PETER ISBISTER, ESQ.
VAZQUEZ & SERVI, P.C.
3190 NORTHEAST EXPRESSWAY N.E.
SUITE 330
ATLANTA, GEORGIA 30341

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
180 SPRING ST. S.W. SUITE 241
ATLANTA, GA 30303

In the Matter of:	)	
	)	
RESPONDENT	)	File No.: A **XXX XXX XXX**
	)	
In Removal Proceedings	)	
	)	

Immigration Judge J. Dan Pelletier
Individual Hearing Date: September 11, 2013 at 8:00 AM

MR. RESPONDENT'S PRE-HEARING MEMORANDUM

Sole Breadwinner, Family of Six

I. INTRODUCTION

COMES NOW, Respondent RESPONDENT, by and through undersigned counsel of record, Peter M. Isbister, Esq., and respectfully submits this "RESPONDENT'S Prehearing Memo."[1] As the ancient belief holds, good things come in threes. In Mr. RESPONDENT'S case the triple blessing came on October 13, 2010 when his wife gave birth to triplets. Now, he is the sole breadwinner for a family of six. The question before the Court, then, is whether to forcibly deport the father, protector and supporter from the United States, leaving his wife, WIFE, an undocumented immigrant herself, alone to care for their four United States children, all under the age of eight. As established below, the answer compelled by the evidence must be no. Mr. RESPONDENT is clearly statutorily eligible for Cancellation of Removal and merits a favorable exercise of this Court's discretion.

II. FACTS

The following facts, submitted in support of Mr. RESPONDENT'S request for relief, are established in the documentary records attached:

1. Mr. RESPONDENT was born in Mexico on September 25, 1978.[2]
2. Mr. RESPONDENT entered the United States without inspection in August of 1998, over fifteen years ago. He has not departed since his initial entry. [3]
3. Mr. RESPONDENT has four U.S. citizen children: L., age 7, and M., A., and E., triplets age 2.[4]

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[1] Mr. RESPONDENT submits the pre-hearing memorandum in accordance with ICPM 4.19.

[2] Respondent's Second Submission, Exhibit A: *Mr. RESPONDENT'S Birth Certificate*, *with English translation*.

[3]Respondent's First Submission in Support of Application for Cancellation of Removal, Exh. ? *Form EOIR 42B*.

4. Mr. RESPONDENT'S triplets endured significant medical complications at birth and have had on-going medical and developmental challenges including regarding speech development.[5]

5. Mr. RESPONDENT'S elder son L. has also endured medical complications, including necessitating treatment for the congenital deformity of his foot.[6]

6. Mr. RESPONDENT is the primary financial support of his four U.S. citizen children and his wife, who is undocumented. [7]

7. Mr. RESPONDENT has filed state and federal taxes each year since 2001.[8]

8. Immigration and Customs Enforcement served Mr. RESPONDENT with a Notice to Appear on July 1, 2011.

9. Mr. RESPONDENT has no criminal history other than minor traffic offenses.[9]

III. <u>BURDEN OF PROOF</u>

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[4] Respondent's Second Submission, Exh. D4: *Birth certificate of Mr. RESPONDENT'S eldest U.S. citizen son, L., born on September 19, 2005*; Exh. D5: *Birth Certificates of Mr. RESPONDENT'S U.S. citizen triplets, born October 3, 2010*.

[5] Respondent's Second Submission, Exh. E10: *Northside Hospital records relating to the birth of Mr. RESPONDENT'S U.S. citizen son, A., indicating that he was born prematurely at 32 weeks and that he was diagnosed with hypotension, respiratory distress syndrome, respiratory failure, feeding problems, apnea of prematurity, and hyperbilirubinemia;* Exh. E11: *Northside Hospital records relating to the birth of Mr. RESPONDENT'S U.S. citizen son, M., indicating that he was born prematurely at 32 weeks and that he was diagnosed with hypotension, respiratory distress syndrome, respiratory failure, feeding problems, apnea of prematurity, and hyperbilirubinemia*; Exh. E12: *Northside Hospital records relating to the birth of Mr. RESPONDENT'S U.S. citizen daughter, E., indicating that he was born prematurely at 32 weeks and that he was diagnosed with hypotension, respiratory distress syndrome, respiratory failure, feeding problems, apnea of prematurity, and hyperbilirubinemia;* Exh. E13: *Copy of Medical Records for Mr. RESPONDENT'S daughter, E.;* Exh. E14: *Records indicating that Mr. RESPONDENT'S U.S. citizen triplets enrolled in a speech therapy course, Babies Can't Wait, to treat clinically diagnosed communication delays*.

