

Shawn Sedaghat, Esq.
LAW OFFICES OF
SHAWN SEDAGHAT
P.O. Box 261368,
Encino, CA 91426-1368
(323) 461-1111

Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:)
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 Respondent)
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Case No: A [REDACTED]

BRIEF IN SUPPORT OF RESPONDENT’S PREVIOUS CONTENTIONS
ON APPEAL TO THE BIA AND REQUEST FOR REMAND TO THE
IMMIGRATION JUDGE FOR FURTHER FACTFINDING

This case has been remanded to the Board of Immigration Appeals (hereinafter “Board” or “BIA”) by the Ninth Circuit Court of Appeals on the issue of good moral character related to an underlying Application for Cancellation of Removal. The Respondent’s petition for review and the prior appeal to the BIA centered around infirmities with which the issue of good moral character was viewed by the IJ and later reviewed by the BIA.

An applicant must establish that she has been a person of good moral character during the ten-year period preceding the Application for Cancellation of Removal. INA § 240A(b), 8 U.S.C. §1229b(b). A finding of good moral character is both a statutory and a discretionary matter. See Campos-Granillo v. INS, 12 F. 3d 849, 853 (9th Cir. 1993) (Reversing the denial of voluntary departure for failing to consider both positive and negative factors.) Congress under INA §101(f), 8 U.S.C. § 1101(f) has determined that certain persons are statutorily ineligible to be considered persons of good moral character because of their status or their commission of certain acts. The Immigration Judge Thomas Y.K. Fong, erred as a matter of law considering Petitioner *statutorily ineligible* to establish good moral character “as defined in section 101(f) of the Act” for having made a false claim to United States Citizen. AR 243. (*emphasis added*)

As was argued before the Ninth Circuit, even if Board finds the Immigration Judge did not err as a matter of law, rather that the Immigration Judge exercised his discretion, this court must grant this petition because the Immigration Judge failed to consider *all* relevant factors determining whether Petitioner possessed the requisite good moral character, and therefore abused his discretion. See Torres-Guzman v. INS, 804 F. 2d 531 (9th Cir. 1986) (Holding the Board erred in basing its finding against petitioner on a single incident and in not considering all the factors relevant to petitioner’s character.) (*emphasis added*).

A. The Immigration Judge erred as a matter of law by considering a false claim to United States Citizenship as a statutory bar to finding good moral character within one of Section 101(f)'s *per se* categories.

The Immigration Judge (hereinafter "IJ") erred as a matter of law determining Petitioner did not possess the requisite good moral character for Cancellation of Removal pursuant to INA § 240A(b)(1)(B), 8 U.S.C. § 1229(b)(1)(B). Specifically the Immigration Judge erred as a matter of law considering a false claim to United States Citizen as a statutory *per se* category bar under INA § 101(f), 8 U.S.C. § 1101(f).

Section 101(f) of the Act, 8 U.S.C. § 1101(f), designates *per se* categories barring a finding of good moral character including habitual drunkards, prostitutes or polygamists, professional gamblers, those who have given false testimony for the purpose of obtaining immigration benefits, and certain aliens having been convicted of certain crimes. INA § 101(f), 8 U.S.C. 1101(f). Noticeably absent from the Congressionally prescribed *per se* categories is any person who makes a false claim to United States false citizenship.

The Immigration Judge erred as a matter of law by considering Petitioner's claim of United States citizenship as a *per se* bar to finding good moral character. In his written order, the Immigration Judge misinterprets and misstates the law. The Immigration Judge states: "Section 101(f) of the Act states, a person shall not be found a person of good moral character if they make a false claim to U.S. Citizenship." A.R. 243. (emphasis added).

However Section 101(f) of the Act, after the designated *per se* categories (which does not include persons making false claims to citizenship), states "the fact that any person is not within any of the forgoing classes shall not preclude a finding that for other reasons such a person is or was not of good moral character." INA § 101(f), 8 U.S.C. § 1101(f). The government may argue that this was simply a misstatement by the IJ who was simply exercising discretion with the issue of false claim of citizenship as a pivotal and important negative factor. True, the Immigration Judge could have considered a false claim of citizenship in deciding moral character, but the Immigration Judge could not

consider such claim as a *per se* category barring Petitioner from establishing good moral character. Taking the words of the IJ for what they purport to be, the Immigration Judge's use of "shall" indicates he impermissibly considered a false claim to citizenship as a *per se* bar.

