UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OMAHA, NEBRASKA

File #: A

Date: JUL 3 1 2018

In the Matter of:

Respondent.

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
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ON BEHALF OF THE GOVERNMENT:
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CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act" or "INA")—Alien who entered the United States without admission or parole for inspection;

Section 212(a)(6)(C)(i) of the Act—Alien who sought a benefit under the Act through fraud or willful misrepresentation.

APPLICATION: Respondent's Motion to Terminate; Section 240A(b) of the Act—Cancellation of Removal for Certain Non-permanent Residents.

DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND AND PROCEDURAL HISTORY

The Department of Homeland Security ("DHS" or "the government") attempted to initiate removal proceedings against Respondent by filing a Notice to Appear ("NTA") with the Court on 5 March 2015. *See* Exh. 1. The NTA alleges that Respondent is a native and citizen of Mexico who arrived at the United States at Nogales, Arizona, and entered without admission or parole for inspection. *Id.* Additionally, the NTA alleges Respondent sought to or did procure some benefit under the INA by fraud or willful misrepresentation of a material fact, specifically by unlawfully gaining employment. *Id.* Based on those allegations, DHS charged Respondent under the above-captioned sections of the Act. Respondent admitted the unlawful entry allegations and conceded the associated charge, while denying and contesting the fraud charge. *Id.* Mexico is the country of removal, should that become necessary. *Id.*; INA § 241(b).

On 8 June 2016, Respondent filed a Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents ("42B"). *See* Exh. 5. The Court held an individual hearing on the merits of Respondent's case on 30 May 2018, after which it allowed for the filing of further evidence and perhaps more testimony, if needed. Both parties submitted evidence in that regard, for Respondent's part following a change of counsel. *See* Exh. 7. The parties entered more evidence at a hearing on 18 June 2018.

After the final hearing, the Supreme Court issued *Pereira v. Sessions*, a case that analyzed the effect of an imperfect NTA on evaluating the stop-time rule in cases like the one at bar. 138 S. Ct. 2110 (2018). The Court ordered briefs and allowed for new evidence on that topic, and the parties filed their answers. *See* Order of the Immigration Court (Jul. 2, 2018); Respondent's Additional Argument in Support of Termination of Proceedings (Jul. 16, 2018) ("Motion to Terminate); DHS Opposition to Respondent's Motion to Withdraw Plea and Opposition to Additional Testimony (Jul. 6, 2018). Respondent's new counsel also moved to terminate proceedings under *Pereira*. *See* Motion to Terminate at ¶ 8.

For the following reasons, the Court will deny Respondent's motion to terminate and grant his application for cancellation of removal.

II. EVIDENTIARY RECORD

The Court has considered all relevant testimonial and documentary evidence in the record, even if not specifically summarized herein. *See Lemuz-Hernandez v. Lynch*, 809 F.3d 392 (8th Cir. 2015).

A. Documentary Evidence

Exhibit 1: Notice to Appear (filed Mar. 5, 2015);
Exhibit 2: Form I-213, Record of Inadmissible/Deportable Alien (rec'd Mar. 23, 2015);
Exhibit 3: Motion to Switch to Detained Docket (filed Mar. 23, 2018);
Exhibit 4: Order Granting Motion to Switch Dockets (issued Mar. 26, 2018);
Exhibit 5: Form EOIR-42B, Application for Cancellation of Removal for Certain Nonpermanent Residents ("42B") (rec'd Jun. 8, 2016);
Exhibit 6: Respondent's Proposed Exhibits (filed May 25, 2018).
Exhibit 7: Respondent's Additional Supporting Documentation (filed Jun. 18, 2018).

B. Testimonial Evidence

The following is a summary of the sworn testimony provided to the Court at a merits hearing held on 30 May 2018:

1. Madeline

Ms. is Respondent's step-daughter. She is 19 and lives with Respondent and her mother, Lisa , and siblings and step-siblings in Council Bluffs, Iowa, when she is not

away at school. She first met Respondent three years ago, when he and her mother first began dating.

