U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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18201 SW 12th St.
Miami, FL 33194

Name: JOSEPH, LENOX ANTHONY

A 072-033-408

Date of this notice: 2/7/2017

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:
Guendelsberger, John
Malphrus, Garry D.
Pauley, Roger

Userteam: Docket

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A072-033-408
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Miami, FL 33194

Name: JOSEPH, LENOX ANTHONY **A 072-033-408**

Date of this notice: 2/7/2017

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:
Guendelsberger, John
Malphrus, Garry D.
Pauley, Roger

Userteam:

File: A072 033 408 – Miami, FL

Date: FEB - 7 2017

In re: LENNOX ANTHONY JOSEPH a.k.a. Lenox Anthony Joseph a.k.a. Randall Linton

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kenneth Panzer, Esquire

ON BEHALF OF DHS: Christina M. Martyak
Assistant Chief Counsel

CHARGE:

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

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

Sec. 212(a)(2)(B), I&N Act [8 U.S.C. § 1182(a)(2)(B)] – Two or more offenses with aggregate sentence of five years or more

APPLICATION: Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Jamaica and lawful permanent resident of the United States, appeals from the Immigration Judge's March 21, 2016, decision, finding him removable as charged and ordering him removed from the United States. The appeal will be sustained and the record will be remanded to the Immigration Judge.

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).

The respondent does not challenge his removability on appeal; rather he challenges the Immigration Judge's determination that his 2009 conviction for manslaughter in violation of section 782.07(1) of the Florida Statutes, constitutes an aggravated felony under sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act, 8 U.S.C. §§ 1101(a)(43)(F) and 1227(a)(2)(A)(iii), namely a crime of violence under 18 U.S.C. § 16(b), such that he is statutorily ineligible for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a).[1]

[1] The Immigration Judge found, and the parties do not dispute, that the respondent's manslaughter conviction does not qualify as a crime of violence under section 16(a) (I.J. at 10).

Upon de novo review, we agree with the respondent that his manslaughter offense does not qualify as a crime of violence under section 16(b), and is therefore not an aggravated felony.

The term "crime of violence" is defined under 18 U.S.C. § 16(b) as: "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Section 782.07(1) of the Florida Statutes, the relevant statute of conviction in these proceedings, provides: "The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree."[2]

In order to determine whether a particular offense satisfies the requirements of section 16(b), we employ a categorical approach. *See Matter of Francisco-Alonso*, 26 I&N Dec. 594 (BIA 2015). Under the categorical approach, we look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the alien's crime. *See Leocal v. Ashcroft,* 125 S. Ct. 377, 381 (2004); *see also Dixon v. U.S. Atty. Gen.*, 768 F.3d 1339, 1343 (11th Cir. 2014). Thus, we must compare the language of the Florida manslaughter statute with the definition of a "crime of violence" under 18 U.S.C. § 16(b), and in so doing, we must determine whether the "conduct encompassed by the elements of the offense raises a substantial risk the defendant may use physical force in the "ordinary case" even though, at the margin, some violations of the statute may not raise such a risk." *See U.S. v. Keelan*, 786 F.3d 865, 871 (11th Cir. 2015) (adopting the "ordinary case" standard established in *James v. United States*, 127 S. Ct. 1586, 1597 (2007) for analyzing section 16(b)).

In setting forth the "ordinary case" standard, the Supreme Court articulated that, asking whether an offense, in the "ordinary case," presents a certain risk is akin to asking whether the offense "by its nature" presents a certain risk. *James v. United States*, *supra*, at 1597. Circuit Courts of Appeal, including the Eleventh Circuit, that have adopted the "ordinary case" inquiry have followed the standard set forth in *James v. United States*, and have further elaborated on that standard. *See e.g. Baptiste v. Atty. Gen.*, 841 F.3d 601(3d Cir. 2016) (looking to cases "occurring in the regular course of events," "normal" cases, and "usual" cases, based on the definition of "ordinary" in Black's Law Dictionary); *U.S. v. Keelan, supra* (looking to the "ordinary" rather than the "hypothetical" or "unusual" case); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013) (looking to the "usual" violation of a statute, rather than conduct

[2] The respondent's Notice to Appear (Form I-862) alleges that the respondent was convicted of manslaughter in violation of section "787.07" of the Florida Statutes; however this is in error as the section of the Florida Statutes covering manslaughter is 782.07, and the record reflects that the respondent was, in fact, convicted of manslaughter in violation of section 782.07, not 787.07, of the Florida Statutes. While we note this error on the NTA, it is harmless and does not affect the outcome of these proceedings (Exh. 1).

"at the margins"); *U.S. v. Taylor*, 630 F.3d 629, 634 (7th Cir. 2010) (looking to "ordinary" rather than "fringe" cases).

