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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON DC 20530

Matter of Castillo-Perez, Respondent.	27 I&N Dec. 495 (A.G. 2018) In Removal Proceedings

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE

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I. INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") respectfully responds to the invitation by the Acting Attorney General on December 3, 2018 for interested *amici* to submit briefs in this matter. IRL is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including in *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016); and *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

II. QUESTIONS PRESENTED

The following questions are presented in this brief:

1. In connection with an application for cancellation of removal under 8 U.S.C. § 1229b(b), what is the appropriate legal standard for determining when an individual lacks "good moral character" under 8 U.S.C. § 1101(f)?

2. What impact should multiple convictions for driving while intoxicated or driving under the influence have in determining when an individual lacks "good moral character" under 8 U.S.C. § 1101(f)?

3. What impact should multiple such convictions have in determining whether to grant discretionary relief under 8 U.S.C. § 1229b(b)?

III. PROCEDURAL BACKGROUND

The procedural background, summarized below, is set forth in greater detail in the underlying Board of Immigration Appeals ("BIA") decision dated January 2, 2018 (hereinafter, the "BIA Decision").[1]

On October 5, 2016, an Immigration Judge granted Respondent a cancellation of removal for non-permanent residents under section 240A(b)(l) of the Immigration and Nationality Act ("INA"), 8 U.S.C § l229b(b)(l). BIA Decision at 1.[2] The Immigration Judge found that Respondent "established good moral character, and that his qualifying relatives would be subject to exceptional and extremely unusual hardship upon his removal." *Id*. (citations omitted).

The Department of Homeland Security ("DHS") appealed from the Immigration Judge's decision and the Respondent filed a brief in opposition. The BIA sustained DHS's appeal, and reversed and vacated the Immigration Judge's October 5, 2016, decision insofar as that decision granted Respondent cancellation of removal and also ordered Respondent removed from the United States to Mexico. BIA Decision at 1, 4. In rendering its decision, BIA noted that it

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[1] IRLI arranged for Freedom of Information Act ("FOIA") requests to be sent to the Executive Office for Immigration Review ("EOIR") at the U.S. Department of Justice in an attempt to obtain a copy of the underlying BIA Decision. In response, on December 20, 2018, EOIR informed counsel for IRLI that a copy of the underlying BIA decision is available at https://www.justice.gov/eoir/frequently-requested-agency-records. The copy of the BIA Decision on that website was redacted under claim of FOIA exemption 6, which deals with the protection of personal privacy. The citations to the BIA Decision herein are to the redacted copy of the decision.

[2] The merits hearing on Respondent's application was held in January 2015. Respondent has the burden of establishing his eligibility for cancellation of removal. INA § 240(c)(4)(A)(i). *See also* BIA Decision at 1 (acknowledging Respondent's burden).

reviews findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard (8 C.F.R. § 1003.l(d)(3)(i)) and reviews questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). BIA Decision at 1.

The BIA reviewed the issue of "extremely and exceptional hardship", a conclusion which BIA reviewed as a question of law. *Id*. at 1. The BIA concluded that if Respondent is removed the alleged hardship would not be substantially different from, or beyond, that normally expected to result from the removal of an alien with family members in the United States. *Id*. at 2. Among other things, the BIA considered Respondent's potential employment opportunities in Mexico and whether certain family members would accompany Respondent to Mexico or would remain in the United States. The BIA disagreed "with the Immigration Judge's conclusion that the diminished educational and economic opportunities, and other relevant factors in this case, are sufficient to satisfy the applicable burden." *Id*. at 3 (citation omitted). According to the BIA, "respondent has not established that any potential hardship to his qualifying relatives rises to the level of exceptional and extremely unusual" and could not establish the requisite hardship as required by law. BIA Decision at 3.

Alternatively, upon its *de novo* review, the BIA also denied Respondent cancellation of removal in the exercise of discretion. *Id*. at 3. In analyzing "the totality of circumstances," the BIA acknowledged that "considerable favorable factors" were present, but concluded that discretionary relief was not warranted. *Id*. at 4. The BIA focused on Respondent's criminal history, including arrests for separate offenses and his most recent conviction (which was for driving while intoxicated) - an offense that Respondent committed after being placed in removal proceedings in 2010. *Id*. at 3-4. The BIA stated that:

> The repetitive nature of his driving while intoxicated arrests and convictions, including one … while he was in removal proceedings, reflects a continuing disregard for our nation's laws and evinces a disregard for the safety of people and property. Therefore, this is an extremely negative factor.