Her mother suffers from anemia, depression, anxiety, and takes medication for her conditions. Respondent's presence and emotional support is critical for her mother. His absence while detained has been devastating.

Respondent has two biological children, Tatiana and Litzy. They are in therapy because they have been harmed in the past, and suffer from separation anxiety due to Respondent's absence. The children's mother is not present in their lives at present. Ms. 's mother drives the children to their appointments. Ms. believes that Respondent is the only one who can ultimately take care of the children and her mother, because of their particular needs and her mother's ailments. She has a biological brother, Ravyn, who is nine.

On cross-examination, Ms. testified that she attends university in Minnesota. She lived in the home with Respondent and her mother for about a year before moving away to college. She has student loans and gets some financial help from her grandparents. She is on her mother's insurance plan. Respondent's girls were with their mother and came to live with him because the conditions they were in were terrible. She is not aware of a court order regarding custody of the girls.

2. Lisa

Ms. is Respondent's wife. She met Respondent in 2015 and married him the following year. She has five children, two of whom still live with her; Ravyn, who is nine, and Madeline, who is 19 and mostly lives at school. Respondent's two daughters came to live with the family on Christmas Eve, 2017. Prior to that, their mother took them across Mexico and the United States in a situation that involved homelessness, malnutrition, and physical and sexual abuse.

The girls were sexually abused by their uncle as well as by their mother's boyfriend. The police were called a number of times on the girls' behalf. The uncle is now dead, and the boyfriend is in Mexico. The girls are in therapy following a school counselor's recommendation. The older girl is 12 and the younger is seven. They are far behind in their studies, having not been in school recently. The girls are no longer malnourished and are progressing, but having their father detained has damaged them. He was arrested in March 2018. The family is trying to adjust. It would be devastating if the girls were to go through another upheaval.

The girls cannot return to their mother. They were missing for two years before it was discovered that they had been homeless and on the run with her. The ordeal ended when the mother ran out of money and contacted Respondent. An agreement followed in which she ceded custody of the children to him in writing. Her current whereabouts are unknown.

Ms. suffers from anemia, a disorder involving the blood that leads to extreme fatigue. She takes medicine for that, as well as a thyroid disorder. She has her own insurance, and Respondent supports her by working and allowing her to not work and heal. She suffers

from depression, which she has had for many years, but also circumstantial depression due to the absence of Respondent. She sees a therapist for that, who has prescribed her medication. Her illness often leaves her bedridden and the depression sometimes leaves her incoherent, making her unable to work. Ms. 's depression includes thoughts about harming herself. Ms. 's siblings are not in the state. Her parents are elderly and not very mobile, and cannot help with childcare. Ms. Lima testified that Respondent rarely drinks.

On cross-examination, Ms. testified that Respondent revealed his prior arrest involving alcohol. During his second arrest, she knew that he had visited a friend but not that he would be drinking there. She is not aware of him having ever attended alcohol treatment. He has never had a driver's license that she knows of, but he is eligible.

Ms. and Respondent met at work. She has worked in the past, at a pizzeria and a company that takes care of plants. From 2013 to 2016, she worked around 15 hours per week. She has homeschooled her son Ravyn since 2016. She took him out of public school because he was being bullied because he refused to speak at school. The teachers suspected he had autism and they and the school's principal believe the best place for him is at home, being homeschooled.

Ms. has always had anemia and occasionally depression, especially in the form of panic attacks. She was first treated for depression in her early twenties. However, the first time she needed to be medicated for depression did not come until Respondent was detained. Her anemia worsened in June of 2017, due to a combination of her thyroid problem and profuse uterine bleeding. Her energy levels fluctuate due to this. She has doctor's records to that effect. She is on Medicaid, and has been since 2016. Her son and Respondent and his girls are also on her plan.

They live in an apartment together and both are named on the lease. Respondent moved in to her place. Respondent took over all of the expenses and pays for everything. Ms. Lima receives $89 per week in child support for Ravyn.