[6] Respondent's Second Submission , Exh. E4: *Two letters from DOCTOR, DPM, at Bare Foot Care Specialist Podiatric Medicine & Surgery*

[7] Respondent's Second Submission , Exh. E1: *Affidavit of Mr. Luis RESPONDENT*; Exh. E2: *Affidavit of Mr. RESPONDENT'S wife, WIFE.*

[8] Respondent's Second Submission , Exhs. F1: *Federal and State Tax Returns for Mr. RESPONDENT, 2001-2012*; Exh. F2: *IRS Account Transcripts for the years 2003 through 2012;* Exh. F3: *GA Dept. of Revenue Certified Copies for Mr. RESPONDENT'S state taxes from 2002 to 2012*

[9] Respondent's Second Submission, Exhs. H1-4.

Immigration and Customs Enforcement (ICE) has charged Mr. RESPONDENT as being present in the United States without admission or parole. As such, ICE has the initial burden to establish Mr. RESPONDENT'S alienage.[10] Once alienage is established, the burden of proof shifts to Mr. RESPONDENT. In seeking relief from removal, Mr. RESPONDENT bears the burden of demonstrating that he is eligible for any relief requested, and that he merits a favorable exercise of discretion.[11] Mr. RESPONDENT admitted the allegations contained in the Notice to Appear and conceded removability at a previous Master Hearing.

IV. LEGAL ARGUMENT

A. Mr. RESPONDENT is Statutorily Eligible for Cancellation of Removal for Certain Nonpermanent Residents.

Pursuant to INA §240A(b)(1), the Attorney General may cancel the removal of, and adjust to the status of lawful permanent resident, any individual who meets four conditions. First, the individual must establish physical presence in the United States for a continuous period of at least ten years. Second, the individual must prove that during the ten years he has had good moral character. Third, the individual must show that he had not been convicted of an offense that would render him inadmissible or deportable. Finally, the individual must show that his removal would result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. INA §240A(b).

In the present case, Mr. RESPONDENT meets each of the four conditions required for the cancellation of removal of a nonpermanent resident. He has resided in the

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[10] "In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent." 8 C.F.R. §1240.8(c).

[11] "The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion." 8 C.F.R. §1240.8(d).

United States since approximately 1998. The Notice to Appear was served on Respondent in November 2011, well beyond ten years since his continuous physical presence began. He has not been convicted of an offense that renders him inadmissible or deportable. His only criminal offenses are traffic offenses.[12] There is no allegation that he has committed any offense listed in INA §212(a), 237(a)(2), or 237(a)(3).

Mr. RESPONDENT has had good moral character during the relevant ten-year period. He is not subject to any of the bars to good moral character listed at INA §101(f). He has no criminal history beyond minor traffic infractions and provides financially for his family. Further, he has been steadily employed in the construction industry since at least 2001 and has paid taxes throughout the relevant period.[13] He is an active member of his church.[14] In addition, he submits eight letters in support of his application attesting to his good character.[15] The government will perhaps contend that Mr. RESPONDENT'S criminal history precludes a finding of good moral character. However, the law is clear that "good moral character should not be construed to mean moral excellence[.] … Depravity of character and violation of the law are not necessarily wedded together …"[16] All of Mr. RESPONDENT'S criminal history is the result of traffic violations, principally driving without a license.[17] While this infraction is of course real and unfortunate, it is a regulatory violation that does not require any sort of malevolent mens rea. It is rather the unfortunate result of his need to support his family and transport his many children to

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[12] Respondent's Second Submission, Exhs. H1-4.
[13] Respondent's Second Submission, Exhs. F1-3.
[14] Respondent's Second Submission, Exh. G7: *Letter from PASTOR, Associate Pastor at Mr. RESPONDENT'S church*.
[15] Id. at Exhs. G1-8.
[16] In the Matter of U 21 I &N Dec. 830, 831 (BIA 1947); See also Posusta v. United States 285 F.2d 533, 535 (2d Cir. 1961).
[17] Respondent's Second Submission, Exhs H1-4.

their numerous appointments, when no in his family has access to a driver's license.[18] The law does not require Mr. RESPONDENT to be an unblemished saint. Instead, the law is more concerned with his reputation among the average person. On this score, as the letters of support in the record demonstrate, he has earned respect and admiration.