In *Leocal v. Ashcroft*, the Supreme Court stated that the word "use" in both sections 16(a) and 16(b) requires "active employment" which, the court concluded, requires a higher degree of intent than negligent or merely accidental conduct. 125 S.Ct. at 382-83; *see also Dixon v. U.S. Atty. Gen., supra*, at 1344 (noting that the use of force cannot be merely accidental, negligent, or even reckless). 'Physical force' has been interpreted to mean "violent force" – that is, "force capable of causing physical pain or injury to another person." *See Matter of Guzman-Polanco*, 26 I&N Dec. 806, 807 (BIA 2016) (quoting *Johnson v. United States*, 130 S. Ct. 1265 (2010)). The *Leocal* court noted that 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense. The reckless disregard in § 16 relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime." *Id.* at 383. Based on the guidance regarding section 16(b) set forth in *Leocal*, this Board has determined that "the critical inquiry is not the mens rea required for conviction of a crime, but rather whether the offense, by its nature, involves a substantial risk that the perpetrator will use force in completing its commission." *Matter of U. Singh*, 25 I&N Dec. 670, 676 (BIA 2012); *see also James v. United States*, *supra*, at 1597. The Immigration Judge answered this inquiry in the affirmative with respect to the Florida manslaughter statute at issue in these proceedings, and cited to a number of Florida cases wherein a manslaughter conviction was satisfied and where force was used in the commission of the crime (I.J. at 10-11).

Notwithstanding the cases cited by the Immigration Judge in his decision, and recognizing that a manslaughter conviction may be satisfied by the use of force, we agree with the respondent's assertion on appeal that, based on relevant case law, a substantial risk of intentional physical force is *not* inherent in a violation of section 782.07(1) of the Florida Statutes in the "ordinary case" (emphasis added). Stated differently, manslaughter under section 782.07(1) of the Florida Statutes is not an offense that, by its nature, usually, or ordinarily, involves a substantial risk that the perpetrator will use force in completing its commission. *See e.g. Filmon v. State*, 336 So.2d 586 (Fla. 1976) (upholding manslaughter by culpable negligence conviction where defendant drove vehicle under the influence at high speed at nighttime, resulting in a crash which killed the vehicle's passenger); *Davison v. State*, 688 So.2d 338 (Fla. Dist. Ct. App. 1997) (similar); *Tongay v. State*, 79 So.2d 673 (Fla. 1955) (upholding manslaughter by culpable negligence conviction where defendant instructed his young daughter to dive from a high distance into a pool, which caused her death); *Rubinger v. State*, 98 So.3d 659 (Fla. Dist. Ct. App. 2012) (manslaughter conviction upheld where defendant hosted party and provided alcohol to minor victims, who consumed alcohol and operated a vehicle, resulting in their deaths); *Herman v. State*, 472 So.2d 770 (Fla. Dist. Ct. App. 1985) (upholding manslaughter conviction where defendant administered cocaine to the victim and failed to summon medical attention when she became ill, resulting in victim's death); *State v. Heines*, 144 Fla. 272 (1940) (finding that charge of manslaughter was sufficient where chiropractor instructed the victim, his patient, against using insulin, which patient depended on for treatment of his diabetes, and which resulted in patient's death).

As the preceding cases demonstrate, convictions for manslaughter under Florida Statutes § 782.07(1) which do not inhere a substantial risk of physical force are not "unusual" or "hypothetical" cases. *See U.S. v. Keelan*, 786 F.3d at 871. We further note that a number of Circuit Courts of Appeal have also concluded that manslaughter statutes are not crimes of violence under section 16. *See United States v. Torres-Villalobos*, 487 F.3d 607, 616-17 (8th Cir. 2007) (finding that a person can commit second-degree manslaughter under Minnesota law without risking the intentional use of force, and therefore holding that second-degree manslaughter is not a crime of violence under section 16); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (finding that involuntary manslaughter under Virginia law was not a crime of violence under section 16(b)); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (finding that second-degree manslaughter under New York law does not intrinsically involve a substantial risk that force will be applied "as a means to an end").

Accordingly, we hold that manslaughter under section 782.07(1) of the Florida Statutes is not categorically a crime of violence under section 16(b), and therefore not an aggravated felony under section 101(a)(43)(F). The parties do not assert on appeal that the statute at issue is divisible or that the modified categorical approach applies, and pursuant to *Descamps v. U.S.*, 133 S.Ct. 2276, 2286 (2013), "the inquiry is over."

We conclude that remanded removal proceedings are warranted in order to provide the respondent with a renewed opportunity to apply for cancellation of removal under section 240A(a) of the Act. We express no opinion on the outcome of the case. The following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

Board Member Garry D. Malphrus respectfully dissents without opinion.

THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
KROME SERVICE PROCESSING CENTER
MIAMI, FLORIDA

IN THE MATTER OF:	)	
	)	
JOSEPH, Lenox Anthony	)	
	)	**IN REMOVAL PROCEEDINGS**
A# 072-033-408	)	
	)	
RESPONDENT	)	

CHARGES: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), an alien who has been convicted of acts which constitute the essential elements of a crime involving moral turpitude (CIMT) (other than a purely political offense);

Section 212(a)(2)(A)(i)(II) of the Act, an alien who has been convicted of acts which constitute the essential elements of any law relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)); and

Section 212(a)(2)(B) of the Act, an alien convicted of two or more offenses (other than purely political offenses) for which the aggregate sentences to confinement actually imposed were five years or more.

APPLICATION: Section 240A(a) of the Act: Cancellation of Removal for Certain Permanent Residents.

ON BEHALF OF THE RESPONDENT
Kenneth Panzer, Esq.
12000 Biscayne Boulevard
Suite 803
North Miami, Florida 33181

ON BEHALF OF THE DEPARTMENT
Christina Martyak, Assistant Chief Counsel
U.S. Department of Homeland Security
18201 SW 12th Street
Miami, Florida 33194

WRITTEN DECISION AND ORDER

I. Procedural History

Lenox Anthony Joseph (Respondent) is a single male, native and citizen of Jamaica. On August 21, 2015, the Department of Homeland Security (DHS) filed a Notice to Appear (NTA), Form I-862, with the Court, charging Respondent as removable under sections 212(a)(2)(A)(i)(I)

(an alien who has been convicted of acts which constitute a CIMT); 212(a)(2)(A)(i)(II) of the Act (an alien who has been convicted of acts which constitute the essential elements of any law relating to a controlled substance as defined in 21 U.S.C. 802); and 212(a)(2)(B) (an alien convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more). See Exhibit (Exh.) 1.

On October 5, 2015, Respondent admitted to four allegations in the NTA. Specifically, Respondent admitted that he: (1) is not a citizen or national of the United States; (2) is a native and citizen of Jamaica; (3) entered the United States at Miami, Florida on or about October 29, 1992 as a B-2 visitor for pleasure; and (4) adjusted his status to that of a lawful permanent resident as a spouse of a U.S. Citizen on July 16, 1996. See id. Respondent was silent as to the remaining four allegations, namely that: (1) on February 21, 2002, he was convicted in the 15th Judicial Court for Palm Beach County, Florida, for the offense of possession of marijuana over twenty grams, in violation of section 893.13 of the Florida Statutes, for which a sentence of one year and six months' probation was imposed (Case Number 01-CF011086A06); (2) on October 3, 2007, he arrived at Miami International Airport (MIA) with a confirmed warrant with extradition to Hendry County, Florida, for Homicide; (3) he arrived at MIA on October 3, 2007 and applied for admission as a returning lawful permanent resident of the U.S. and was paroled pending 240 Proceedings; and (4) on May 21, 2009, he was convicted in the Twentieth Circuit Court for Hendry County, Florida for Count 1 Manslaughter, in violation of section 787.07 of the Florida Statutes, for which a sentence of nine years three months and nine days incarceration was imposed (Case Number 07-000615CF). See id. Based on Respondent's admissions and the evidence in the Record, the Court sustained the charges under sections 212(a)(2)(A)(i)(I) and 212(a)(2)(A)(i)(II) of the Act on October 5, 2015 and the charge under section 212(a)(2)(B) of the Act on January 19, 2016. See infra Part II.

On November 5, 2015, Respondent filed an Application for Cancellation of Removal for Certain Permanent Residents (Form EOIR-42A). See Exh. 8, Tab B. The Court heard testimony from Respondent and his witnesses in support of his application on January 19, 2016 and February 26, 2016.

II. Charges of Removability

A. Section 212(a)(2)(A)(i)(I) of the Act

Under section 212(a)(2)(A)(i)(I) of the Act, an alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a CIMT (other than a purely political offense) is inadmissible. See § 212(a)(2)(A)(i)(I) of the Act.

Moral turpitude involves "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Walker v. U.S. Att'y Gen., 783 F.3d 1226, 1229 (11th Cir. 2015) (quoting Itani v. Ashcroft, 298 F.3d 1213, 1215 (11th Cir. 2002); see also Matter of Serna, 20 I&N Dec. 579 (BIA 1992). There are two elements for a crime to constitute moral turpitude: (1) "morally reprehensible and intrinsically

wrong, or malum in se" conduct, and (2) "a culpable mental state." See Matter of E. E. Hernandez, 26 I&N Dec. 397, 398 (BIA 2014); Matter of Louissaint, 24 I&N Dec. at 754, 756-57 (BIA 2009) (declaring that a "crime involving moral turpitude involves reprehensible conduct committed with some degree of scienter, either specific intent, deliberateness, willfulness, or recklessness"); Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994) (rendering that a crime involving moral turpitude involves "the nature of the act itself and not the statutory prohibition"); Matter of Leal, 26 I&N Dec. 20, 21 (BIA 2012) (requiring "specific intent, knowledge, willfulness, or recklessness.").