Respondent's girls are behind as much as a full grade in school but they have done well with the work they know. They are in English-language training as well. Litzy will be placed on an IEP beginning in the next year.

In Mexico, with their mother, Tatiana (then aged 11) had a job, and also took care of Litzy and four other step-siblings. The girls' mother relinquished custody in writing, and Ms. did not believe their mother had ever been awarded custody in the first place. She does not know whether the children would stay with her or whether she would accompany Respondent to Mexico. Because she cannot work, she fears the children would become wards of the state in that case.

The girls were being counseled by the school psychologist who eventually decided they needed more acute care, which is why they were sent to the outside therapist in the record. Tatiana has bad asthma. Ms. drives the girls to their doctor's appointments. Her family is

not available to help. Her parents live in Omaha but are not in a position to help financially. Ms. could not stay with them if she needed to.

Upon questioning by the Court, Ms. testified that the girls' uncle was killed by their mother's new boyfriend. Ms. was aware of Respondent's prior drinking history and never saw him drink and drive. She reiterated that she was not aware of him having attended alcohol treatment but allowed it may have happened early in their relationship, when their ability to communicate was worse. Respondent only rarely drinks, so the topic did not really come up. She has never seen him drunk.

3. Respondent

Respondent is 38 years old and has two children. He came to the United States for the first time in 2000, and left in 2008 following a voluntary departure.[1] He was gone for less than two months.

When he first came to the states, he lived in Arizona. The girls were born there, Tatiana in 2006 and Litzy in 2010. He and the girls moved to Nebraska around 2010. He split with their mother around 2013. When she left, she took the girls. He did not see them again until December of 2017.

Respondent is married currently to Lisa , nee . She has five children from prior relationships, two of whom still live with her: Madeline and Ravyn. He began living with that family in 2016. He recently learned that the girls had been sexually abused while they were with their mother, and they are having a difficult time. They are in therapy.

His current wife suffers from numerous medical conditions, including severe depression. She has never threatened to harm him or the children. Respondent goes to her doctor's appointments with the family.

Respondent is unsure if he could get funds together to pay a voluntary departure bond. Because they have been separated and suffered so much, he would prefer the children stay with him. If removed to Mexico, he is not sure whether he would take the children or not. It would be bad for them either way. He has no family in the United States, and their mother has no status here. Ms. has applied for him to get a visa.

On cross-examination, Respondent testified he has used one other name in the United States: Roberto Marquez. He made the name up. He denied buying or stealing documents with that name on it. He denied claiming to be a lawful permanent resident. He admitted using the name to work at a sushi restaurant. He had an Arizona state ID with the name on it, and used it for around fifteen years, but only used it get work once. He testified that he had no documents proving his employment because he worked without them, under the table. His living situation was the same. Ms. Lima helped him get the documents that are in the record.

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[1] There is no evidence of Respondent ever having been in proceedings before. The Court presumes he means a voluntary return.

Respondent testified that he was gone from the United States for no more than two months in 2008. He remembers because it was too hot in Mexico. He believes he left around June 2008 and cannot recall the date he returned. He did not have any documentation to that effect. He was doing yard work in Arizona at the time, working with friends who were also doing that.

There was no de jure custody agreement between Respondent and his children's mother. She disappeared for years. He asked the police in Mexico to search for them. He became aware of them again when her sister contacted him and said she was in a bad situation. The sister put the two of them in contact around November 2017. Their mother wanted Respondent to take the children. She is a Mexican citizen.

If returned to Mexico, it would be harder for them and there is nowhere to live. He would not return the children to their mother, under whose watch they were abused. The children have been on Medicaid since they were returned to him. He and Ms. were married after he was already in proceedings, but she was aware. She applied for him to get a visa, but he does not know the status of that application. He did not marry her to get status in the United States.

Respondent's first drunk driving conviction was in 2014. He went to alcoholics anonymous classes for a couple months after that, but his work schedule prevented him from doing more. An immigration judge granted him a bond in 2015, and then Respondent was arrested for drunk driving again in 2018. Respondent rarely drinks and denied having a problem with alcohol. He believes that classes would help him move past the issue.

