U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Acklin, Christopher James
Avanti Law Group, PLLC
600 28th St. SW
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DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: MANDUJANO-TORRES, ARTURO **A 091-480-873**

Date of this notice: 1/4/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Guendelsberger, John
Pauley, Roger

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

MANDUJANO-TORRES, ARTURO
A091-480-873
CALHOUN COUNTY JAIL
DHS CUSTODY
185 E. MICHIGAN
BATTLE CREEK, MI 49014

DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: MANDUJANO-TORRES, ARTURO **A 091-480-873**

Date of this notice: 1/4/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Guendelsberger, John
Pauley, Roger

Userteam:

File: A091 480 873 – Detroit, MI

Date: JAN – 4 2017

In re: ARTURO MANDUJANO-TORRES a.k.a. Arturo Torres

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Christopher J. Acklin, Esquire

ON BEHALF OF DHS: Jason A. Ritter
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

This case was last before us on June 30, 2015, when we remanded the record for the Immigration Judge to conduct an elements-based analysis of whether the respondent's conviction for possession of child sexual abusive material, in violation of section 750.145c(4) of the Michigan Compiled Laws ("section 750.145c(4)"), constitutes an aggravated felony under sections 237(a)(2)(A)(iii) and 101(a)(43)(I) of the Immigration and Nationality Act (pertaining to knowing possession of child pornography). On July 27, 2015, the Immigration Judge certified this case to the Board on the respondent's appeal of his finding that the respondent is removable as charged. The Department of Homeland Security ("DHS") opposes the appeal. The respondent's appeal will be sustained and proceedings will be terminated.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

At issue on appeal is whether the Immigration Judge properly sustained the above-captioned removal charges due to respondent's conviction for possession of child sexual abusive material, a violation of section 750.145c(4). *See* Respondent's Brief at 2-7.

The Immigration Judge found that the state law conviction was a categorical match to 18 U.S.C. § 2252,[1] the federal statute pertaining to knowing possession of child pornography that is referenced in section 101(a)(43)(I) of the Act and therefore serves as the generic point of comparison for determining whether the respondent's conviction is an aggravated felony. *See* I.J. at 7. Before the Immigration Judge and on appeal, the respondent argues that his Michigan conviction does not categorically qualify as an aggravated felony, and in fact describes a crime broader than that described in the federal statute. Specifically, it is the respondent's contention that the Michigan statute can be violated when a perpetrator is merely negligent as to the age of the victims depicted in the child sexually abusive material, whereas the federal statute requires that a defendant know that the images possessed are of minors. *See* Resp.'s Brief at 4-7.

To determine whether the respondent's offense qualifies as an aggravated felony under section 101(a)(43)(I) of the Act, we employ the "categorical approach," which requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under section 750.145c(4), rather than on the facts underlying the respondent's particular violation of that statute. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-85 (2013).[2]

Section 750.145c(4) provides that:

> A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

---

[1] We agree with the Immigration Judge that 18 U.S.C. § 2252(a)(4) is the relevant subpart and point of comparison for the respondent's offense (I.J. at 8). This subpart of the federal statute provides that:

(a) Any person who . . . (4) either

(A) . . . knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce . . . if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

[2] To conclude there is such a realistic probability, there must "at least" be "cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which [Petitioner] argues." *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007).

Although on its face the Michigan statute covers a broader range of conduct than does the federal statute[3]—due to its coverage of conduct where the perpetrator is reckless or negligent about, or does not take reasonable precautions to determine, the age of the persons depicted in the sexually abusive material—the Immigration Judge found that there was no realistic probability that Michigan would prosecute individuals who operated with a mens rea of less than knowledge as to the age of those depicted in the sexually explicit materials. *See* I.J. at 7-10. This conclusion was based on an examination of, inter alia, *People v, Harmon*, 640 N.W.2d 314 (Mich. Ct. App. 2002), a case in which the Immigration Judge found that the defendant therein had "demonstrated greater culpability than mere negligence." *See* I.J. at 10. The Immigration Judge explained that although the Michigan court found that the defendant in *Harmon* "failed to take reasonable precautions" regarding the age of two 15-year-old girls he photographed, the facts of the case reflect that the defendant did not confirm the girls' ages and backdated consent forms to cover his actions. *Id.*

