U.S. Department of Justice

Executive Office for Immigration Review

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Name: C[redacted]-G[redacted], C[redacted] M[redacted] **A [redacted]-275**

Date of this notice: 7/31/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Wendtland, Linda S.
O'Connor, Blair

Userteam: Docket

File: [redacted] 275 – Dallas, TX

Date: JUL 3 1 2017

In re: C[redacted] M[redacted] O[redacted]-G[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Ray Urenda, Esquire

APPLICATION: Termination; section 212(c) waiver

The respondent appeals from an Immigration Judge's July 15, 2016, decision ordering him removed from the United States. The appeal will be sustained and the removal proceedings will be terminated.

The respondent is a native and citizen of Guatemala and a lawful permanent resident of the United States. In August 1995, the respondent was indicted in the Criminal District Court for Tarrant County, Texas, on a charge of "indecency with a child - contact" (Exh. 2). *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon 1994) (hereafter "section 21.11(a)(1)"). The respondent pled guilty to that charge in December 1995, with the result that the sentencing court deferred adjudication of his guilt and placed him on community supervision for a period of 10 years (Exh. 2). *See* TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 5 (Vernon 1979 & 1995 Supp.). At all relevant times, section 21.11(a)(1) provided that "[a] person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he ... engages in sexual contact with the child." In 1995, Texas defined the term "sexual contact" to mean "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *See* TEX. PENAL CODE ANN. § 21.01(2) (Vernon 1994). According to the Texas courts, however, "sexual contact" included touching of the relevant body parts through clothing. *See Guia v. State*, 723 S.W.2d 763, 766 (Tex. App. 1986).

Based on the foregoing plea and judgment, the former Immigration and Naturalization Service (now the Department of Homeland Security ("DHS"))[1] initiated deportation proceedings against the respondent in February 1997, charging him with deportability as an alien convicted of an "aggravated felony" under former section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(iii) (1994 & Supp.). However, those proceedings were terminated on May 7, 1997, based on the Immigration Judge's determination that the respondent's Texas deferred adjudication was not a "conviction" for immigration purposes because it lacked "finality." The DHS did not appeal the Immigration Judge's termination order, and thus it became the final agency decision by operation of law. *See* 8 C.F.R. §§ 3.38(b), 3.39 (1996).

[1] The functions of the Immigration and Naturalization Service were transferred to the DHS pursuant to the Homeland Security Act of 2002. To avoid needless confusion, this order shall hereafter refer to the government as the DHS.

In December 2015, the DHS initiated the present removal proceedings against the respondent, charging him with removability under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), as an alien convicted of a "crime of child abuse" (Exh. 1), and under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony, to wit—"sexual abuse of a minor" under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A) (Exh. 1A). The sole factual predicate for both charges is the same 1995 Texas deferred adjudication that formed the basis for the 1997 deportation charge.

The respondent argued below that the removal charges are precluded by the doctrines of res judicata and collateral estoppel (Exh. 3, at 3-12). Further, and in the alternative, he argued that the "crime of child abuse" charge is barred because section 237(a)(2)(E)(i) of the Act applies only to convictions occurring after September 30, 1996 (Exh. 3, at 2-3). Despite these arguments, the Immigration Judge "found both charges of removal proven by clear and convincing evidence" (IJ at 4), denied the respondent's application for a waiver under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994) (IJ at 12-13), and ordered the respondent removed to Guatemala. This timely appeal followed.

Upon de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we conclude that the Immigration Judge sustained the removal charges in error. As the respondent correctly points out (Resp. Brief at 27-28), section 237(a)(2)(E)(i) of the Act applies only to convictions occurring after September 30, 1996. *See* section 350(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-640 (September 30, 1996); *see also Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 507 (BIA 2008); *Matter of Gonzalez-Silva*, 24 I&N Dec. 218, 220 (BIA 2007). As the respondent's alleged "conviction" was entered in 1995, it cannot support a section 237(a)(2)(E)(i) charge. Therefore, we reverse the Immigration Judge's decision sustaining that charge.