Upon questioning by the Court, Respondent denied knowing anyone named Roberto Marquez. He returned to Mexico around June 2008 because he was removed by immigration. They captured him in Tucson, Arizona when he and a bunch of others were working. The immigration patrol took him to a jail in Tucson and then to Florence, Arizona. He was there for around two days when they told him to sign a paper for voluntary departure. He was not given an option to appear before a judge and does not remember being given a copy. He returned to the United States less than two months later.

He returned to the United States via Nogales, Arizona. He told immigration officers that he returned the same year, but does not remember telling them what month he returned. He did not return in November, despite what it says he told the officers on the I-213. He does not know why it says November there. He testified that he was not out of the country for more than two months.

III. CREDIBILITY

Relief applications filed on or after May 11, 2005, such as Respondent's, are governed by the credibility provisions instituted by the REAL ID Act. *See* INA § 240(c)(4), note 29.3. Consistent with the REAL ID Act, the following factors may be considered in the assessment of an applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements,

the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not the inaccuracy or falsehood goes to the heart of the applicant's claim. INA § 240(c)(4)(C).

The Court has taken into account these factors and finds that Respondent's testimony was candid, responsive, and generally consistent. Respondent testified credibly.

IV. MOTION TO TERMINATE

Respondent moved to withdraw his plea and terminate proceedings, arguing that *Pereira*'s holding strips this Court of jurisdiction where an NTA that is not fully compliant with INA § 239(a)(1) has been filed by DHS. *See* Motion to Terminate. In Respondent's view, the interplay of 8 C.F.R. §§ 1003.14, 32, and 1239.1 along with INA § 239(a)(1) creates the same requirement that *Pereira* found at INA §§ 240A(b) and (d). *Id.* DHS disagrees arguing *Pereira*'s holding is limited. *See* DHS Opposition to Respondent's Motion to Withdraw Plea and Opposition to Additional Testimony (Jul. 6, 2018); DHS Response in Opposition to Respondent's Motion to Terminate (Jul. 24, 2018). The Court agrees with the government.

When the government files a Notice to Appear ("NTA") for an alien who later seeks to have his or her removal canceled, the filing date serves as the date on which his or her physical presence ends. INA § 240A(d)(1)(A). In *Pereira v. Sessions*, the alien appealed the denial of his request for cancellation of removal because he felt his period of continuous physical presence had been improperly calculated. 138 S. Ct. 2105 (2018). Pereira argued that his 2006 NTA could not end the period of his presence because it did not contain the time and date of his initial hearing. *Pereira*, 138 S. Ct. at 2107–08. Finding the statutory language unambiguous, the Supreme Court agreed and held that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section [239](a)' and so does not trigger the stop-time rule." *Id.* at 2113–14.

The filing of an NTA is a consequential event with numerous potential downstream effects, one of which is the creation of immigration court jurisdiction. *See Matter of Lujan-Quintana*, 25 I&N Dec. 53, 56 (BIA 2009) (finding that INA jurisdiction is a creature of statute, binding on the courts). The Supreme Court was careful to frame the issue narrowly. Justice Sotomayor narrowed the question presented specifically to whether the lack of a date and time on an NTA triggers the stop-time rule. *See Pereira*, 138 S. Ct. at 2110, 2113. And, thus, the Supreme Court declined to determine whether, for example, the lack of a warning of the consequences of failing to update one's address would also render an NTA invalid. *Id.* at 2113. It would have been trivial to apply the logic in *Pereira* to every so-called requirement under Section 239(a)(1) but still the Court declined. *See id.* at 2110. The Supreme Court deliberately limited itself in an act of self-declared "judicial restraint," so there is no case law basis for extending *Pereira* beyond the stop-time context. *Id.* at 2113 n.5.