To determine whether a conviction qualifies as a CIMT, the Court must apply the "categorical approach" to determine whether the statute of conviction is comparable to the offense listed in the Act. See Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013); Louissaint, 24 I&N Dec. at 75. Under this approach, the Court looks to whether the statutory elements of the state statute categorically fits within the generic definition of the offense, considering the inherent nature of the offense "rather than the circumstances surrounding a defendant's particular conduct. See Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1305 (11th Cir. 2011); see also Moncrieffe, 133 S. Ct. at 1684; Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). A state offense is a categorical match to a generic federal offense only if a conviction under the state statute necessarily involved facts equating to the generic federal offense. Moncrieffe, 133 S. Ct. at 1684-85. Whether the applicant's actual conduct involved such facts is irrelevant. Id. (citing Shepard v. United States, 544 U.S. 13, 24 (2005)).

Furthermore, the Court "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." Donawa v. U.S. Att'y Gen., 735 F.3d 1275, 1280 (11th Cir. 2013) (quoting Moncrieffe, 133 S. Ct. at 1684). In determining the least of the acts criminalized by the state statute, there must be a "realistic probability" that the State would prosecute such conduct. Moncrieffe, 133 S. Ct. at 1684-85; Matter of Ferreira, 26 I&N Dec. 415, 419 (BIA 2014). Here, the Court must analyze whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a CIMT. See Cano v. U.S. Att'y Gen., 709 F.3d 1052, 1053 (11th Cir. 2013); Donawa, 735 F.3d at 1280 (quoting Moncrieffe, 133 S. Ct. at 1684). If the statute of conviction bans only actions that involve moral turpitude, then it is categorically a CIMT. Matter of Ortega-Lopez, 26 I&N Dec. 99, 100 (BIA 2013).

Respondent was convicted of manslaughter, in violation of section 782.07(1) of the Florida Statutes. See Exh. 3. His statute provides, in relevant part:

> (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree . . .

Fla. Stats. § 782.07(1) (2009). Section 782.07 of the Florida Statutes may be violated by "act, procurement, or culpable negligence." The least culpable conduct is the killing of a human being

by culpable negligence.

"Culpable negligence" under Florida law involves a state of mind so wanton or reckless that the behavior it produces may be regarded as intention. See McCreary v. Florida, 371 So.2d 1024, 1026 (1979); Charlton v. Wainwright, 588 F.2d 162, 164 (5th Cir. 1979); Cannon v. State, 107 So. 360 (Fla. 1926). As used in the manslaughter statute:

> [C]ulpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights. . . . Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

Fla. Std. Jury Instr. (Crim.) 7.7; see Carraway v. Revell, 112 So.2d 71, 73 (Fla. App. 1959) (internal citations omitted); see also McCreary, supra; McCullers v. State, 206 So.2d 30, 33 (Fla. 4th Dist. 1968), cert. denied, 210 So.2d 868 (Fla. 1968); Cannon, supra. The Court finds that the killing of a human being by culpable negligence involves morally reprehensible conduct committed with some degree of scienter. Therefore, Respondent has been convicted of acts which constitute a CIMT and, as such, is removable as charged under section 212(a)(2)(A)(i)(I) of the Act. See § 212(a)(2)(A)(i)(I) of the Act.

B. Section 212(a)(2)(A)(i)(II) of the Act

Under section 212(a)(2)(A)(i)(II) of the Act, an alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 803)) is inadmissible. See § 212(a)(2)(A)(i)(II) of the Act.

Respondent was convicted of possession of marijuana over twenty grams, in violation of section 893.13(6)(a) of the Florida Statutes in 2002. See Exh. 2. Respondent's statute of conviction states, in relevant part: "It is unlawful for any person to be in actual or constructive possession of a controlled substance . . . ." See Fla. Stats. § 893.13(6)(a) (2002) (amended 2012). In this case, Respondent's conviction involved marijuana, which is a federally controlled substance. See 21 U.S.C. § 802(16). Therefore, Respondent is removable as charged under section 212(a)(2)(A)(i)(II) of the Act. See § 212(a)(2)(A)(i)(II) of the Act

C. Section 212(a)(2)(B) of the Act

Under section 212(a)(2)(B) of the Act, an alien convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more is inadmissible. See § 212(a)(2)(B) of the Act.

Respondent was convicted of possession of marijuana over 20 grams in 2002 and manslaughter in 2009. See Exhs. 2, 3. Respondent submitted evidence that he paid a fine and was subject only to probation for his marijuana conviction, see Exh. 2, but he was sentenced to confinement for nine years for his manslaughter conviction. See Exh. 3. Therefore, Respondent has been convicted of two offenses (other than purely political offenses) for which the aggregate sentences to confinement actually imposed were five years or more; as such, Respondent is removable as charged under section 212(a)(2)(B) of the Act. See § 212(a)(2)(B) of the Act.