Furthermore, we conclude that the aggravated felony charge cannot be sustained in light of the Supreme Court's intervening opinion in *Esquivel-Quintana v. Sessions*, No. 16-54, --- S. Ct. ---- (U.S. May 30, 2017), *available at* 2017 WL 2322840. In *Esquivel-Quintana*, the Court held that, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Id.*, slip op. at 4. Because section 21.11(a)(1) extends to acts of "sexual contact" involving 16-year-old victims, it is broader than the generic federal definition of "sexual abuse of a minor."

In reaching this conclusion, we realize that section 21.11(a)(1) technically does not define a "statutory rape offense" because it does not require the participants to engage in "sexual intercourse." Nevertheless, it closely resembles statutory rape in that it criminalizes conduct (i.e., "sexual contact") "based solely on the age of the participants." To be precise, section 21.11(a)(1) requires proof of nothing more than "sexual contact" between two persons, at least one of whom is 16 or younger. It does not require proof of any aggravating elements—such as involuntariness or the existence of a special relationship of trust vis-à-vis the participants—that might justify a departure from the Supreme Court's default rule that a "minor" is a person under 16. If, as the *Esquivel-Quintana* Court held, *sexual intercourse* between an adult and a 16 year old is not categorically sexual abuse of a minor, it follows that mere *sexual contact* between the

same participants—which may involve nothing more than a sexually-motivated touching of a breast through clothing—is also not sexual abuse of a minor.

Section 21.11(a)(1) is not "divisible" with respect to the victim's age, moreover, nor do any of the statutory alternatives contained within the definition of "sexual contact" describe conditions of coercion or betrayed trust that would tend to aggravate the offense into one necessarily involving "sexual abuse of a minor." Under the circumstances, the DHS has not established by clear and convincing evidence that the respondent's 1995 conviction was for an aggravated felony.[2]

In conclusion, the DHS has not proven either of its removal charges by clear and convincing evidence. In light of this determination, we find it unnecessary to decide whether the proceedings are barred by the doctrines of res judicata or collateral estoppel. As the respondent is not removable, moreover, his eligibility for a section 212(c) waiver is a moot point. The following order shall be issued.

ORDER: The appeal is sustained and the removal proceedings are terminated.

FOR THE BOARD

[2] The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has never squarely decided in any immigration case whether section 21.11(a)(1) defines a categorical "sexual abuse of a minor" aggravated felony under section 101(a)(43)(A) of the Act. That court has concluded, however, that section 21.11(a)(1) is a "sexual abuse of a minor" offense within the meaning of former versions of section 2L1.2(b)(1)(A)(ii) of the United States Sentencing Guidelines. *United States v. Quiroga-Hernandez*, 698 F.3d 227, 229 (5th Cir. 2012); *United States v. Najera-Najera*, 519 F.3d 509, 512 (5th Cir. 2008).

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

IMMIGRATION COURT

DALLAS, TEXAS

File No.: A[redacted] 275

In the Matter of	)	
	)	
C[redacted] M[redacted] O[redacted]-G[redacted]	)	IN REMOVAL PROCEEDINGS
Respondent	)	
	)	

CHARGE(S): Section 237(a)(2)(E)(i); Section 237(a)(2)(A)(iii) of the Act

APPLICATION(S): Waiver of deportability (now removal) or removability under former Section 212(c) of the Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Vinesh Patel, Esq.	Joshua Levy, Esq.
Attorney at Law	Assistant Chief Counsel

DECISION AND ORDER OF THE IMMIGRATION JUDGE

The Respondent is a native and citizen of Guatemala. The present action commenced when the Department of Homeland Security ("DHS" or "Department") brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filing of a Notice to Appear ("NTA") dated December 17, 2015 with the Immigration Court. The Notice was served on Respondent on the same date.[1] [Exhibit 1].