We disagree with the Immigration Judge's conclusion that *People v. Harmon, supra,* supports his finding that Michigan would not successfully prosecute less-than-knowing possession of child pornography. Leaving aside the fact that the defendant in that case was convicted of producing (rather than possessing) sexually abusive images,[4] it is clear that at least one count charged under section 750.145c related to the defendant taking photographs of a 15-year-old girl where he "did not ask [her] about [her] age." Therefore, as the Immigration Judge acknowledged, the defendant in *People v. Harmon, supra,* "failed to confirm" the age of the victims in that case (I.J. at 10). In our view, this conduct does not satisfy the "knowing" mens rea embedded in the generic federal statute. *See also People v. Girard*, 709 N.W.2d 229, 233 (Mich. Ct. App. 2005) (rejecting defendant's argument that state did not prove that images were of "real" children where jury was permitted to convict if they found that defendant "should reasonably be expected to know" that images were of children).

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[3] The federal statute requires proof that a defendant knew that the sexually explicit images at issue were of children. *See United States v. Symanski*, 631 F.3d 794, 799 (6th Cir. 2011) (*citing, inter alia, United States v. X–Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)).

[4] The conviction in *People v. Harmon* arose under a different subpart of the Michigan statute at issue in the respondent's case, but both subparts provide for a conviction where the defendant "knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child."

For similar reasons, we reject the DHS's reliance on the language of the charging document in the respondent's case, which alleged in Count 2 that the respondent did "knowingly possess child sexually abusive material." *See* DHS's Brief at 4.[5] Even if we were to conclude that the Michigan statute was divisible, and even if we were to examine the record of conviction pursuant to a modified categorical analysis, the inclusion of the word "knowingly" in the felony information does not indicate that to convict, Michigan requires that a defendant have knowledge of the age of the persons depicted in the sexually abusive material. Rather, as demonstrated above, the word "knowingly" modifies possession, and clarifies the degree of control that is required to be exercised over the material before one can be found to "possess" it.

Because we find that the record does not establish that the respondent was convicted of an aggravated felony, and there are no other charges of removal at issue, we will sustain the respondent's appeal and terminate these proceedings.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: Proceedings are terminated.

FOR THE BOARD

[5] The DHS argues on appeal that the statute of conviction is divisible, but has not proffered adequate authority to establish that the various mens rea theories set forth under 750.145c(4) reflect discrete offenses or a single offense with a disjunctive sets of "elements," more than one combination of which could support a conviction. That is, the record lacks evidence that Michigan law defines the different mens rea theories underlying section 750.145c as alternative "elements" of the offense," *Descamps v. United States, supra*, at 2288 (*citing Richardson v. United States*, 526 U.S. 813, 817 (1999)).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

Avanti Law Group, PLLC
Acklin, Christopher James
600 28th St. SW
Wyoming, MI 49509

Date: Jul 28, 2015

File A091-480-873

In the Matter of:
MANDUJANO-TORRES, ARTURO

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

_____ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

_____
Immigration Court Clerk UL

cc: RITTER, JASON
333 MT. ELLIOTT
DETROIT, MI 48207

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: A 091-480-873 July 27, 2015

In the Matter of:	)	
	)	
MANDUJANO-TORRES, Arturo	)	**In Removal Proceedings**
	)	**DETAINED**
Respondent	)	

Charge: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(I) of the Act, a law relating to an offense described in Tittle 18, United States Code, Sections 2251, 2251A, or 2252 (relating to child pornography).

Application: Cancellation of Removal for Certain Permanent Residents under § 240A(a).