III. Summary of the Evidence

A. Documentary Evidence

In conjunction with the testimony from Respondent and his witnesses described below, the Court considered the following exhibits:

Exhibit 1: NTA, filed Aug. 21, 2015.
Exhibit 2: Record of Conviction, Case Number 01-CF011086A06.
Exhibit 3: Record of Conviction, Case Number 07-000615CF.
Exhibit 4: Record of Deportable/Inadmissible Alien, Form I-213 (Mar. 13, 2015).
Exhibit 5: Departure Record, Form I-94 (Oct. 3, 2007).
Exhibit 6: DHS Brief Regarding Ineligibility for Cancellation of Removal for Permanent Residents.
Exhibit 7A: Respondent's Brief, filed Jan. 19, 2016:
- Tab A: Dimaya v. Lynch, No. 11-71307 (9th Cir. 2015) and Johnson v. United States, 135 S. Ct. 2551 (2015); and
- Tab B: United States v. Garcia-Perez, 779 F.3d 278 (5th Cir. 2015) and Riesel v. Florida, 48 So.3d 885 (Fla. Dist. Ct. App. 2010).

Exhibit 7: Respondent's Short Brief.
Exhibit 8: Respondent's Application and Supporting Documents:
- Tab A: Notice of Receipt of Application and Fee, Form I-797C;
- Tab B: Application for Cancellation of Removal for Certain Permanent Residents, Form EOIR-42A, filed Jan. 19, 2016;
- Tab C: Respondent's Birth Certificate; Departure Record, Form I-94; and Social Security Card;
- Tab D: Birth Certificate of Lennox Anthony Joseph Jr., Antaysia Le'Voryae Joseph, Zion Ar'mon Joseph; Naturalization Certificate of Mavernie

Payne and Bobbette White; and Record of Marriage and Dissolution of Marriage of Respondent and Yolander Evette Felton;

Tab E: Collection of Certificates; Respondent's Custody Report (June 5, 2013); and Collection of Letters; and

Tab F: Information documents relating to Respondent's arrests, including Case Number 07-000615CF and 01-CF011086A06.

B. Testimonial Evidence[1]

a. Testimony of Respondent

Respondent testified that he is forty-years old and was born in Jamaica. He stated that he was seventeen years old when he entered the United States in 1992 and that he became a lawful permanent resident in 1996. He confirmed that he lived in the United States (U.S.) from 1992 to 1996. He noted that his maternal aunt, Mavernie Payne, is a U.S. citizen living in Florida. He stated that he previously lived in West Palm Beach, Florida, with his three biological children, three step-children, and the mother of his children, Stacy Coleman. He stated that he has been in a relationship with Ms. Coleman for twelve years but they are not married.

Respondent testified about two convictions:[2] in 2001, Respondent pled guilty to possession of marijuana over twenty grams and, in 2009, a jury convicted Respondent of manslaughter in Florida. Respondent was sentenced to 111.3 months and served about nine years in four different jails in Florida for the manslaughter conviction. He said that he has been incarcerated since 2007 and confirmed that he was immediately put into immigration detention after his release.

Respondent confirmed that he received the manslaughter conviction from an incident that occurred on May 13, 2007 and that John Tull was the victim in this incident. He stated that during this incident, Mr. Tull shot Respondent in the jaw, chest, and arm, though Respondent maintained his own innocence in this ordeal throughout his testimony. Respondent denied police finding a weapon on Respondent, denied ever being convicted of having a gun during the commission of the crime, and denied a gun ever being offered as evidence at his trial. Respondent further confirmed that he was hospitalized for a couple days after he was shot during which police came to take his statement. He stated that police did not arrest him after he was discharged from the hospital and that Ms. Coleman picked him up.

Respondent confirmed that after he was shot, he returned to Jamaica to recover and that he stayed there for four months. Respondent confirmed that he did not need to come back to the

[1] In addition to Mavernie Payne, the Court heard testimony in support of Respondent from four other witnesses,—Michael Jackson, Antaysia Joseph, Zion Joseph, and Stacy Coleman. Their testimony related to Respondent's character and the hardships they will face if Respondent is removed to Jamaica; however, because Respondent is not statutorily eligible for cancellation of removal, character and hardship do not factor into the Court's decision. See discussion infra Part IV.B.

[2] The Court heard extensive testimony from Respondent about his actual conduct during each of these convictions; however, this does not factor into the Court's decision. See discussion infra Part IV.B.

United States but explained that he returned to the United States because he missed his children and wanted to be with them. On cross-examination, he explained that he felt like he could be with his mom and get well and confirmed that he was living with Ms. Coleman prior to leaving for Jamaica but that he did not want her and the children to see his pain or suffer emotionally.

