



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: E [REDACTED] S [REDACTED] P [REDACTED] A [REDACTED] 947

Date of this notice: 10/20/2015

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:

Pauley, Roger
Geller, Joan B
Guendelsberger, John

Useteam: Docket

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Falls Church, Virginia 22041

File: A [REDACTED] 947 - New York, NY

Date:

In re: S [REDACTED] P [REDACTED] E [REDACTED] a.k.a. [REDACTED]

OCT 20 2015

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jacqueline Pearce, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony as defined in section 101(a)(43)(A)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony as defined in section 101(a)(43)(U)

APPLICATION: Adjustment of status

The respondent, a native and citizen of Belize, timely appeals from the Immigration Judge's May 27, 2015, decision denying the respondent's application for adjustment of status under section 245(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1255(a). The Department of Homeland Security has not filed a brief on appeal. The appeal will be sustained and remanded for further proceedings.

The Immigration Judge found that the respondent's conviction for attempted criminal sexual act in the second degree in violation of New York Penal Law sections 110-130.45 constitutes a crime involving moral turpitude and an aggravated felony (I.J. at 2-4). Inasmuch as the respondent was found inadmissible under section 212(a)(2)(A)(i)(I) (crime involving moral turpitude) of the Act and ineligible for a waiver of inadmissibility under section 212(h) of the Act, because he was convicted of an aggravated felony, the Immigration Judge determined that the respondent was not eligible for adjustment of status (I.J. at 2-5). The respondent argues on appeal that the Immigration Judge erred in finding that his conviction constitutes a crime involving moral turpitude because the convicting statute does not have a scienter requirement with respect to the age of the victim. We agree with the respondent's argument.

The Immigration Judge reasoned that scienter is not required in certain statutory rape convictions when there is a large age gap between the victim and the perpetrator or the victim is of a particularly young age (I.J. at 4). In reaching that conclusion, the Immigration Judge noted that the respondent's argument that a crime involves moral turpitude only if the requisite scienter was established is based on *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), which was vacated by *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015). The Immigration Judge, however, failed to consider that the Attorney General specifically left the scienter requirement untouched in the later *Matter of Silva-Trevino*, *supra* at 553, n.3. Consequently, the

Immigration Judge erred in finding that the respondent's conviction constitutes a crime involving moral turpitude even though the convicting statute does not include a scienter element.

Based on the foregoing, we will remand the record to the Immigration Judge to determine if the respondent is otherwise eligible for adjustment of status and warrants such relief as a matter of discretion.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further findings consistent with this decision.



FOR THE BOARD