The Eighth Circuit has spoken directly on point in *Haider v. Gonzales*, 438 F.3d 902, 907–10 (8th Cir. 2006). There, the alien was served an NTA that did not contain the date and time of his initial hearing but he subsequently received a Notice of Hearing ("NOH") that did,

and was removed when he failed to attend. *Id.* at 907–08. In upholding the alien's removal, the Eighth Circuit reasoned:

> The INA simply requires that an alien be provided written notice of his hearing; it does not require that the NTA served on Haider satisfy all of § [239](a)(1)'s notice requirements. Our reading of the INA and the regulations compels the conclusion that the NTA and the NOH, which were properly served on Haider, combined to provide the requisite notice. *The NTA initiated removal proceedings against Haider* and informed him that an NOH would be mailed to the address listed on the NTA.

Id. at 907 (emphasis added). The Eighth Circuit also pointed out that the NTA by itself would have been insufficient to give the alien notice of his hearing and could not result in an *in absentia* removal order, but that was a matter of notice, not jurisdiction. *Id.* The defective NTA initiated proceedings in accordance with 8 C.F.R. § 1003.14(a) (filing a charging document), even though notice had not yet been perfected. That concept—that an NOH can cure a lack of notice from a defective NTA—is etched into the INA at section 240(b)(5)(A), which only permits *in absentia* removal for aliens who have not been notified under *either* the NTA or NOH subsections of Section 239(a). And, the Supreme Court addressed that issue in the context of cancellation of removal, but deliberately went no further. *See* 138 S. Ct. at 2108. Because *Pereira* is deliberately narrow, it cannot have altered this precedent. Thus, once the "notice" in the NTA has been perfected, there are no obstacles to proceeding on a removal charge.

In this case, we have a charging document, satisfying 8 C.F.R. § 1003.14, and Respondent had notice of his hearing, satisfying *Haider*. *See* Exh. 1; Respondent's Testimony. Termination would be inappropriate. Therefore, the motion will be denied.

V. CANCELLATION OF REMOVAL

A. Statement of Law

To be eligible for Cancellation of Removal under section 240A(b)(1) of the Act, an applicant must prove that he or she:

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 INA § 212(a)(2), § 237(a)(2), or § 237(a)(3); and
4) has shown that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent, or child, who is a United States citizen ("USC") or lawful permanent resident ("LPR").

B. Continuous Physical Presence

Respondent has conceded removability pursuant to section 212(a)(6)(A)(i) of the Act. *See* Exh. 1. Therefore, he has the burden of establishing his eligibility for relief from removal. *See* INA § 240(c)(4)(A). To be eligible to cancel his removal, Respondent must demonstrate, *inter alia*, that he was continuously physically present in the United States for a period of ten years preceding service of the NTA. *See* INA §§ 240A(b)(1)(A), 240A(d). As a practical matter, we calculate the period by starting with the date the government filed a valid NTA and work backwards until we encounter (1) conduct that would render the applicant inadmissible or removable as a criminal alien or removable as a security risk, (2) a break in presence within the United States that exceeds 90 days, or multiple breaks aggregating to more than 180 days, (3) the date of the applicant's entry, or (4) the passage of ten years. INA § 240A(d)(1)–(2). However, if the applicant's NTA does not indicate the time and place that he or she should initially appear before an Immigration Court, it cannot break his or her period of continuous physical presence. *Pereira v. Sessions*, 138 S. Ct. 2210 (2018). When that happens, per the statutory language of the Act, we begin with the date of the filing of an application and work backwards from there to calculate physical presence. INA § 240A(b)(1)(A).

Such is the case here. Exh. 1. DHS filed Respondent's NTA on 5 March 2015, but in the blanks where the date and time of his initial appearance should be, the NTA reads "to be set." *Id.* at 1. That was the problem in *Pereira* as well, and thus Respondent's NTA is not an "[NTA] under section 1229(a), and so does not trigger the stop-time rule." *Pereira*, 138 S. Ct. at 2114. The Court holds that Respondent's ten-year period begins on the date he filed his initial application: 9 May 2018. *See* Exh. 5. That means Respondent must prove that he was continuously present in the United States between that date, 9 May 2018, and 9 May 2008. *See* INA § 240A(d)(1)(B).

