

Falls Church, Virginia 22041

File: A30 487 328 - Newark

Date:

In re: JOSE BARRIOS CASTILLA

MAY 12 2005

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeffrey B. Steinfeld, Esquire

ON BEHALF OF DHS: Susan G. Roy
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

APPLICATION: Section 212(c) waiver

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals from the Immigration Judge's November 30, 2004, decision granting the respondent relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The appeal will be sustained.

On appeal, the DHS contends that the Immigration Judge erred by granting the respondent a section 212(c) waiver. Specifically, the DHS maintains that the positive equities demonstrated by the respondent did not outweigh the negative factors present in the case to warrant a favorable exercise of discretion.

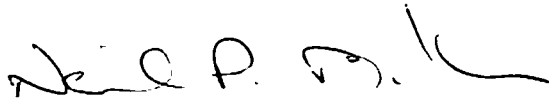
An application for discretionary relief under section 212(c) of the Act necessitates a balancing of the adverse factors of record evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of relief is in the best interest of this country. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). Furthermore, an alien who demonstrates unusual or outstanding equities, as may be required in a section 212(c) matter, merely satisfies the threshold test for having a favorable exercise of discretion in his case; such a showing does not compel that discretion be exercised in his favor. *See Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988).

The Immigration Judge in this instance looked to the respondent's long residence in this country, his family relationships, and that the fact that the respondent was never incarcerated to determine his eligibility

(I.J. at 20). Even if we assumed, *arguendo*, that the respondent demonstrated outstanding and unusual positive equities, we would nevertheless find that the respondent did not meet his burden to establish that the equities presented outweigh the negative factors. *See Matter of Marin, supra; Matter of Buscemi, supra*. The respondent was convicted of sexually abusing a minor and we find that the respondent's crime is serious. We also agree with the DHS that the respondent was in a position of trust when he committed his crime. Finally, we note that the Immigration Judge appeared to look behind the conviction, speculated that the respondent's criminal actions may have been related to alcohol use and ultimately appears to give diminished weight to the respondent's conviction (I.J. at 18). *See Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991). Moreover, the Immigration Judge determined that because the respondent completed a 2-year program he demonstrated rehabilitation, but we cannot find that a completion of a program necessarily demonstrates rehabilitation, especially since the respondent did not fully accept responsibility for his actions (Tr., Sept. 30, 2003, at 24-25, 58-60, 65-66). *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996) (commenting that absence of rehabilitation may be determinative in a case involving exercise of discretion and there are questions whether the alien will revert to criminal behavior). We note the testimony of the respondent's son who stated that he would not feel comfortable leaving his children alone with the respondent (Tr., Oct. 7, 2003, at 118-119). We conclude that the respondent has not adequately demonstrated that a favorable exercise of discretion is warranted in this case. *See Matter of Marin, supra; Matter of Buscemi, supra*.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's November 30, 2004, order is vacated, and the respondent is ordered removed from the United States to Colombia.



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