In the NTA, DHS alleged that Respondent was subject to removal, notwithstanding his status as a Lawful Permanent Resident, as a consequence of a conviction on December 4, 1995 in Criminal Court No. 3, Tarrant County, TX for the offense of Indecency with a Child – Contact in violation of Texas Penal Code Section 21.11.[2] Subsequent to the initial service of the NTA, Respondent was served with a Form I-261, adding a second charge of removability under Section 237(a)(2)(A)(iii) of the Act. The Department alleged in the amendment that Respondent' conviction was also an aggravated felony under Section 237(a)(2)(A)(iii), as a violation of Section 101(a)(43)(A) of the Act.[3] The Form I-261 was served on Respondent and counsel, who acknowledged proper service.

In due course, Respondent, after being given a full explanation of his rights in both English and his native language of Spanish, entered pleadings at a hearing on April 6, 2016. Respondent, through counsel, admitted factual allegations 1-4 of the NTA, but denied both charges of removability. For its part, DHS submitted a Form I-213 relating to Respondent, as well as copies of Respondent's conviction documents [Exhibit 2].

Respondent based his denial of the removability charges on a termination of a prior deportation case, which occurred in the San Antonio Immigration Court on May 7, 1997. In those proceedings, the Immigration Judge ("IJ") noted that Respondent had received deferred adjudication on the Indecency with a Child – Contact offense and sentenced to ten (10) years probation. The IJ found that under the law existing at the time a deferred adjudication was not a "final" judgement under the Act because in such an instance, a Respondent had neither waived

[1] Respondent refused to sign the Notice to Appear when it was originally served. Respondent eventually acknowledged proper service of the NTA.

[2] The victim was Respondent's step-daughter, who, at the time of the offense, was below the age of consent under Texas law.

[3] According to Section 101(a)(43)(A) of the Act, "The term "aggravated felony " includes murder, rape *or sexual abuse of a minor*". [Emphasis *added*].

his direct appeal rights nor had the appeal period lapsed.[4] The Court also noted that the then-recent changes to the Act known as "IIRIRA" passed in 1996 by the Congress did not, in her opinion, change the definition of finality such that the requirement that a conviction be "final" before it could be relied upon to establish (then-) deportability on a charge which requires a conviction.[5] Based on the IJ's rulings, she then terminated proceedings.

When the proceedings were reinstituted in 2015, Respondent argued that his now-removal proceedings were barred by *res judicata* because they had been terminated by the original IJ's Order in 1997. Respondent also argued that he was not removable under Section 237(a)(2)(E) of the Act, because that ground of removability did not exist at the time of the original 1997 proceedings. Respondent's brief is included in the record as Exhibit 3.[6] In addition, Respondent argued that DHS was collaterally estopped from bringing the present action because the issue of whether or not Respondent was convicted of the subject offense was already litigated in the 1997 proceedings.

DHS also filed a brief on the issue of removability [Exhibit 4]. DHS argued that the current proceedings are not collaterally estopped because the 1996 IIRIRA amendments made it clear that the new definition of "conviction" could be applied retroactively, and thus the d

This analysis was affirmed by the Fifth Circuit in Moosa v. INS, 171 F.3d 994 at 1006-7, (5th. Cir. 1999). In Moosa, the Circuit expressly stated that the plain language of Section 322(c) of IIRIRA expressly stated that then amended definition of "conviction" under the Act [set forth in Section 322(a)] applied to "convictions and sentences entered *before*, on or after the date of the enactment of this Act.

This Court notes that the facts in Moosa are similar to the facts of the present case. Like Respondent, Moosa was convicted of indecency with a child under Texas law. Like Respondent, Moosa received a deferred adjudication sentence for his offense. The Circuit addressed and rejected Moosa's argument that the amended definition of "conviction" should not be applied to his 1990 conviction, noting that Congress' amendment of the Act unambiguously stated that it applied to all convictions, regardless of their date of inception.