Finally, as explained below, Mr. RESPONDENT'S qualifying relatives would suffer exceptional and extremely unusual hardship if he were removed.

A. The Forcible Removal of Mr. RESPONDENT, Father and Provider to United States Citizen Children, L., A., M. and E. Would Cause His Children to Suffer Exceptional and Extremely Unusual Hardship

L., age 7 and M., A. and E., age two, would suffer exceptional and extremely unusual hardship as a result of their father's forcible removal from the United States.

The seminal case of In re Monreal 23 I & N Dec. 56 (BIA 2001), established that the level of hardship required under INA §240A(b) must be "uncommon", "rare", "not ordinary", "substantially beyond that which would be expected to result from the alien's deportation" and therefore limited to "compelling cases."[19] However, the court was careful to note that the standard is **not** so harsh as to require a showing of an "unconscionable" effect on a qualifying relative.[20] The court declared that the relevant factors for consideration include the ages, health and circumstances of the qualifying relatives. The Board also held that how a lower standard of living or adverse country conditions in the country of return might affect that qualifying relative is also relevant.[21]

The facts of this case involving a father of four very young United States citizens meet the Monreal test. The age and health issues of L., A., M. and E. all support a

[18] Respondent's Second Submission, Exhs. E1 & E2.
[19] Monreal, 23 I & N at 59.
[20] Id. at 60.
[21] Id.

finding of exceptional hardship. The children, especially the triplets, are all very young and completely dependent on their parents. The REDACTED family is in no position to have WIFE do anything other than care for the children at home. Therefore, removing the children's father would have disastrous consequences. In addition all the children have had significant health and developmental complications that have necessitated treatment. As a result of being born two months premature, the triplets were all afflicted with a variety of complications, including respiratory failure and feeding problems, which required an extended "NICU" stay.[22] To this day the triplets suffer from extreme delay in their speech development and therefore are enrolled in speech therapy through the "Babies Can't Wait" program.[23] Finally, seven year old L. suffers from a congenital deformity in his foot that requires the treatment of a doctor of podiatry.[24] Mr. RESPONDENT has played an indispensable role in supporting his children and his wife—emotionally, logistically, financially—in facing the challenge of all of these medical complications.[25]

If their father were forcibly deported from the United States, the four young United States citizen children would also suffer economic hardship and hardship in the form of undermining their opportunity for educational success. Mr. RESPONDENT is his children's sole economic provider for a family of six people. The family budget is feasible only because in addition to their other costs, the family does not need to pay for child care for the four children. However, Mr. REDACTED's wife, who is not authorized to work in the United States, could not manage all of the household costs, including

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[22] Respondent's Second Submission, Exhs. E10, 11 & 12.
[23] Respondent's Second Submission, Exh. E14.
[24] Respondent's Second Submission, Exh. E7.
[25] Respondent's Second Submission, Exhs. E1 & 2; G2: *Letter from Dr. REDACTED, pediatrician for Mr. RESPONDENT'S U.S. citizen children*.

paying for child care, on her own. With regard to the prospect that the four children might be denied the chance to pursue their education in the United States, our own Supreme Court has expressed the danger most eloquently:

> [E]ducation prepares individuals to be self-reliant and self-sufficient participants in society. [Education] is required in the performance of our most basic public responsibilities[.] It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education … It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime.[26]

It is hard to imagine Mr. RESPONDENT'S children succeeding, or even staying, in school without their father's support. In addition, an education in Mexico would not be on par with what the Court in Plyler envisioned. Therefore, the denial of their father's application would in all likelihood doom them to membership in the "subclass" of which the Court dramatically and appropriately warned.

i. *The Case of* Matter of Recinas *Also Supports a Finding that Mr. RESPONDENT'S Removal Would Cause His Children Exceptional and Extremely Unusual Hardship*

In addition to the medical, financial and educational hardships the children would suffer, there is case law support for the notion that the size of Mr. RESPONDENT'S family will contribute to exceptional and extremely unusual hardship in the event of his removal.[27] The respondent in Matter of Recinas was a single mother from Mexico, who had no other viable means to immigrate to the United States and who had four United

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[26] Plyler v.Doe, 457 U.S. 202, 222-23, 230 (1982); Respondent's Second Submission, Exh. F19.
[27] *Matter of Recinas*, 23 I & N Dec. 467 (BIA 2002).