That presents a problem for him, as the testimony in this case indicated that Respondent may have been absent from the United States for a period of longer than 90 days, which would break his otherwise continuous presence and restart the clock at the date of his re-entry. The record reflects Respondent last entered the United States on 1 November 2008, an allegation which he admitted, backed by a line of text in the I-213. *See* Exhs. 1, 2. Respondent testified that he had previously entered the United States in 2000 and "voluntarily departed" in June 2008, and that he returned about two months later. He denied ever telling an immigration official that he had returned in November of that year; he remembered leaving Mexico while it was still hot. Respondent's counsel moved to withdraw his pleading on that allegation, made by prior counsel, and substitute it with something more accurate. *See* Motion to Terminate. He offered affidavits that fixed Respondent return to America at a statutorily-acceptable time, though these were *post-hoc* documents created by the urging of a respondent who knew exactly what he needed the affiants to say to meet his burden. *See* Exh. 7. This discrepancy matters because an absence of June to November renders Respondent statutorily ineligible for cancellation, while an absence of June to August does not. *See* INA § 240A(b)(d)(1). Either gap would fall within the ten-year period since he applied to cancel his removal. After careful consideration, the Court credits Respondent's testimony that he was only gone for two months.

First, the prior admission. It is true that Respondent admitted the allegation through counsel, and that we presume counsel's admissions and concessions are "reasonable tactical"

decisions. *See* Exh. 1; *Matter of Velazquez*, 19 I&N Dec. 377, 389 (BIA 1986). In this case, though, prior counsel conceded on the record that his knowledge of the case was minimal and that he had not had time to follow through with the information in his detained client's case. Furthermore, allowing Respondent to withdraw his admission to change the date of his entry does not affect his removability, and the Court granted both parties equal time to investigate the matter, meaning there is no discernible prejudice. Respondent's admission to allegation 3 is withdrawn.

Respondent testified credibly that he was gone from the United States for around two months and that he left Mexico because it was too hot there. Although he was less than certain about exactly what date he returned, he never wavered from his testimony about how long he was gone. He was also clear that he left around June, when it was hot. After the hearing, Respondent submitted further evidence of his return, in the form of two affidavits from individuals with knowledge of the timeframe. *See* Exh. 7 at Tab A. DHS pointed out that this evidence is very self-serving, having been gathered after Respondent knew exactly what they would have needed to say in order to get the result he needed, and that argument is well taken. But, it has *some* weight, and there is other evidence as well.

On the whole, after giving the affidavits the weight they deserve, as well as Respondent's testimony and his credible demeanor while testifying, the Court finds that Respondent left the United States in June 2008 and returned sometime in mid-August of that same year, a period of no more than two months. Because that amounts to fewer than 90 days, the Court holds Respondent has established that he was continuously physically present during the relevant period.

C. Good Moral Character

A respondent must establish that he has been a person of good moral character during the relevant 10-year period, which is a continuing period ending at the date of final adjudication.[2] *See* INA § 240A(b)(1)(B). The finding of good moral character is both a statutory and discretionary matter. *See* INA § 101(f); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967). The fact that no statutory bar applies does not preclude a discretionary finding that for other reasons such person was not of good moral character. *See* INA § 101(f). However, the Board of Immigration Appeals ("BIA" or "Board") has held that "good moral character does not mean moral excellence and that it is not destroyed by a single lapse." *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 366 (BIA 1991) (citing *Matter of B-*, 1 I&N Dec. 611 (BIA 1943)) (quotations omitted).

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[2] The Court notes that the Eighth Circuit has rejected the notion that an application for Special Rule Cancellation of Removal pursuant to Section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA") is a continuing application. *See Cuadra v. Gonzales*, 417 F.3d 947, 951 (8th Cir. 2005). The Court requested briefs from the parties on whether *Cuadra* applies outside of the narrow NACARA cancellation context, and they agreed that it does not. *See* Respondent's Closing Brief (Dec. 28, 2017); DHS Brief Regarding Applicability of Eighth Circuit Case to Good Moral Character Analysis (Dec. 22, 2017). The Court agrees with the parties; essentially, because our Circuit has not spoken directly on the issue, *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), controls. The relevant period for good moral character is a continuing ten-year period dating back from the final adjudication date.