Although the Immigration Judge may interpret the scope of Section 101(f) of the Act, 8 U.S.C. § 1101(f) *per se* categories, the Immigration Judge is not free to enlarge them. See Hernandez-Robledo v. INS, 777 F. 2d 536, 542 (9th Cir. 1985) (This Court declined to equate the destruction of property *per se* with lack of good moral character). Because the Immigration Judge considered a false claim of citizenship as a *per se* category barring good moral character under INA § 101(f), 8 U.S.C. 1101(f), the Immigration Judge impermissibly enlarged the Congressionally prescribed *per se* categories.

Petitioner notes that Section 101(f) of the Act, 8 U.S.C. § 1101(f) does briefly address persons claiming false citizenship, but not in terms of person statutorily barred, rather in the last sentence of a separate section after the *per se* categories. Furthermore, that sentence does not suggest any bar from finding of good moral character for a false claim to citizenship, rather quite the opposite. That sentence, read in its entirety, actually prohibits the use of a false claim of citizenship to find certain aliens (those whose parents are United States citizen or who resided in the United States prior to the age of sixteen) lack good moral character if the alien reasonable believed the false claim was true. INA § 101(f), 8 U.S.C. 1101(f). Because Petitioner's parents are not United States citizens, nor did she permanently reside in the United States prior to the age of sixteen, that sentence does not even pertain to Petitioner and cannot be used as a basis for finding Petitioner is statutorily ineligible for a finding of good moral character.

Because the Immigration Judge misstated and misinterpreted INA § 101(f), 8 U.S.C. 1101(f) and overall erred as a matter of law, this Court should grant Petitioner's Petition for Review so she may have the opportunity to establish her good moral character.

The Immigration Judge's error in interpretation was far from harmless because the Immigration Judge found Petitioner *statutorily* ineligible from establishing good moral character, the Immigration Judge never exercised his discretion as required.

Moreover, because a finding of good moral character requires a consideration of all relevant factors, the Immigration Judge abused his discretion in considering Petitioner lacked good moral character for a single claim to false citizenship. See Torres Guzman, 804 F. 2d 531, *supra*.

B Petitioner’s false claim of citizenship was not made immediately preceding her application for cancellation of removal and therefore does not render her statutorily ineligible from a finding of good moral character.

To be eligible for cancellation, an applicant must establish that she “has been a person of good moral character during such period.” INA § 240A(b)(1)(a), 8 U.S.C. § 1229b(b)(1)(a). The statutory “such period” refers to the preceding section, INA § 240A(b)(1)(a), 8 U.S.C. § 1229b(b)(1)(a), concerning the continuous physical presence requirement. As such, the period of good moral character for “such period” is 10 years “immediately preceding the date of the application.” INA § 240A(b)(1)(a), 8 U.S.C. § 1229b(b)(1)(a).

Under INA § 240A(d), 8 U.S.C. § 1229b(d) the 10 years “immediately preceding the date of the application” and therefore “such period” ends when the applicant is served with a notice to appear. See Cruz-Aguilera v. INS, 245 F. 3d 1070 (9th Cir. 2001)(order). Petitioner was served a Notice to Appear on November 26, 2001. AR 332. To be eligible for Cancellation of Removal, Petitioner must establish good moral character for ten years preceding “such period.” Therefore, the period of time Petitioner is statutorily required to establish good moral character is between November 26, 1991 and November 26, 2001. Petitioner’s false claim of citizenship occurred on March, 6 2002 – outside the statutory period. AR 262. Therefore, Petitioner’s false claim cannot be a factor in determining eligibility based on good moral character.

Moreover, Petitioner first “applied” for cancellation of removal through her initial request made on January 29, 2002. AR 247. Petitioner, through counsel, specifically sought cancellation of removal on January 29, 2002. Through this affirmative act,

Petitioner started the application process, and therefore her March 6, 2002 false claim occurred after, not immediately preceding, her application for cancellation of removal.

Because Petitioner's false claim falls outside the statutory period and after her application for cancellation of removal, such claim does not make her statutorily ineligible for cancellation of removal based on lack of good moral character. Therefore, the Immigration Judge erred in pre-terminating Petitioner's application without a full adjudication on the merits.