On cross-examination, Respondent confirmed that police took a sample of DNA from him at the hospital. He said that he did not remember if police told him the reason for the sample but at the time, he believed that the reason was the shooting at Mr. Tull's house. Respondent said he left for Jamaica a couple days after police took the sample, but he then stated that he remained in the United States for a month before going to Jamaica. He confirmed that he believed police were investigating Mr. Tull's death and that Respondent was a potential suspect but denied this consideration having any part in his decision to leave the United States. Respondent then denied police contacting him before leaving for Jamaica. He added, "I didn't flee or run or anything like that. Just went."

Respondent confirmed that he was arrested at the airport when he returned to the United States and that there was an outstanding warrant for him. He denied knowing that there was such a warrant when he left the United States, denied being extradited to the United States, and confirmed that he had a return ticket. Respondent said that the first time he knew police were interested in him for the incident was when he arrived at the airport and not while he was in Jamaica. He denied knowing whether police actually came to his house where he was living with Ms. Coleman and the children during this time.

b. Testimony of Mavernie Payne (Ms. Payne)

Ms. Payne testified that she is Respondent's maternal aunt. She said that she was born in Jamaica, is a U.S. citizen, and has lived in Belle Grade, Florida for twenty-eight years. She stated that she is married to a natural born U.S. citizen but has been separated from him for about ten years.

Ms. Payne confirmed that Respondent was convicted of manslaughter in the second degree and that Mr. Tull died.[3] She said that she visited Respondent at the hospital on the night of the incident and that Ms. Coleman picked up Respondent when the hospital discharged him. She stated that Respondent went to Jamaica a month later and explained that Respondent went to his mother's home to heal. She stated that his mother currently lives in Jamaica.

IV. Applications for Relief

A. Credibility

The REAL ID Act amended the standards for burden of proof and credibility determinations in applications for relief or protection from removal made on or after May 11,

[3] The Court heard testimony from Ms. Payne regarding her role in investigations as it relates to Respondent's actual conduct; however, this also does not factor into the Court's decision. See discussion infra Part IV.B.

2005. See REAL ID Act § 101(h)(2), Pub. L. No. 109-13, 119 Stat. 302 (2005); § 240(c)(4)(C) of the Act. The REAL ID Act of 2005 applies to Respondent's application for relief because it was filed on January 19, 2016. See Exh. 8, Tab B. Respondent has the burden of proof to establish that he satisfies the applicable eligibility requirements and that he merits a favorable exercise of discretion. § 240(c)(4)(A) of the Act. In order to sustain his burden of proof under the REAL ID Act, Respondent must comply with applicable requirements to submit information or documentation supporting his claim for relief. § 240(c)(4)(B) of the Act.

An applicant's testimony may be sufficient to meet the burden of proof if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. See Matter of L-A-C-, 26 I&N Dec. 516, 518 (BIA 2015) (citing § 208(b)(1)(B)(ii) of the Act). Conversely, the Court may deny relief based on adverse credibility, "especially if the alien fails to produce corroborating evidence." Lyashchynska v. U.S. Att'y Gen., 676 F.3d 962, 967 (11th Cir. 2012) (citing Mohammed v. U.S. Att'y Gen., 547 F.3d 1340, 1347 (11th Cir. 2008)). The need for corroborating evidence is greater when an applicant's testimony is weak. See Yang v. U.S. Att'y Gen., 418 F.3d 1198, 1201 (11th Cir. 2005).(citing Matter of Y-B-, 21 I&N Dec. 1136, 1139 (BIA 1998)). When the Court requires an applicant to provide corroboration, "the applicant bears the burden to provide corroborative evidence, or a compelling explanation for its absence." Matter of J-Y-C-, 24 I&N Dec. 260, 263 (BIA 2007) (citation omitted). Detailed and specific testimony supports a finding of credibility, while vague testimony may contribute to an adverse credibility determination. Compare Niftaliev v. U.S. Att'y Gen., 504 F.3d 1211, 1217 (11th Cir. 2007) with Alim v. Gonzales, 446 F.3d 1239, 1256-57 (11th Cir. 2006).

To determine whether such burden has been met, the Court must weigh credible testimony along with other evidence of record. § 240(c)(4)(B) of the Act. As to credibility, the Court considers the totality of circumstances and all relevant factors including: demeanor, candor, responsiveness, plausibility of witnesses' testimony, consistency between oral and written presentations, consistency with other evidence of record, and inaccuracies or falsehoods without regard for whether it goes to the heart of the respondent's claim, or any other relevant factor. § 240(c)(4)(C) of the Act.

After careful consideration of the totality of the circumstances and all relevant factors, the Court finds that Respondent testified credibly. His testimony was internally consistent and consistent with his written application as well as his witnesses' testimony. See § 240(c)(4)(C) of the Act; Exhs. 7-8. For the same reasons, the Court finds Respondent's witnesses testified credibly as well.