1. Statutory Preclusion of Good Moral Character

The mandatory bars to a finding of good moral character are: (1) being a habitual drunkard; (3) being describable as involved in prostitution or commercialized vice, smuggling, or polygamy, or being inadmissible under INA § 212(a)(2)(A)–(C);[3] (4) deriving one's income principally from gambling; (5) conviction for two or more gambling offenses during the relevant period; (6) giving false testimony for a benefit under the Act; (7) confinement during the relevant period to a penal institution for a period aggregating 180 days or more; (8) conviction for an aggravated felony at any time; or (9) participating in Nazi persecution, genocide, or torture, or participating in severe violations of religious freedom. INA § 101(f).

None of the mandatory bars appears to apply in this case. Respondent has a criminal history, but it is not severe enough to implicate any mandatory poor moral character finding. *See* Exhs. 2–7.

2. Discretionary Finding of Good Moral Character

An IJ determines whether an alien merits a favorable exercise of discretion for cancellation of removal using the criteria for INA § 212(c) cases articulated in *Matter of Marin*. *See* 15 I&N Dec. 581, 584–85 (BIA 1978); *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). Positive factors include: family ties; long duration of residency; any evidence of hardship to Respondent or his family should he or she be removed; armed forces service; employment history; property or business ties; value and service to the community; genuine proof of rehabilitation; and, other good character evidence. *C-V-T-*, 22 I&N at 11. Negative factors include: circumstances underlying grounds of removal; criminal history; any and all significant immigration violations; and, other evidence of bad character or undesirability. *Id.*

DHS argues that Respondent does not merit a discretionary finding of good moral character due his use of a false name during a portion of the relevant period. *See* DHS Closing Argument (Jun. 25, 2018). Respondent testified that he used the name "Roberto Marquez" throughout his time in the United States, at least up until his 2015 encounter with DHS. The evidence corroborates that, as the I-213 refers to an I-9 with that name on it. *See* Exh. 2 at 3. The government's evidence is that the I-9 also includes an A# (not Respondent's) and an SSN belonging to a real person with the initials R.M. (the A# appears to belong to a different person, a naturalized citizen). *Id.* However, Respondent denies targeting a real person, stating that he had chosen the name essentially at random and did not know anyone by that name. Further, the government's evidence shows that the I-9 is incomplete and unsigned by any party. *Id.* Based on the documentary evidence and Respondent's credible testimony, the Court holds that Respondent used a false name to gain employment but will stop short of finding that he made a claim to citizenship or status. He admitted as much in his testimony.[4] This weighs against a finding of good moral character.

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[3] Section 101(f)(2) was removed in 1981. It referred to adulterers.

[4] The Court declines to make a finding on allegation 5 or the fraud charge because it is not necessary to complete the adjudication and not germane to the assessment of Respondent's character. An Immigration Judge need not "write an exegesis on every contention." *Mayorga-Rosa v. Sessions*, 888 F.3d 379, 383–84 (8th Cir. 2018). Immigration Courts are instructed to focus on dispositive issues in the interests of judicial and procedural economy. *Matter of A-B-*, 27 I&N Dec. 316, 340 (AG 2018).

Bear in mind, poor choices are distinct from poor character, despite that the former can sometimes reveal the latter. In fact, "[g]ood moral character should not be construed to mean moral excellence, nor is it destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum-total of all his actions in the community." *Matter of U-*, 2 I&N Dec. 830, 831 (BIA, AG 1947). In this case, Respondent has several items weighing in his favor. The record is quite full of evidence regarding his value to and connection with his community. *See* Exhs. 6, 7. Respondent credibly testified to a long work history in the United States, and his family testified to his work ethic and willingness to support them. But for a couple of months ten years ago, Respondent has resided here for nearly twenty years, and has two United States citizen children. *Id.* Respondent has a criminal history, but it is fairly sparse, and the testimony is that his problems with alcohol are not severe and that he is willing to control them, though it is clear he needs to make time for counseling rather than just wish he had it. After carefully balancing the positive and negative factors here, the Court finds Respondent merits a positive exercise of discretion. *See C-V-T-*, 22 I&N at 11.