C. The Immigration Judge's and the Board's prior failure to consider all relevant factors in determining good moral character was an abuse of discretion.

The government may argue that the IJ did not in fact view the false claim of citizenship as a *per se* consideration but in fact he considered Petitioner statutorily eligible but made a *discretionary* finding that Petitioner lacked good moral character; However this argument if raised would not overcome the infirmities with which this alleged discretionary review took place. The Immigration Judge failed to consider *all* relevant factors weighing positive and negative factors, in determining good moral character. As such, the decision was an abuse of discretion and should be vacated. See Torres Guzman, 804 F. 2d 531, *supra*.

True, an immigration judge may find a person lacks good moral character and therefore ineligible for cancellation of removal as a matter of discretion. See Matter of Turcotte, 12 I. & N. Dec. 206 (BIA 1967) (Where specific conduct does not result in statutory ineligibility, the immigration judge may still consider it as a discretionary matter). However, it is an abuse of discretion to fail to consider all factors relevant to the determination of good moral character. Torres Guzman, *supra* at 534 (“We reject the suggestion that conduct not in fact falling within the seven *per se* categories of section 1101(f) may support, without any consideration of other relevant counterbalancing factors, a conclusion of lack of good moral character.”)

In the present case, the Immigration Judge failed to consider all factors. Specifically the Immigration Judge failed to consider that Petitioner had filed income taxes between the periods 1994-2001 (AR 310); her two United States citizen daughters (AR 311); Petitioner answered “no” to all questions under question 64 of EOIR Form 42B (AR 312). Moreover, the Immigration Judge failed to consider why Petitioner stated she left the United States. Petitioner offered evidence that she traveled to Mexico to care for her mother who was in very critical condition due to her advanced diabetes. AR 302. Not one of these factors were mentioned, much less considered by the Immigration Judge is his written decision which for all practical purposes pre-termitted Petitioner’s application for Cancellation of Removal.

The consideration of all relevant factors is a general necessary condition for rational decision-making. The Immigration must consider all countervailing positive factors supporting applicant’s claim where there is no statutory bar to good moral character. Torres Guzman, supra. The Immigration Judge failed to mention any of Petitioner’s countervailing factors, and therefore this Court must assume the Immigration Judge did not consider them. See Georgiu v. INS, 90 F. 3d 374 (9th Cir. 1996)(Reversed the Board’s denial of 212(c) relief where the Board failed to address positive equities). The Immigration Judge and the Board must actually consider and meaningfully address the positive equities and favorable evidence when reaching its decision. The Immigration Judge’s and then the Board’s failure to adequately consider all relevant factors in their determination was an abuse of discretion.

Moreover, the Board has “long held that good moral character does not mean moral excellence and that it is not destroyed by a ‘single incident.’” Matter of Sanchez-Linn, 20 I. & N. Dec. 362 (BIA 1991). True, an applicant’s general conduct, including her manner of entry into the country may be a factor in determining lack of good moral character. See Matter of Carbajal, 17 I. & N. Dec. 272 (Comm. 1978) (Four illegal entries without more, insufficient to bar finding good moral character.) However, given Board precedent, finding Petitioner lacked good moral character based solely on a single false claim to United States citizenship, made in Spanish at the U.S./Mexico border when Petitioner was returning from visiting her mother who was in critical condition at the hospital, is an abuse of discretion.

Since the Immigration Judge failed to consider all the relevant factors, including her positive factors, and because the Immigration Judge and then the Board considered only a single false claim of citizenship made under reasonable circumstances, the Petition for Review was granted, and Respondent's case was remanded to this court for further consideration.

The BIA still, retains review regarding "questions of law, discretion and judgment and all other issues in appeals from decisions" of IJs. 8C.F.R. § 1003.1(d)(3)(ii). Here, the record is sufficiently detailed as to the equities for or against a finding of good moral character and the Board is urged to weigh *one* alleged aberrant conduct against a lifetime of otherwise law-abiding behavior and find that the Respondent in fact enjoyed good moral character, remanding the case to the IJ for proceedings in line with this decision with an order that the IJ conduct further factfinding as to the other attendant requirements under an application for Cancellation of Removal.

Respectfully Submitted,

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Shawn Sedaghat, Esq.
LAW OFFICES OF
SHAWN SEDAGHAT
Attorney for Respondent