In the present case, there is no evidence in the record to support the conclusion that the 1997 Immigration Court proceedings were dismissed "with prejudice." In the absence of such evidence, this Court concludes that the 1997 proceedings were dismissed without prejudice, and, thus, *res judicata* does not apply to prevent DHS from instituting the present action. Hull v. Kyler, 190 F.3d 88 (3d. Cir 1999). Likewise, collateral estoppel does not apply to bar the present

[4] Montoya v. INS, 904 F.2d 1018 (5th. Cir. 1990).
[5] See Exhibit 3, Tab E.
[6] Respondent also submitted a Reply Brief to DHS' submission [Exhibit 4], which is in the record as Exhibit 5.

proceedings, because the requirements for application of that doctrine are not present here. The issue of whether or not Respondent's conviction made him subject to removal does not appear to have been litigated, because the case law in 1997 was unsettled regarding the "finality" of his conviction at that point. In any case, Respondent's conviction *did* become final when he completed probation in 2005.

Case law also supports the finding that the charge under Section 237(a)(2)(A)(iii) is applicable in the present matter. Prior to IIRIRA, "sexual abuse of a minor" was not included in the list of aggravated felonies as defined in Section 101(a)(43) of the Act. The BIA and at least several Circuits have held that the filing of such a claim is not barred by either *res judicata* or by collateral estoppel. Omran v. Gonzales, 208 Fed. Appx. 346 (5th Cir. 2006), Maldonado v. U.S. Attorney General, et al., 664 F.3d 1369 (11th. Cir. 2011).

After analyzing the arguments of Court and the applicable case law, the Court found both charges of removal proven by clear and convincing evidence. Guatemala was designated as the country of removal, and Respondent sought relief from an Order of Removal under the provisions of former Section 212(c) of the Act. Respondent's application, with supplemental documents, is included in the record as Exhibits 6, 7 and 7A. Prior to the admission of the application, the Respondent was given the opportunity to make any necessary corrections to the application, and then swore or affirmed before this court that the application as corrected was all true and correct to the best of his knowledge.[7]

STATEMENT OF THE LAW

Former section 212(c) of the Act provides that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States in the discretion of the Attorney General despite the applicability of certain grounds of exclusion specified in INA § 212(a). This waiver was expanded to also be available to lawful permanent residents who did not proceed abroad, but risked losing their LPR status due to charges of deportability or removability. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976); Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976). However, section 212(c) relief applies only to charges of deportability or removability for which there are comparable grounds of exclusion or inadmissibility. 8 C.F.R. § 1212.3(f)(5); Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (BIA 1990; A.G. 1991); see, e.g., Matter of Wadud, 19 I. & N. Dec. 182 (BIA 1984); Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979).

[7] DHS also submitted documents relevant to Respondent's application [Exhibit 8].

On November 29, 1990, the Immigration Act of 1990 ("IMMAct") amended section 212(c) to ban aggravated felons from applying for relief under § 212(c) if they had served a term of imprisonment of at least five years. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. On April 24, 1996, section 212(c) was amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which further reduced the class of aliens eligible for relief from removal. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214. Section 440(d) of AEDPA made the following classes of aliens ineligible for § 212(c) relief: (1) aggravated felons; (2) those convicted of controlled substance offenses; (3) those convicted of firearm offenses; (4) those convicted of certain miscellaneous crimes, such as espionage; and (5) those convicted of multiple CIMTs. AEDPA § 440(d); see also INA § 212(c) (1995). Section 212(c) was subsequently repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA").