B. Cancellation of Removal for Certain Lawful Permanent Residents

To establish eligibility for cancellation of removal under section 240A(a) of the Act, an applicant must demonstrate that (1) he has been lawfully admitted as a permanent resident for not less than five years; (2) he has resided in the United States continuously for seven years after having been admitted in any status; and (3) he has not been convicted of any aggravated felony. See § 240A(a)(1)-(3) of the Act. In addition, the applicant must establish that he warrants a

favorable exercise of discretion. See § 240(c)(4)(A)(ii), 240A(a) of the Act; Matter of A-M-, 25 I&N Dec. 66, 76 (BIA 2009); 8 C.F.R. § 1240.8(d).

As an initial matter, the Court finds that Respondent has been lawfully admitted as a permanent resident for more than five years because he was accorded lawful permanent resident status on July 16, 1996. See supra Parts I, III.B.

Furthermore, the Court finds that Respondent has resided in the U.S. continuously for seven years after having been admitted in any status. To determine whether Respondent has continuously resided in the United States for seven years after having been accorded that status, the Court must apply the stop-time rule. See Matter of Jurado, 24 I&N Dec. 29, 30 (BIA 2006). Under the stop-time rule, continuous physical presence begins upon lawful admission and is deemed to end upon service of the NTA to the applicant or upon the commission of an offense "referred to in section 212(a)(2) that renders the [applicant] . . . removable . . . under section 237(a)(2) or 237(a)(4)," whichever is earlier. §§ 240A(a)(1), (d)(1) of the Act; see also Matter of Perez, 22 I&N Dec. 689, 700 (BIA 1999) (holding that continuous physical presence ends upon the commission of the offense, not upon the conviction of the offense); Jurado, 24 I&N Dec. at 31 (prosecuting authorities are not required to have charged an alien with a referenced offense to invoke the "stop-time" rule). An applicant is also considered to have failed to maintain continuous physical presence if he has departed from the United States "for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." § 240A(d)(2) of the Act.

Respondent entered as a B-2 visitor for pleasure on October 29, 1992. See Exh. 8, Tab B. As discussed previously, Respondent's convictions for possession of marijuana over twenty grams and manslaughter fall under section 212(a)(2)(B) of the Act, as an alien convicted of two or more offenses, for which the aggregate sentences to confinement were five years or more. See supra Part II.C; see also § 212(a)(2)(B) of the Act. Respondent committed the offense which led to his manslaughter conviction "on or about May 13, 2007." See Exhs. 3; 8, Tab F. Accordingly, on May 13, 2007, Respondent's continuous physical presence ended.[4] See §§ 240A(a)(1), (d)(1) of the Act; Perez, 22 I&N Dec. at 700; Jurado, 24 I&N Dec. at 31. On that date, Respondent had already resided in the U.S. for over fourteen years. Therefore, the Court finds that Respondent resided in the U.S. continuously for over seven years after having been accorded lawful status. See § 240A(a)(2); (d)(2) of the Act.

However, the Court finds that Respondent's state conviction for manslaughter, in violation of section 782.07(1) of the Florida Statutes, categorically[5] qualifies as an aggravated felony as defined in section 101(a)(43)(F) of the Act. See § 101(a)(43)(F) of the Act; Fla. Stats. § 782.07(1).

[4] The Court notes that Respondent departed from the United States for a period of 110 days, from June 15, 2007 to October 3, 2007. See Exh. 8, Tab B.

[5] See discussion of categorical approach supra Part II.A; see also Shepard, 544 U.S. at 17; Descamps, 133 S. Ct. at 2281; Moncrieffe, 133 S.Ct. at 1684 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007) (citing Taylor v. United States, 495 U.S. 575, 599-600 (1990))).

Section 101(a)(43)(F) of the Act defines an "aggravated felony" as "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." See Matter of Chairez, 26 I&N Dec. 349, 352 (BIA 2014). Respondent received a sentence of nine years of imprisonment for the offense of manslaughter. See Exh. 3. Therefore, the issue for the Court is whether Respondent's conviction for manslaughter is a categorical match to a "crime of violence" under 18 U.S.C. § 16, which is defined to be either:

> (a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (2015); see also Chairez, 26 I&N Dec. at 352.