ON BEHALF OF RESPONDENT
Christopher Acklin, Esq.
Avanti Law Group, PLLC
600 28th Street SW
Wyoming, Michigan 49509

ON BEHALF OF THE GOVERNMENT
Jason Ritter, Assistant Chief Counsel
Department of Homeland Security
333 Mt. Elliott, Second Floor
Detroit, Michigan 48207

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that this matter is **RECERTIFIED** to the **Board of Immigration Appeals.**

Hon. David H. Paruch
U.S. Immigration Judge

7/27/2015
Date

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

Avanti Law Group, PLLC
Acklin, Christopher James
600 28th St. SW
Wyoming, MI 49509

Date: Jul 27, 2015

File A091-480-873

In the Matter of:
MANDUJANO-TORRES, ARTURO

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

__X__ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

KLF
Immigration Court Clerk UL

cc: DHS/ICE/ATTORNEY RITTER

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: A 091-480-873 July 27, 2015

In the Matter of:	)	
	)	
MANDUJANO-TORRES, Arturo	)	**In Removal Proceedings**
	)	**DETAINED**
Respondent	)	

Charge: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(I) of the Act, a law relating to an offense described in Tittle 18, United States Code, Sections 2251, 2251A, or 2252 (relating to child pornography).

Application: Cancellation of Removal for Certain Permanent Residents under § 240A(a).

ON BEHALF OF RESPONDENT
Christopher Acklin, Esq.
Avanti Law Group, PLLC
600 28th Street SW
Wyoming, Michigan 49509

ON BEHALF OF THE GOVERNMENT
Jason Ritter, Assistant Chief Counsel
Department of Homeland Security
333 Mt. Elliott, Second Floor
Detroit, Michigan 48207

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent, Arturo Mandujano-Torres, is a fifty-one-year-old male, native and citizen of Mexico. Respondent entered the United States without inspection or admission at an unknown location, date, and time. Exh. 1. On July 24, 1991, respondent adjusted his status to a lawful permanent resident ("LPR") under section 210(a)(2) of the Act. *Id.* The Department of Homeland Security ("DHS" or "Government") commenced removal proceedings against respondent by filing a Notice to Appear ("NTA") with the Detroit Immigration Court on February 23, 2015. *Id.* Respondent was charged as removable under section 237(a)(2)(A)(iii) of

the Act for his December 2014 felony conviction, where he was found guilty of possessing child sexually abusive material in violation of MICH. COMP. LAWS § 750.145c(4) by the 20th Circuit Court in Grand Haven, Michigan.[1] *Id.*

At his initial master calendar hearing on March 2, 2015, respondent was represented by counsel who requested and was given a continuance for attorney preparation. On March 16, 2015, respondent appeared for his second master calendar hearing, at which he admitted factual allegations one through five of his NTA, including his conviction for possessing child sexually abusive material in violation of MICH. COMP. LAWS § 750.145c(4). Transcript of Record at 8-10. Respondent, however, contested his charge of removability, specifically arguing that his conviction did not constitute an aggravated felony. Respondent also indicated his intention to file an application for cancellation of removal under section 240A(a) of the Act. *Id.* at 10, 15-16. The Court designated Mexico as the country of removal, should such action become necessary. *Id.* at 9.

On March 30, 2015, the Court found that the materials submitted to the Court, including the respondent's certified Judgment of Sentence, coupled with his admission of the factual allegations in his NTA, were sufficient to deny respondent's request for bond. *Id.* at 15. The Court also sustained the charge of removability. *Id.* at 17. The Court found that respondent's conviction in violation of MICH. COMP. LAWS § 750.145c(4) was a conviction for an aggravated felony under the Act. *Id.* The Immigration Judge ("IJ") subsequently issued an oral decision finding respondent removable as charged as a result of his aggravated felony for possession of child sexually abusive material, and for using a computer to commit a crime involving child sexually abusive material. Order of the IJ (Mar. 30, 2015). Moreover, the IJ concluded that

[1] Respondent was simultaneously convicted for using a computer to commit a crime involving child sexually abusive material in violation of MICH. COMP. LAWS § 752.797(3)(d). Respondent was sentenced to thirty days in jail and sixty months of probation.

because respondent's conviction under MICH. COMP. LAWS § 750.145c(4) was an aggravated felony, he was statutorily ineligible for cancellation of removal. *Id.* The IJ then ordered respondent removed to Mexico. *Id.*

Respondent appealed the IJ's decision to the Board of Immigration Appeals ("Board" or "BIA"). On June 30, 2015, the Board remanded the case, finding that the IJ's oral decision did not include an elements-based analysis of whether respondent's offense under MICH. COMP. LAWS § 750.145c(4) categorically qualifies as an aggravated felony under section 101(a)(43)(I) of the Act. The Board instructed the Court to provide a more detailed analysis of the particular statute involved in determining whether respondent was removable, and if he had demonstrated statutory eligibility for cancellation of removal.