In 2001, the United States Supreme Court rendered a decision in INS v. St. Cyr, holding that section 212(c) relief remains available to aliens, irrespective of when they were put into proceedings, if their "convictions were obtained through plea agreements [prior to April 1, 1997] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect." INS v. St. Cyr, 533 U.S. 289, 326 (2001). Employing the retroactivity analysis formulated in Landgraf v. USI Film Products, et al, 511 U.S. 244 (1994), the Supreme Court in St. Cyr determined that section 304(b) of IIRIRA, when applied to aliens who had entered into plea agreements in reliance on the availability of such relief, caused an impermissible retroactive effect. Id. Thus, section 304(b) of IIRIRA could not be applied retroactively in such cases. Id.; see also 8 C.F.R. §§ 1003.44, 1212.3, 1240.1.

ANALYSIS AND FINDINGS

At the outset, the Court finds that Respondent is statutorily eligible to seek relief under former Section 212 (c) of the Act, since his conviction was rendered prior to April 1, 1997. Therefore, this case centers on the discretionary balance of factors within the framework of Matter of Marin, 16 I. & N. Dec. 581, 584-585 (BIA 1978).

Respondent bears the burden of proof to demonstrate that his application warrants a favorable exercise of discretion. Matter of Marin, 16 I. & N. Dec. at 584-585. Under the law, each case must be judged on its own merits and both adverse and positive factors should be considered to determine whether or not it would be in the best interests of the United States to grant Respondent the relief he seeks. *Id.*; Matter of Edwards, 20 I. & N. Dec. 191, 196 (BIA 1990).

The severity of adverse factors in a particular case may require that the alien to introduce offsetting favorable evidence involving "unusual" or "outstanding" equities. Matter of Marin, 16 I. & N. Dec. at 585-586; see also Matter of Edwards, 20 I. & N. Dec. 191, 196 (BIA 1990); Matter of Buscemi, 19 I. & N. Dec. 628, 633 (BIA 1988) (holding that whether an applicant is required to show "unusual" or "outstanding" equities depends on the gravity of the offense). An alien who demonstrates unusual or outstanding equities merely satisfies the threshold test for having a favorable exercise of discretion considered; such demonstration does not compel that discretion be favorably exercised. Matter of Buscemi, 19 I. & N. Dec. at 634.

The Individual Hearing on this matter began on June 8, 2016. Due to time constraints, testimony was continued and completed on July 6, 2016. A summary of the testimony is set forth below:

Respondent testified on his own behalf. He stated that he came to the United States in 1977 and has lived here ever since. He has been married to his present wife since 1986, and has worked as a truck driver since 1988.

Respondent stated that although he and his wife met at the workplace, she has not worked for the past six years due health problems. According to Respondent, his wife has been diagnosed with lupus (an auto-immune disorder). He stated that she has "good days and bad days". She also suffers from fatigue, sometimes has difficulty walking, and that he helps her with household duties.

Respondent testified that his financial support of his wife was "the main thing". He is his wife's sole financial support, and states that since he has been incarcerated his wife has been selling family properties to make ends meet. Respondent testified that his wife has been required to cash in life insurance policies for her and her son, and has also lost her health insurance. He also stated that the family is in danger of losing the family home and vehicles.

Respondent stated that he and his wife have two adult children together, and he also has a stepdaughter.[8] He stated that he had one previous marriage, and that marriage ended when a child from that marriage died shortly after birth.

Respondent admitted that he had been charged with one count of robbery in 1986. He testified that he kicked down a door and entered a building where he thought a man he believed was having an affair with his wife was located. He was given one year probation after pleading guilty to Burglary of a Habitation in 1989. See Exhibit 8, page 3.

[8] The stepdaughter is the victim in the Indecency with a Child – Contact conviction.

Respondent testified about the 1995 sexual abuse of his then 13 or 14 year old stepdaughter. He stated that he had finished work the day before and stayed out with coworkers afterwards, not arriving home until 1:00 or so the following morning. He was awakened a few hours later to take his wife to work.

When he returned to his home, he found his stepdaughter asleep on the carpet. He lay behind her on the floor, touching her breasts and vaginal area for "one minute maximum". Respondent stated that he did sexually penetrate his stepdaughter, and that no further contact occurred, expressly denying that he placed her hand on his penis.[9] When his stepdaughter started waking up as a result of his contact with her private areas, he immediately ran away, "because he knew he was in trouble". He further testified that there had no prior or subsequent instances of sexual contact with his stepdaughter.