States children, none of whom had ever been to Mexico. [28] The BIA concluded in Matter of Recinas that the "cumulative factors present in this case are indeed unusual and will not typically be found in most other cases, where respondents have smaller families and relatives who reside in both the United States and their country of origin." [29] Thus, the respondent in Recinas met her burden of showing that her removal would result in exceptional and extremely unusual hardship to his qualifying relative.

Mr. RESPONDENT'S situation bears many similarities to that of Ms. Recinas. Like the respondent in Recinas, he is responsible for four United States citizen children.[30] The family size is not the only similarity with regard to hardship factors between this case and Matter of Recinas. Both Respondents are from Mexico and in Recinas, as here, the United States citizen children had never been to Mexico.[31] The Respondents in the Matter of Recinas had been present in the United States fourteen years by the time of the hearing, where Mr. RESPONDENT has now been present here for *fifteen* years. [32] Next, the financial straits of the RESPONDENT'S family are no less dire than those of the Recinas family.[33]

In Recinas the Board focused in significant part on the presence of a steady support network of family from whom the removal of respondent would also separate the children.[34] In Mr. RESPONDENT'S case the prospect of removal is even more dangerous for his children because they *lack* a similar support network. Their mother is

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[28] Id. at 470.
[29] Id. at 473.
[30] Id. at 469.
[31] Id. at 470.
[32] Id. at 468.
[33] Id.
[34] Id. at 471-72.

undocumented, and therefore at constant risk of removal.[35] They have no one who is an active presence in their family life who is a United States citizen or Lawful Permanent Resident who could reliably support them in the event of their father's removal. [36] The children live on the edge when it comes to their financial and logistical support. If Mr. RESPONDENT is removed, they will surely fall over the edge in a disastrous way. This instability is exacerbated by the fact that, like the Respondent in Recinas, Mr. RESPONDENT has no other means to immigrate lawfully to the United States in the foreseeable future.[37]

B. L., A., M. and E. Would Suffer Exceptional and Extremely Unusual Hardship if they Had to Live in Mexico with their Father

It is not a viable option for the four very young children to live in Mexico with their father were he deported. With their father having been in the United States roughly fifteen years, the children have no meaningful family connections left in Mexico. Further, the weak economy in Mexico offers the children few prospects. The Gross Domestic Product Per Capita is eighty-eighth in the world. [38] The United States ranks fourteenth in the world for that metric.[39] The percentage of the population below the poverty line in

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[35] Respondent's Second Submission, Exhs. E1 & E2.

[36] In this regard, the instant case is similar to the Matter of Andrade (097 681 046), unpublished decision, BIA 09/17/2012, AILA Infonet Doc. No. 12110750. In Matter of Andrade, the BIA applied the standard articulated in Matter of Monreal to sustain an appeal from an Immigration Judge's decision denying Respondent's Application for Cancellation of Removal for Certain Nonpermanent Residents. Respondent in that case was the primary caregiver for his fourteen-year-old U.S. citizen daughter who was in good health. The BIA concluded in Matter of Andrade that Respondent's daughter would face emotional and financial hardship "'substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here[.]'"

[37] See Matter of Recinas at 472 (citing Matter of B-, 6 I&N Dec. 713 (BIA; AG 1995); Matter of W-, 5 I&N Dec. 586 (BIA 1953); Matter of M-, 5 I&N Dec. 448 (BIA 1953); Matter of U-, 5 I&N Dec. 413 (BIA 1953).

[38] Respondent's Second Submission, Exh. E33: *CIA World Factbook Country Report on Mexico*.

[39] Id., E34: *CIA World Factbook Country Report on the U.S.A.*.