II. EVIDENCE OF RECORD

The record of proceedings is comprised solely of documentary evidence. The Court admitted into the record Exhibits 1 and 2, consisting of respondent's NTA and his Judgment of Sentence. The Court notes that it has considered all admitted evidence in its entirety, even if not specifically mentioned further in the text of this decision.

III. LEGAL STANDARDS

A. REMOVABILITY

The Government bears the burden of proving an admitted alien's removability by clear and convincing evidence. INA § 240(c)(3)(A). Once the Government "has established its *prima facie* case, the burden of going forward to produce evidence of non-deportability then shifts to the [alien]." *Pickering v. Gonzales*, 465 F.3d 263, 269 (6th Cir. 2009) (internal citations and quotation marks omitted). An alien who has been convicted of an aggravated felony after admission is removable. INA § 237(a)(2)(A)(iii).

B. AGGRAVATED FELONY

Under the Act, the definition of an aggravated felony includes "an offense described in section . . . 2252 of title 18, United States Code (relating to child pornography)." INA § 101(a)(43)(I). In turn, the federal offense penalizes any person who, in pertinent part:

> Knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . by any means including by computer, if – (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct.

18 U.S.C. § 2252(a)(4)(B).

To determine whether a state criminal conviction constitutes an aggravated felony as defined under INA § 101(a)(43)(I), the Court must apply the categorical approach. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Matter of Chairez*, 26 I&N Dec. 349, 351 (BIA 2014). Using the categorical approach, the Court must consider whether the statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. *Moncrieffe*, 133 S. Ct. at 1684 (internal citations and quotations omitted). This requires the Court to presume that the conviction rests upon nothing more than the least serious of the acts criminalized by the statute. *Id.* However, there must be a realistic probability that the state would apply its statute to conduct outside of the generic offense in order to show that the statute in question is not a categorical match. *Id.*

Not all statutes fall clearly within or outside of the generic federal definition. In the case of a divisible statute (one which contains several different crimes, each described separately) the Court may use a modified categorical approach. *Id.*; *see also Descamps v. United States*, 133 S. Ct. 2276, 2293 (2013) ("A court may use the modified [categorical] approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction.");

Chairez, 26 I&N Dec. at 352-55. The Court may then consider certain limited documents, such as the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

C. CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS

Section 240A(a) of the Act authorizes the Court to exercise its discretion to cancel the removal of an alien who is removable from the United States if the alien: (1) has been lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of an aggravated felony. Any period of continuous residence shall be deemed to end when the alien is served an NTA or when the alien commits a crime involving moral turpitude that renders him inadmissible under INA § 212(a)(2) or removable under INA §§ 237(a)(2) or (4), whichever is earliest. INA § 240A(d)(1).

The applicant bears the burden of establishing his eligibility for cancellation of removal and that he merits a favorable exercise of the Court's discretion. *See* INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d). In exercising its discretion under INA § 240A(a), the Court "'must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his . . . behalf to determine whether the granting of . . . relief appears in the best interest of this country.'" *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (quoting *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978) and extending it to cancellation of removal under INA § 240A(a)). Positive factors include family ties in the United States; residence of long duration; evidence of hardship to the alien and his family if the alien is removed; service in this country's armed forces; a history of employment; the existence of

property or business ties; evidence of value and service to the community; proof of genuine rehabilitation if a criminal record exists; and other evidence of the alien's good character. *Id.* Negative factors include the nature and circumstances of the removal grounds; the presence of significant violations of this country's immigration laws; the recency and seriousness of any criminal record; and other evidence of the alien's bad character or undesirability as a permanent resident. *Id.*

"In any balancing test, various factors . . . are accorded more weight than others according to the specific facts of the individual cases." *Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001). "In some cases," mere eligibility for relief may suffice to "warrant favorable discretionary action." *C-V-T-*, 22 I&N Dec. at 12. "[A]s the negative factors grow more serious," however, the alien must "introduce additional offsetting favorable evidence." *Id.*