Respondent testified that he eventually turned himself in for the offense and obtained an attorney. He ultimately pled guilty to Indecency with a Child by Contact so that he would not get a "conviction", which the Court took to mean jail time for his offense. Respondent was sentenced to ten years deferred adjudication, and was required to report monthly and attend counseling. He was also barred from any contact with the victim, which required him to live elsewhere for ten years. He was also required to have supervised visits with his children for ten years. His mother and wife were required to be present for any interactions with his children.

Respondent testified that through counseling, he learned about the effects of his sexual abuse. He learned that he caused pain for his family, and stated that the effect on his stepdaughter was "very terrible". He does not believe he will re-offend, because he has learned that his behavior needs boundaries and controls. He also wants to make amends with his family for the harm he has caused.

On cross examination, Respondent admitted that in addition to his other convictions, he had tried to improperly obtain a United States passport and made false claims to U.S. citizenship on at least two occasions. In 1985, Respondent attempted to obtain a United States passport in the by using the birth certificate of a U.S. citizen[10] without permission.[11] In support of that

[9] This testimony is at variance with the written statement of his stepdaughter, who indicated that Respondent did, in fact, placed her hand on his penis. See Exhibit 7, Tab I, page 43.

[10] Exhibit 8, page 13.

[11] [Exhibit 8, page 11]. The birth certificate belonged to the father of Respondent's stepdaughter. Respondent's wife made a statement that she believed Respondent had found her former husband's birth certificate by going through her papers. [Exhibit 8, pages 14-15].

application, he provided an "Affidavit of Identifying Witness" executed by Grace Morales, who turned out to be Respondent's mother.[12]

Respondent also attempted to claim United States citizenship at the Port of Entry in Del Rio, TX on two separate occasions on April 22, 1986 and November 30, 1989. According to the record, Respondent declared to the primary officer on both instances that he was a U.S citizen at the Port of Entry. However, under secondary inspection, Respondent admitted that he was, in fact, not a U.S. citizen.[13]

During cross-examination, Respondent admitted to the attempt to fraudulently obtain a U.S. passport. He stated that he did so because he had previously told his wife that he was a citizen when they met, and that be believed she would reject him if she found out the truth about his immigration status.

Respondent testified that his wife "may have told others" the he may have abused other children. He believed that she learned potential "signals" of possible abusive behavior during chaperone training, and "may" have reported those "signals" to others.[14]

On redirect examination, Respondent finally admitted that he had made a false claim to U.S. citizenship at the border Port of Entry in 1986. He also stated he "didn't remember" making the same claim in 1989.

The Court also heard testimony from Dr. Shari Julian, PhD, who evaluated Respondent as part of his present application for relief. Dr. Julian's report and *curriculum vitae* are included in the record at Exhibit 7A, Tabs A and B. Dr. Julian was proffered by Respondent and accepted by the Court to provide expert testimony on the issues of analysis of sex offenders and their recidivism/rehabilitation.

Dr. Julian testified she spoke with Respondent for three to four hours. He related the history of the sexual abuse of his step-daughter that was generally compatible with his testimony set forth above. She expressed her opinion that based on her analysis, Respondent was not a

[12] See Exhibit 8, page 12. In his testimony, Respondent denied that anyone had helped him with the attempted passport fraud. When confronted with the documentation, however, Respondent admitted that Grace Morales was his mother.

[13] Exhibit 8, page 16. Notwithstanding the sworn affidavit Respondent made regarding his verbal claim to U.S. citizenship in 1986, he testified on three separate occasions during cross-examination that he never told anyone at the border, other than his wife after he was detained, that he had falsely claimed U.S. citizenship in 1989 [Exhibit 10, page 10].