Id. at 4.

The BIA also considered the issue of Respondent's good moral character, a mandatory showing for which Respondent also bears the burden of proof. See *id*. at 4 (citing authority). "Upon consideration of the respondent's criminal history, including the 2012 driving while intoxicated conviction, …and negative immigration history, [the BIA concluded] that he has not established the good moral character required for cancellation of removal." BIA Decision at 4.

The BIA Decision thus vacated the Immigration Judge's cancellation of removal and ordered the Respondent removed from the United States to Mexico. *Id*. at 4.

On December 3, 2018, the Acting Attorney General of the United States ("AG") referred the BIA Decision to himself for review of the questions presented, stayed the BIA Decision during the pendency of his review, and invited the parties and interested *amici* to submit briefs on points "relevant to the disposition" of the case. *Matter of Castillo-Perez*, 27 I&N Dec. 495 (A.G. 2018) (hereinafter, the "AG Referral"). The AG referral does not provide any factual information about the action.

Pursuant to the AG's referral to himself, the parties' briefs were due in this matter by January 4, 2019. IRLI, through counsel, unsuccessfully attempted to obtain a copy of those briefs.

IV. SUMMARY OF THE FACTS

The Respondent is a native and citizen of Mexico. He entered the United States without inspection in 1993 and returned to Mexico in 1997 pursuant to a grant of voluntary return.

Respondent reentered the United States again without permission in 1997. Respondent has been unlawfully present in the United States for 20 years. At the time of Respondent's merits hearing in January 1995, he resided with another person who also is a native and citizen of Mexico, and who was without lawful status in the United States. BIA Decision at 1-4.

Respondent apparently based his hardship claim on the presence in the United States of certain family members. *Id*. at 1-3. The identity and ages of those family members is unclear because of the redactions. The evidence indicated that if Respondent was deported family members probably would accompany him to Mexico. *Id*. at 2, n.1. The Immigration Judge seems to have concluded that those relatives would qualify Respondent for cancellation of removal and that they allegedly would experience exceptional and extremely unusual hardship if Respondent was deported to Mexico. *Id*. at 2. As noted, the BIA disagreed with the Immigration Judge. *Id*. at 2-3.

In denying Respondent's cancellation of removal in the exercise of its discretion, the BIA specifically focused on Respondent's multiple convictions for driving while intoxicated. *Id*. at 3-4. Although much of the information regarding Respondent's criminal history was redacted in the BIA Decision that IRLI obtained, the BIA relied heavily on Respondent's repeated convictions for driving while intoxicated, including the severity of such offenses, in reaching part of its decision.[3] For example, after examining Respondent's criminal history (including arrests for separate offenses) and negative immigration history, the BIA concluded that Respondent also failed to establish good moral character required for cancellation of removal. *Id*. at 3-4.

[3] The BIA Decision also notes an arrest of Respondent for charges were dismissed. *Id*. at 4. Much information about the Respondent, including that arrest, was redacted in the BIA Decision, making it difficult to brief the issues.

V. SUMMARY OF THE ARGUMENT

Respondent has the burden of establishing his eligibility for cancellation of removal and of demonstrating his good moral character. He failed to do either. The BIA examined the record, including Respondent's multiple conviction for driving while intoxicated, and applied the correct legal standard to conclude that Respondent failed to establish **"**good moral character**"** for cancellation of removal. Multiple convictions for driving while intoxicated (or driving under the influence) should weigh heavily against the exercise of discretionary relief for cancellation of removal.

VI. ARGUMENT

A. Burden of Proof

Respondent has the burden of establishing his eligibility for cancellation of removal. INA § 240(c)(4)(A)(i). Respondent also has the burden of demonstrating his good moral character. BIA Decision at 4. In that regard, INA § 101(f), 8 U.S.C. § 1101(f), specifies that "[t]he fact that any person is not within [the classes enumerated in section 101(f)] shall not preclude a finding that for other reasons such person is or was not of good moral character." *See also Matter of Urpi-Sancho*, 13 I&N Dec. 641, 643 (BIA 1970) ("In other words, where specific conduct does not preclude a finding of good moral character under the enumerated categories of section 101(f), that same conduct may nevertheless be considered in making a determination on good moral character in accordance with the provisions of the last sentence of section 101(f).") (citations omitted). The record here establishes that Respondent failed to meet his burden in each instance.