An offense is not categorically a crime of violence under 18 U.S.C. § 16(a) "unless it includes as an element the actual, attempted, or threatened use of violent force that is capable of causing pain or injury." See Matter of Francisco-Alonzo, 26 I&N Dec. 594, 596-97 (BIA 2015); Matter of Velasquez, 25 I&N Dec. 278, 283 (BIA 2010). However, in considering whether a state conviction qualifies as a "crime of violence" under 18 U.S.C. § 16(b), the proper inquiry is whether the conduct encompassed by the elements of the offense raises a "substantial risk" that the defendant may use physical force in the "ordinary case," even though, at the margin, some violations of the statute may not raise such a risk. United States v. Keelan, 786 F.3d 865, 871 (11th Cir. 2015); see also Francisco-Alonzo, 26 I&N Dec. at 597, 601 (citing Matter of Ramon-Martinez, 25 I&N Dec. 571, 574 (BIA 2011)) ("The "realistic probability" doctrine in Moncrieffe differs from the "ordinary case" analysis in [James v. United States, 127 S. Ct. 1586, (2007)]."). "Substantial risk" under 18 U.S.C. § 16(b) refers to the use of force in the commission of the crime, rather than the potential effect of the offender's conduct. See Leocal v. Ashcroft, 543 U.S. 1, 10 n.7 (2004). For both 18 U.S.C. § 16(a) and (b), "use" indicates volition, and "physical force" indicates "violent, active force capable of causing pain or injury[.]" Chairez, 26 I&N Dec. at 350-51 (citations omitted). The intent required also involves a higher degree of intent than negligent or merely accidental conduct. See Leocal, 543 U.S. at 8-9.

Respondent's statute of conviction is not categorically a crime of violence under 18 U.S.C. § 16(a) because it does not require actual, attempted, or threatened use of violent force as an element of the offense. See Fla. Stats. § 782.01(1); see also Francisco-Alonzo, 26 I&N Dec. at 596-97; Velasquez, 25 I&N Dec. at 283. Therefore, the Court will now consider whether Respondent's conviction qualifies as a crime of violence under 18 U.S.C. § 16(b). First, Respondent's conviction is a state felony. See Fla. Stats. § 782.07(1).

Second, a review of Florida case law reveals that in the "ordinary case," manslaughter under section 782.07(1) of the Florida Statutes is a "violent" crime because the conduct required by the statute involves a substantial risk of physical force being used in the course of committing the offense. See, e.g., Aguilera v. Jones, 2016 U.S. Dist. LEXIS 25258 (Fla. Dist. Ct. App.

2016) (striking the victim with a gun and accidentally discharging the gun); Geovera Specialty Ins. Co. v. Hutchins, 831 F. Supp. 2d 1306 (Fla. Dist. Ct. App. 2011) (displaying a gun by placing the barrel of the gun against the victim's neck unsure whether a bullet was in the chamber and discharging bullet); Betancourt v. Buss, 2011 U.S. Dist. LEXIS 38155 (Fla. Dist. Ct. App. 2011) (shooting victim); Brown v. McNeil, 2010 U.S. Dist. LEXIS 142399 (Fla. Dist. Ct. App. 2010) (inflicting five stab wounds on the victim); Mullins v. Crosby, 2008 U.S. Dist. LEXIS 29595 (Fla. Dist. Ct. App. 2008) (shooting victim); Hogarth v. Crosby, 17 Fla. L. Weekly Fed. D 1045 (Fla. Dist. Ct. App. 2004) (engaging in a physical altercation with victim, causing the victim to fall backwards and strike his head on a stove); see also Francisco-Alonzo, 26 I&N Dec. at 600-01 (discussing five cases to determine the "ordinary case").

Third, the Court finds that Respondent's statute requires sufficient intent. The state must prove beyond a reasonable doubt that the defendant acted intentionally or with culpable negligence. Fla. Std. Jury Instr. (Crim.) 7.7, 997 So. 2d 403 (2009) (amended in 2010 and 2011); see supra Part II.A; see also In re: Amendments to Std. Jury Instr. in Crim. Cases – Instruction 7.7 (2008); Hall v. State, 951 So. 2d 91, 95-96 (Fla. Dist. Ct. App. 2007) (stating that manslaughter does not require premeditated intent, only an intent to commit an act which caused death). Therefore, this provision is clearly distinguishable from Leocal v. Ashcroft, which involved simple negligence. 543 U.S. 1 (2004).

Accordingly, Respondent's statute of conviction is categorically a crime of violence under 18 U.S.C. § 16(b) and, as such, Respondent has been convicted of an aggravated felony under section 101(a)(43)(F) of the Act. See § 101(a)(43)(F) of the Act; 18 U.S.C. § 16(b). Therefore, Respondent is statutorily ineligible for cancellation of removal under section 240A(a) of the Act. See § 240A(a) of the Act.

In light of the foregoing, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that Respondent's application for Cancellation of Removal for Certain Permanent Residents under § 240A(a) of the Act be **DENIED**.

IT IS FURTHER ORDERED that Respondent be **REMOVED** from the United States to the country of **JAMAICA** pursuant to §§ 212(a)(2)(A)(i)(I), 212(a)(2)(A)(i)(II) and 212(a)(2)(B) of the Act.

DATED this 21st day of March, 2016

Honorable Adam Opaciuch
Immigration Judge