[14] Respondent's wife was questioned on this point during her testimony by DHS counsel.

pedophile or a hebophile.[15] She concluded that Respondent had a dissociative "fugue state" where he" went out of his head" during the sexual attack on his stepdaughter.

She testified that many pedophiles and hebophiles exhibit behavior that allows them to gravitate towards children, such as being involved in youth-based activities that would allow them to groom children for future sexual abuse. According to Dr. Julian, Respondent did not display any of those tendencies. She believes that Respondent's sexual abuse of his step-daughter was a onetime event that would not happen again. She also stated that the victim herself has no fear of a repeat of the 1995 sexual abuse.[16]

Dr. Julian testified that Respondent is "riven with guilt" over his sexual abuse, to the point of never referring to his stepdaughter by name, instead calling her "my victim." She also testified that she personally knows the counselor that treated Respondent during his probation, and that she believes that counselor's methods are sound, valid and in this case successful.

Dr. Julian also gave a possible explanation for Respondent's sexual abuse of his stepdaughter. According to her, respondent told her of an incident where he had his own first sexual experience, which consisted of having sex with a female in a room with a group of others cheering him on. In addition, she stated her belief that Respondent was greatly affected by the civil war that occurred in Guatemala during his childhood, and she characterized Respondent as a "child of the streets" in Guatemala.

Dr. Julian summed her testimony by opining that Respondent was guilt-ridden by his actions, that he does not have sexual attraction to children or adolescents and that because of the passage of time since the 1995 sexual abuse, there is little likelihood that Respondent with reoffend with another victim.

The Court also took testimony from Respondent's wife, Dianne Osorio. Mrs. Osorio is a U.S. citizen, and stated that she has been married to Respondent for 33 years. She testified that she has not worked for six years because of various medical problems, including a long-term battle with lupus, asthma, diverticulitis[17] and high blood pressure.

She testified that she relies on her husband for financial support, and that since he has been incarcerated, she has been forced to sell some of her jewelry and rely on other family members for financial assistance. She testifies that for these reasons, she would travel with her

[15] A pedophile, according to Dr. Julian, is attracted to children, while a hebophile is sexually attracted to early adolescents or pubescent children.
[16] Respondent's stepdaughter is now in her mid-30s.
[17] Diverticulitis is an abdominal disorder.

husband if he were removed to Guatemala, even though she is not sure of the medical care in that country.

She testified that she never saw any bad behavior from her husband, and characterized him as an "easygoing" person who "tries to get along with others." She also testified that her husband treats her well, and takes care of her when she is ill.

On cross-examination, Mrs. Osorio stated that she has medical appointments on both a regular and on an "as needed" basis due to her medical conditions. She also testified that she was aware of her husband' various attempts to claim U.S. citizenship, as well as the incident where he kicked down a door. She further stated that her daughter told her about Respondent sexually abusing her only after she told her biological father about the attack.

The Court also received testimony from Respondent's son Carlos Osorio, Jr. Mr. Osorio is a U.S. citizen. He testified that he has his own medical problems, which include psoriatic arthritis, which causes joint inflammation and also suffers from psoriasis, a non-contagious skin condition that causes lesions to appear when the condition is active.[18] Mr. Osorio testified that the medication he takes for this condition also causes liver problems.

The witness stated that he formerly worked as a general manager for a fast food provider, but took an extended leave of absence due to his medical issues. He also stated that while he was recovering and before his father was incarcerated, Respondent provided financial support to him, and helped him with his medical issues. The witness now works as a forklift operator. He also testified that he has tried to get Medicaid to help with his medical expenses, but has been turned down due to exceeding the program's income requirements.

Mr. Osorio testified that he would be lonely if his parents departed to Guatemala. He also stated that Respondent and his stepdaughter communicate on a regular basis.