D. Disqualifying Behavior

None of the mandatory bars apply in this case. Respondent has a criminal history, but it is not severe. *See* Exh. 2.

E. Exceptional and Extremely Unusual Hardship

In this case, Respondent has five potential qualifying relatives: his wife, his two step-children, and his biological daughters, all United States citizens. First, the Court finds no meaningful hardship to Madeline, his eldest step-daughter, who is 19 and lives away from home at a university. The Court will focus instead on his daughter Tatiana, aged 12.

The evidence of qualifying hardship is overwhelming in this case. The Court finds that Tatiana is exceptionally vulnerable to harm caused either by separation from her father or relocation to Mexico. The source of her vulnerability is the years-long ordeal in which she and her sister were kept homeless, were beaten, sexually abused, overworked, underfed, and emotionally assaulted. *See* Exh. 7. Tatiana's statement is edifying in its entirety, but the Court chooses here to highlight two of the more eye-opening statements: "We had a little dog for awhile. Then [my mother's boyfriend] said he was going to cut it up with his knife and eat him. So I had the dog run away." Another: "My Uncle Poncho touched Litzy and I in our privates. That is all I want to say about that." Exh. 7 at Tab B. And so on. This United States citizen has been very poorly treated indeed.

But that is in the past, and Respondent needs to demonstrate hardship in the future, conditioned on his removal. The evidence does that, because it shows that Tatiana's ordeal left her far behind in her school work and her language skills, that she is emotionally scarred into the present, and that she needs special assistance at school in order to rehabilitate her intellect and to open a path to a normal education for her. *Id.* Hence the Court's finding of her exceptional vulnerability; the things that have happened to her have created in her an exceptional and extremely unusual vulnerability that her already severe harm might be worsened. *See Nunez-*

Portillo v. Holder, 763 F.3d 974, 977 (8th Cir. 2014) (quoting *Monreal*, 23 I&N Dec. at 63). The evidence was that Tatiana was already displaying signs of separation anxiety since Respondent's incarceration, jeopardizing her progress so far. Even if the Court declined to credit that assessment from amateur sources (her step-mother and step-sister), the Court could not ignore Ms. 's testimony that leaving her alone with the girls might end up with them as wards of the state. To avoid that fate, Tatiana would have to return with Respondent to Mexico, where the evidence shows that she again would have no place to live and would potentially be in contact with her mother who enabled much of her harm in the first place, and the Court is mindful that there is no custody agreement between Tatiana's mother and Respondent. Moreover, the evidence credibly showed that Tatiana's school believed she needed a specialized educational program, called an IEP, in order to educate her properly in light of her particular needs. There is no evidence that she would be in a position to find substantially similar help in Mexico if she accompanied her father there.

Based on the above analysis, the Court holds that Tatiana would suffer exceptional and extremely unusual harm if Respondent were removed to Mexico, whether she accompanied him or not.[5] Respondent has therefore met his burden. *See* INA § 240A(b).

VI. CONCLUSION

For the foregoing reasons, the Court finds that Respondent has satisfied each of the statutory requirements for cancellation of removal under section 240A(b)(1) of the Act. Therefore, the following orders will be entered:

ORDERS OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that Respondent's motion to terminate be **DENIED**;

IT IS FURTHER ORDERED that Respondent's application for Cancellation of Removal under Section 240A(b)(1) of the Act be **GRANTED**.

JACK L. ANDERSON
Immigration Judge

[5] The Court would likely make the same finding with respect to Litzy, based largely on the same evidence. *See* Exhs. 5--7.