B. The Appropriate Legal Standard for Determining When an Individual Lacks "Good Moral Character" Under 8 U.S.C. § 1101(f) in Connection with an Application for Cancellation of Removal Under 8 U.S.C. § 1229b(b).

The AG may cancel the removal of a nonpermanent resident from the United States for various reasons. *See* 8 U.S.C. § 1229b(b). The alien has the burden of establishing the reasons justifying cancellation of removal. 8 U.S.C. § 1229a(c)(4)(A).

Section 1229b(b) contains two subsections dealing with cancellation of removal: the first subsection concerns the general rule applicable to nonpermanent residents (8 U.S.C. § 1229b(b)(1)) and the second subsection contains special rules for an alien who is a battered spouse or a child. (8 U.S.C. § 1229b(b)(2)).[4]

Section 1229b(b)(1) provides that:

> IN GENERAL The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

For cancellation of removal under that section, the lawful permanent resident must have been continuously physically present in the United States for at least ten years, must have exhibited

[4] Because 8 U.S.C. § 1229b(b)(1) is the provision that applies generally, this brief focuses on that subsection.

good moral character during the ten years, must have never been convicted of certain enumerated criminal offenses, and must demonstrate that removal would result in "exceptional and extremely unusual hardship" to his family members who are lawfully present in the United States. *See Tomaszczuk v. Whitaker*, 909 F.3d 159, 163 (6th Cir. 2018) (citing to the statute).[5]

The starting point for the issue of whether or not an alien has "good moral character" is also the statute itself. 8 U.S.C. § 1101(f) enumerates certain issues that prevent an alien from establishing good moral character and provides, in part, that:

> (f) For the purposes of this chapter –
>
> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—
>
> (1) a habitual drunkard;
>
> * * * * *
>
> (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
>
> (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); ….
>
> The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

The section entails a statutory bar to establishing good moral character if an applicant falls within one of the enumerated categories. The residual clause at the end of the section, however,

[5] As noted, the redactions in the BIA Decision make it difficult to discern all the relevant facts about Respondent. If the BIA had determined that certain provisions of 8 U.S.C § 1101(f) applied, however, Respondent could not establish good moral character as a matter of law and the BIA presumably would not have discussed the other issues, such as whether discretionary relief was available regarding cancellation of removal.

permits the exercise of discretion when considering the issue of good moral character if an applicant does not fall one of the enumerated categories. *See Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967) (noting the availability of discretion).

Each term in 8 U.S.C. § 1101(f) focuses on conduct instead of status. *See Tomaszczuk*, 909 F.3d at 165-167 (discussing the definition and interpretation of the phrase "habitual drunkard"). In that discussion, the Sixth Circuit stated that "Congress intended the term 'habitual drunkard' to focus on the *conduct* associated with an applicant's drinking, rather than solely on whether the applicant has the *status* of an alcoholic.). *Id*. at 166 (emphasis in original).

The USCIS Policy Manual recognizes the legal standard to use in determining good moral character for purposes of 8 U.S.C. § 1101(f) and states that:

> USCIS is not limited to reviewing the applicant's conduct only during the applicable [good moral character] period. An applicant's conduct prior to the [good moral character] period may affect the applicant's ability to establish [good moral conduct] if the applicant's present conduct does not reflect a reformation of character or the earlier conduct is relevant to the applicant's present moral character.
>
> In general, an officer must consider the totality of the circumstances and weigh all factors, favorable and unfavorable, when considering reformation of character in conjunction with [good moral character] within the relevant period.

USCIS Policy Manual, Vol. 12, Part F, Good Moral Character, Ch. 2(B) (specifying "factors that may be relevant in assessing an applicant's current moral character and reformation of character…").

Whether 8 U.S.C. § 1101(f) bars an applicant from establishing good moral character might depend, in some instances, on whether state law considers the applicant's conduct to fall within one of the other numbered items in that section**.**[6] For example, the punishment imposed

[6] The presence or absence of scienter for an offense under state law can be dispositive, for immigration law purposes, regarding the analogous issue of whether or not an applicant

under state law also can be relevant under § 1101(f) regarding cancellation of removal. *See Duron-Ortiz v. Holder*, 698 F.3d 523, 525, 528-529 (7th Cir. 2012) (upholding an Immigration Judge's denial of cancellation of removal because applicant had served over 300 days in state custody for two recent driving under the influence arrests).