Mexico, is over fifty-one.[40] In the United States the percentage is fifteen.[41] In Mexico the "school life expectancy" is only fourteen years.[42]

In addition, the abuse of women in Mexico also remains a problem.[43] According to our own government's State Department, "state and municipal laws sanctioning domestic violence largely fail to meet the required federal standards and were often unenforced."[44] In addition, the problem of femicide is alarming. Again, according to our own government's State Department report, in an eighteen-month period just eight state attorney generals' offices reported 1235 femicides.[45] These dangers are of particular relevance in this case where one of the qualifying relatives is a little girl, who, as our State Department report indicates, would very soon be at severe risk of violence and even murder if forced to return with her father to Mexico.

The high levels of violence in the particular region of Mexico from which their father hails also poses risk of exceptional hardship to the children. According to the U.S. Department of State Travel Warnings, grenade attacks, car-jacking and armed robberies are commonplace in Tamaulipas.[46] Mr. RESPONDENT'S U.S. citizen children have never been exposed or subjected to the degree of violence commonly experienced in Mexico, and this sudden exposure to such prevalent violence would result in exceptional and extremely unusual hardship.

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[40] Id., Exh. E33.
[41] Id., Exh. E34.
[42] Id., Exh. E33.
[43] Exh. E31: *Department of State Country Report on Human Rights Practice for 2012 for Mexico (p. 132)*.
[44] Id.
[45] Id.
[46] Respondent's Second Submission, Exh. C32: *U.S. Department of State, Travel Warning for Mexico, July 12, 2013*; Exh. C33: Jared Taylor, *Tamaulipas' murder rate up 90 percent, kidnappings double, U.S. State Department says*, The Monitor (July 13, 2013).

The future for L., A., M. and E. in Mexico is one of poverty, lost opportunity, significant emotional and cultural disruption, and risk of violence. Relocation to Mexico is simply not an option for the children. Therefore, Mr. RESPONDENT'S deportation would bring the complete rupture of the family, and all of the exceptional hardship described above.

V. CONCLUSION AND RELIEF SOUGHT

L., A., M. and E. would face exceptional and extremely unusual hardship in the event of the forcible removal of their father. They would suffer medical, emotional, economic and educational deprivation. If they were to travel to Mexico their fate would be imperiled by vicious poverty and violence. The parallels between Matter of Recinas and the instant case are compelling and should be determinative for this Court. At their essence both cases concern four young United States citizen children with no viable plan B in the event of their parent's forcible removal from the United States to Mexico. The Cervantes children face the additional hardship of significant medical complications. The same old belief alluded to at the start tells that tragedy, as well as fortune, strikes in threes. The choice before this Court, then, is whether the story of the father and his triplets will be one that turns to bleak suffering, or tells of the triplets as a harbinger of bounty and good fortune for the family. The facts and the law of this case command a grant of Mr. RESPONDENT'S application.

THEREFORE, based on the foregoing arguments, Respondent L. E. RESPONDENT, by and through undersigned counsel of record, Peter Isbister, Esq., respectfully requests that this Court issue a favorable decision on the Application for Cancellation of Removal for Certain Nonpermanent Residents pursuant to INA

§240A(b). In the alternative, Mr. RESPONDENT requests post-hearing voluntary departure pursuant to INA §240B(b).

Respectfully Submitted,

_______________________ ___________________

PETER ISBISTER, ESQ. (Date)

Attorney for Mr. RESPONDENT
State Bar No. 230018
Vazquez & Servi, P.C.
3190 Northeast Expressway, N.E. Suite 330
Atlanta, Georgia 30341
Tel. 678-303-0018

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Immigration Judge J. Dan Pelletier
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CERTIFICATE OF SERVICE

On September 10, 2013 I, Peter Isbister, Esq., served a copy of this: "**Mr. L. RESPONDENT'S Pre-Hearing Memorandum"** and any attached pages to:

United States Department of Homeland Security
Immigration and Customs Enforcement
Office of the Chief Counsel
180 Spring St. SW, Suite 332
Atlanta, GA 30303

By **hand delivery**.

________________________ ____________________

PETER ISBISTER, Esq. Date
Attorney for Mr. RESPONDENT
Vazquez & Servi, P.C.
3190 Northeast Expressway N.E.
Atlanta, GA 30341
Ph: 678-303-0018