Hearing. The honorable judge (b) (6) presided over my case.
- ❖ My attorney (b) (6) was representing me at the hearing. My husband, (b) (6) was present at my hearing and was listed as a witness for my case.
- ❖ I was called to testify and I was asked questions by both my attorney and the trial attorney and the judge.
- ❖ At the end of my testimony, the judge called a recess. (b) (6) sent me out of the court first and then my attorney followed.
- ❖ My attorney approached me when we were outside the courtroom to talk to me about my options. We stepped into a room and she explained that I could go forward with my application or I could withdraw my application and request voluntary departure.
- ❖ I told my attorney that I wanted to go forward with my application because I did not agree with withdrawing it and requesting voluntary departure.
- ❖ My attorney asked that I step out of the room and I did. I waited outside the courtroom in the lobby area with my husband. We waited to be called in to the court.
- ❖ I waited outside the courtroom for about ten or fifteen minutes and then I was called back into court.
- ❖ When we stepped back into the courtroom my case continued. At the end of the hearing, the judge stated that (b) (6) was not going to issue a decision on that day and that (b) (6) would issue a written decision.
- ❖ My attorney did not at any time, prior to my hearing or during my hearing, coach me as to my testimony.

❖ Under penalty of perjury, I swear that the preceding information is true and correct.

(b) (6)

Subscribed and sworn before me on this 28th day of June 2011

(b) (6)

STATE OF (b) (6) }

COUNTY OF (b) (6) }

Before me, a notary in and for the State of (b) (6) did appear before me, (b) (6) who after being duly sworn, did depose the following information:

- ❖ My name (b) (6) and I presently reside at (b) (6) (b) (6)
- ❖ I am (b) (6) husband.
- ❖ On May 17, 2011 my wife appeared before the Immigration Court for an Individual Hearing. The honorable judge (b) (6) presided over her case.
- ❖ My wife's attorney (b) (6) was representing her at the hearing. I was present at her hearing and was listed as a witness for her case.
- ❖ I entered the courtroom with my wife and her attorney. I met the judge and then the judge asked that I along with other witnesses for my wife's case step outside the courtroom. (b) (6) told us we would be called in to testify later.
- ❖ My wife's attorney approached us when we were outside the courtroom during a break. We stepped into a room and the attorney explained that my wife could go forward with her application or she could withdraw her application and request voluntary departure. Then my wife's attorney asked if I could step outside so she could speak to my wife alone for a few minutes.
- ❖ I stepped outside and waited a few minutes and then my wife came out of the room and the attorney stayed in the room by herself.
- ❖ My wife and I waited outside the courtroom in the lobby area. We waited to be called in to the court.
- ❖ I was later called into the courtroom to testify. After giving my testimony, I stepped back outside the courtroom and waited for my wife's hearing to end.
- ❖ My attorney did not at any time, prior to my hearing or during my hearing, coach me as to my testimony.
- ❖ Under penalty of perjury, I swear that the preceding information is true and correct.

(b) (6)

Subscribed and sworn before me on this 7th day of June of 2011

(b) (6)

1 JUDGE TO (b) (6)

2 Q. All right, ma'am, thank you very much, you may
3 step down.

4 A. Pardon me a thousand times.

5 (OFF THE RECORD)

6 (ON THE RECORD)

7 JUDGE FOR THE RECORD

8 On the record.

9 JUDGE TO (b) (6)

10 Q. Who's going to be your next witness?

11 A. Could I recall the respondent to the stand?

12 Q. Not at this time. Why do you need to recall the
13 respondent? You know, we had a break, you've obviously had an
14 opportunity to speak to her about the evidence in this case.
15 Why do you want to recall the respondent?

16 A. To see if we can clear up the issue with the
17 taxes and also with the classes, the Spanish classes.

18 Q. No, ma'am. I think that to -- for the record,
19 the Court had a conversation with both parties on the posture of
20 this case off the record. And the Court pointed out some
21 concerns it had. And to discuss this with the respondent about
22 what the Court told you its concerns were basically undermines
23 the integrity of the hearing.

24 A. Okay.

25 Q. So I'll hear from your next witness.

1 gather and stuff, she does.

2 Q. In your opinion, is she a good person?

3 A. Very good to me, she's like my second mother.

4 Q. Why do you say that?

5 A. When my mom's not here, like if she's out of town
6 or et cetera, and if I need something, I would come to her.

7 (b) (6) TO JUDGE

8 Q. Nothing further.

9 (b) (6) TO JUDGE

10 Q. No questions.

11 JUDGE TO (b) (6)

12 Q. All right, thank you, (b) (6) you may step
13 down.

14 A. May I go?

15 Q. Yes, you're excused.

16 JUDGE TO (b) (6)

17 Q. Who's your next witness?

18 A. No further witnesses.

19 Q. All right, and I'll hear from the Government on
20 this. (b) (6) I'll let you recall the respondent but I want
21 the record to reflect the following. That at approximately
22 11:19, the Court took a recess. The Court had a conversation
23 with both parties in court, off the record, about the case that
24 lasted until about 11:35. I indicated pursuant to that
25 conversation we'll take a 10 minute recess. You did not return

1 until 12:10, exceeding the 10 minute recess. During that
2 conversation the Court had with both parties, the Court pointed
3 out some issues with respect to the respondent's testimony that
4 related to what she testified about the formal education of the
5 children in the Spanish language not having that education.
6 Whereas the evidence in the record indicate that they were
7 taught in the Spanish language. The Court also had a
8 conversation with both parties about the respondent's
9 credibility and during the period of time that we took a recess,
10 apparently there were some discussions about that and respondent
11 now wants to address that before the Court, and the Court will
12 admit that, and I'll hear from the Government whether or not
13 they have an objection, and then I'll certainly consider that.
14 But I am leaning toward allowing that occur with the
15 understanding that the respondent's counsel had ample enough
16 opportunity before we took the recess, on redirect examination,
17 to address any of these apparent inconsistencies between the
18 evidence and the respondent's testimony but failed to do so.
19 And it was only after we took the recess and the Court conversed
20 with both parties is there, apparently, wanting to address these
21 issues. So I will permit that.

22 JUDGE TO (b) (6)

23 Q. (b) (6) even though I said I'll permit
24 that, if there's anything that you want to place on the record
25 to preserve your right to an objection on appeal, I certainly