Convictions for driving under the influence and driving while intoxicated thus raise several considerations, including whether such conduct might constitute a crime of moral turpitude, an aggravated felony, or a factor to consider when deciding whether to exercise discretionary relief for cancellation of removal.

The BIA acted correctly here. It examined the record and various factors, including Respondent's conviction for driving while intoxicated, to conclude that Respondent failed to establish good moral character for cancellation of removal. BIA Decision at 3-4.

C. Multiple Convictions for Driving While Intoxicated or Driving Under the Influence Should Prevent an Individual from Establishing "Good Moral Character" Under 8 U.S.C. § 1101(f).

The second question presented in the AG Referral issue involves two different but related issues.

The first issue is whether multiple convictions for driving while intoxicated or driving under the influence suffices to establish that a person is a habitual drunkard and prevents the person from establishing good moral character during the ten year period before his or her application. *See* 8 U.S.C. § 1101(f)(1).[7] The AG should hold that it does prevent such a

committed a crime of moral turpitude. *See, e.g., Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (discussing Arizona statute at issue, involving the offense of aggravated driving while under the influence, and whether that law required demonstration of a culpable mental state).

[7] The second question in the AG Referral does not distinguish between the offense of driving while intoxicated versus driving while under the influence, or whether the elements necessary to establish each offense are the same or different. For purposes of the discussion herein, neither

showing, especially when combined with other negative factors. Multiple convictions for drunk driving, along with other factors, precluded an alien from proving his good moral character. *See Tomaszczuk*, 909 F.3d at 162 (Immigration Judge found that petitioner was an "habitual drunkard" based on evidence that included multiple convictions for drunk driving as well as a conviction as a "Disorderly Person" related to being drunk while in public.).

The second issue is whether multiple convictions for driving while intoxicated or driving under the influence – even without equating that to a finding of being a "habitual drunkard" – prevents an alien from establishing good moral character under Section 1101(f). Determining whether an applicant has established "good moral character" often requires subjective evaluations and analysis of facts that differ from situation to situation. But because of the threat to public safety posed by aliens in the country without permission who are convicted of driving while intoxicated or driving under the influence, the AG should hold that multiple convictions for such offenses prevent such alien applicants from establishing good moral character under 8 U.S.C. § 1101(f). Referring to the Respondent, BIA Decision notes that "[t]he repetitive nature of … driving while intoxicated arrests and convictions, including one … while he was in removal proceedings, reflects a continuing disregard for our nation's laws and evinces a disregard for the safety of people and property." *Id.* at 4.

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does this brief. It should be irrelevant whether multiple convictions are for driving while intoxicated or for driving under the influence because each involves the risk of grievous bodily harm to the driver and other persons as well as to property.

D. Multiple Convictions for Driving While Intoxicated or Driving Under the Influence Should Weigh Heavily Against Discretionary Relief Under 8 U.S.C. § 1229b(b).

The exercise of discretion involves a balancing test of many factors. The analysis weighs multiple positive and negative factors. Many of the factors are borrowed from *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The BIA conducted that analysis, considered the "totality of circumstances," and properly concluded that discretionary relief was unwarranted in the case of Respondent. BIA Decision at 3. Respondent's conviction for driving while intoxicated, combined with his negative immigration history, precluded the exercise of discretionary relief for cancellation of removal and prevented him from establishing good moral character. *Id*. at 3-4 (noting that the convictions and disregard for law and safety of people and property was an "extremely negative factor").

While existing law provides for discretionary relief under certain circumstances, multiple convictions of driving while intoxicated or driving under the influence (combined with illegal immigration status) normally should be an "extremely negative factor" (see BIA Decision at 4) because those two situations are highly likely to reoccur. *See generally* USCIS Policy Manual, Vol. 12, Part F, Good Moral Character (discussing various factors relevant to the issue of good moral character). Thus, multiple convictions for those offenses should have a significant and substantial impact and weigh heavily against discretionary relief under 8 U.S.C. § 1229b(b).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 18, 2019, I filed the foregoing *amicus curiae* brief by electronic mail addressed to AGCertification@usdoj.gov and sent three (3) printed copies of the foregoing *amicus* brief via first class mail, postage prepaid, to the following:

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