An alien with a criminal record "will ordinarily be required to present evidence of rehabilitation" before discretionary relief is granted. *Id.* "However, applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion." *Id.*; *see also Matter of Edwards*, 20 I&N Dec. 191, 196 (BIA 1990). "[A] showing of rehabilitation is not a prerequisite in every case involving an alien with a criminal record." *C-V-T-*, 22 I&N Dec. at 12. The Court must "weigh the favorable and adverse factors to determine whether, on balance, the 'totality of the evidence . . .' indicates that the 'respondent has adequately demonstrated that he warrants a favorable exercise of discretion." *Sotelo-Sotelo*, 23 I&N Dec. at 204 (quoting *C-V-T-*, 22 I&N Dec. at 10).

IV. DISCUSSION AND ANALYSIS

A. REMOVABILITY UNDER INA § 237(a)(2)(A)(iii)

After having considered all of the evidence, the Court concludes that respondent's conviction under MICH. COMP. LAWS § 750.145c(4) is categorically an aggravated felony under INA § 101(a)(43)(I), in that it is an offense described in 18 U.S.C. § 2252. As such, respondent is removable under INA § 237(a)(2)(A)(iii).

Respondent contends that his conviction under MICH. COMP. LAWS § 750.145c(4) is not an aggravated felony because the state statute is patently dissimilar to the corresponding federal offense under 18 U.S.C. § 2252. Respondent points to the language of 18 U.S.C. § 2252(a)(2), which requires that a person "knowingly receive" visual depictions involving a minor engaging in sexually explicit conduct, and contrasts it with MICH. COMP. LAWS § 750.145c(4), which reads "if that person knows, has reason to know or should reasonably be expected to know" that the child sexually abusive material "includes a child or . . . appears to include a child." Specifically, respondent posits that the difference in text between the Michigan statute and the federal statute results in Michigan courts finding defendants culpable under a *mens rea* standard lower than the *mens rea* required under the federal statute. Based on that assumption, respondent asserts that MICH. COMP. LAWS § 750.145c(4) allows for a conviction based on the mere negligence of the defendant, while § 2252 purportedly requires specific intent, such as knowledge, rather than mere negligence.

The Court finds this argument without merit. The Michigan Supreme Court's recent interpretation of MICH. COMP. LAWS § 750.145c(4) is particularly instructive. In *People v. Flick*, 790 N.W.2d 295 (Mich. 2010), the Supreme Court found that a conviction under MICH. COMP. LAWS § 750.145c(4) requires "a specific *mens rea* or knowledge element as a prerequisite for

establishing criminal culpability." *Flick*, 790 N.W.2d at 302-03. The Michigan Supreme Court noted that the defendants "did more than passively view child sexually abusive material." *Id.* at 304. Rather, they engaged in several affirmative, intentional actions that demonstrated knowing possession of the prohibited material. *See id.* The Michigan Supreme Court distinguished such conduct from a person who "accidentally views a depiction of child sexually abusive material on a computer screen." *Id.* at 305. In that instance, the *Flick* Court found that such person does not "'knowingly possess' any child sexually abusive material in violation of MCL 750.145c(4)." *Id.*

The Michigan Supreme Court's repeated emphasis upon intentional and purposeful actions by defendants clearly demonstrates that a higher *mens rea* than negligence is necessary for a conviction under MICH. COMP. LAWS § 750.145c(4). This directly undermines respondent's assertion that Michigan courts hold defendants culpable under a *mens rea* standard which is lower than the intentional *mens rea* required under the federal statute.

Additionally, respondent asserts that MICH. COMP. LAWS § 750.145c(4) does not fall within the federal statute because a subsection of the federal offense[2] requires that a person "knowingly receive" sexually explicit conduct involving a minor, whereas the Michigan statute does not. However, this argument also fails. The Court finds that subsection (a)(4) of 18 U.S.C. § 2252, rather than subsection (a)(2), closely follows the language of MICH. COMP. LAWS § 750.145c(4) because it penalizes a person who "*knowingly possesses*, or knowingly accesses with intent to view . . . by any means including by computer, if – (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct." 18 U.S.C. § 2252(a)(4)(B) (emphasis added). In comparison, the state statute of conviction penalizes a person who:

[*K*]*nowingly possesses* or knowingly seeks and accesses any child sexually abusive

[2] 18 U.S.C. § 2252(a)(2).

> material . . . if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

MICH. COMP. LAWS § 750.145c(4) (emphasis added). As such, the Court finds that the relevant provision under the federal statute for determining whether respondent's state conviction was an aggravated felony is 18 U.S.C. § 2252(a)(4), rather than 18 U.S.C. § 2252(a)(2).

Lastly, respondent argues that the Michigan statute is broader than the federal offense by seemingly encompassing merely negligent actions, and is thus not a categorical match. However, there must be a realistic probability that the state would apply its statute to conduct outside of the generic federal offense in order to show that the statute in question is not a categorical match. *Moncrieffe*, 133 S. Ct. at 1684. Although the second clause of the Michigan statute *facially* criminalizes a broader range of conduct than the federal offense, there is no evidence that Michigan courts *actually* convict defendants for this conduct. Rather, Michigan courts emphasize that a conviction under the statute requires that a defendant knowingly possess or access child sexually abusive material. Thus, the categorical approach proves dispositive.

Moreover, in an attempt to magnify the alleged differences between the Michigan statute and the federal offense, respondent points to certain state cases which purportedly demonstrate that defendants have been convicted under a "'negligence' standard." However, the Court's review finds that those defendants were not merely negligent. For example, respondent cites to *People v. Harmon*, 640 N.W.2d 314 (Mich. Ct. App. 2001), where the defendant was convicted under MICH. COMP. LAWS § 750.145c(2). This subsection contains a similar clause to MICH. COMP. LAWS § 750.145c(4), in that it penalizes a person for producing sexually abusive material if that person "knows, has reason to know, or should reasonably be expected to know" that the

child is a child or that person "has not taken reasonable precautions to determine the age of the child." MICH. COMP. LAWS § 750.145c(2). Although the Michigan court stated that the defendant "failed to take reasonable precautions regarding the age of the victims," his actions demonstrated greater culpability than mere negligence. *Harmon*, 640 N.W.2d at 318-19. The defendant failed to confirm the age of the victims before photographing them in the nude, even after he informed them that such confirmation was required. *Id.* Subsequently, he then had the children sign backdated consent forms in an attempt to cover his tracks. *Id.* Such actions can hardly be described as simple negligence.

Therefore, the Court finds that respondent's conviction under MICH. COMP. LAWS § 750.145c(4) is categorically an aggravated felony under INA § 101(a)(43)(I), in that it is an offense described in 18 U.S.C. § 2252. The Michigan statute falls within the federal offense because both statutes penalize the *knowing* possession or access of child pornography. Although the language of the Michigan statute may suggest a lesser culpability necessary for convictions, there is no realistic probability that persons would be convicted for mere negligence, as respondent alleged. As such, respondent's conviction is an aggravated felony, and he is removable under INA § 237(a)(2)(A)(iii).

B. CANCELLATION OF REMOVAL UNDER INA § 240A(a)

Respondent is statutorily ineligible for cancellation of removal under INA § 240A(a). In order to be statutorily eligible for such relief, respondent must show: (1) that he has been an LPR for at least five years; (2) that he has seven years of continuous residence in the United States; (3) that he has not been convicted of an aggravated felony; and (4) that there is a positive balance of factors for this discretionary form of relief. INA § 240A(a); *see generally C-V-T-*, 22 I&N Dec. 7. As the Court has found that respondent's conviction for possessing child sexually

abusive material in violation of MICH. COMP. LAWS § 750.145c(4) is an aggravated felony, respondent is barred from seeking cancellation of removal.

VI. ORDERS

IT IS HEREBY ORDERED that the charge of removability under INA § 237(a)(2)(A)(iii) is **SUSTAINED**.

IT IS FURTHER ORDERED that respondent is ineligible for cancellation of removal under INA § 240A(a).

IT IS FURTHER ORDERED that respondent be removed to **MEXICO**, pursuant to the charges contained in his Notice to Appear.

Hon. David H. Paruch
U.S. Immigration Judge

7/21/2015
Date