SUSTAINING BURDEN AND CREDIBILITY

The provisions of the "REAL ID Act of 2005" apply to the respondent's application as it was filed on or after May 11, 2005. Section 240(c)(4)(B) and (C) of the Act state as follows:

(B) SUSTAINING BURDEN- The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or

[18] At the request of DHS counsel, he witness raised his shirt, showing a significant number of large lesions on his torso.

protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) CREDIBILITY DETERMINATION- Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Here, the Court makes the finding that Respondent's testimony was not credible. The record shows that Respondent made two and probably three false claims to United States citizenship. Although such claims did not bar the Respondent's application for relief under former Section 212(c) of the Act, because that bar did not exist prior to the 1996 IIRIRA amendments, the Court can consider Respondent's actions under the totality of the circumstances for a credibility finding. Respondent's explanation that he "couldn't remember" one of his false claims to citizenship rings hollow to the Court, especially in light of the lengths he went to falsely claim citizenship on two other occasions.

In addition, the Court finds that there was a significant variance between Respondent's testimony and other documents in the record regarding the exact nature of the sexual abuse of his stepdaughter. Respondent denied that he forced his stepdaughter to touch his penis, while the written statement of the stepdaughter stated the opposite. This discrepancy, in this Court's analysis, is not a small one, and is indicative of Respondent's attempt to minimize his misconduct.

The Court does, however, find the testimony of Respondent's other witnesses credible.

Based on the adverse credibility finding, the Court denies Respondent's application for relief.

In the alternative, the Court denies Respondent's application on discretionary grounds. In a case arising under former Section 212(c) of the Act, the Court is required to balance the positive and negative equities in an applicant's record to determine whether or not it is in the best interest of the United States to allow Respondent to remain in this country.

In the present case, Respondent has shown he has a number of positive equities. Respondent has significant family ties in the United States, and is a long-time lawful permanent resident of this country. The record indicates that there would be hardship to Respondent's family if he is returned to Guatemala, especially because his wife testified that she has significant medical issues, and because she indicated she would return to Guatemala with respondent is he was ordered there. However, there is no evidence in the record to suggest that Respondent's wife would not be able to get medical care in Guatemala for her various issues. The Court also acknowledges the hardship to respondent's adult son, who also has medical issues, and would miss his parents if they were not in the United States.

The Court also gives full credit to the testimony of record that Respondent has a significant employment history, and testified that he paid his taxes regularly up to approximately five years ago. Respondent also has property ties in this country, and there is also evidence that Respondent has some value to the community through his church attendance, as expressed by his son's testimony.

The Court, however, takes issue with the expert testimony of Dr. Julian on some points. While she opines that Respondent has successfully completed counseling and probation for the 1995 sexual abuse of his stepdaughter, the Court is deeply troubled by the testimony of Respondent, who, as noted above, attempted to minimize the scope of the sexual abuse he committed against his stepdaughter. The Court also notes that there is scant evidence relating to Respondent's good character. Finally, there is no evidence that the general country conditions in Guatemala would be a problem for Respondent.

On the other hand, there are significant negative equities in Respondent's record. In addition to the sexual abuse of his stepdaughter, there is also evidence of multiple false claims of U.S. citizenship, as well as a conviction for burglary of a habitation. While the Court notes that all of Respondent's criminal issues occurred in the past, the Court cannot over the scope and breadth of that criminal record.

The Court takes note of the fact that Respondent's sexual abuse of his stepdaughter is an aggravated felony under Sections 101(a)(43)(A) and 237(a)(2)(A)(iii) of the Act. Section 101(a)(43)(A) of the Act classes sexual abuse of a minor along with murder and rape as aggravated felonies. This Court gives weight to the fact that these crimes are listed first in the definitional section of aggravated felonies. When this country's Founding Fathers drafted the Constitution, they also attached a Bill of Rights, consisting of ten amendments. The first of those amendments listed several specific rights, including the right to freedom of speech and freedom of religion. These particular rights were listed first, according to contemporary accounts, because those rights were the most important to the drafters. Likewise, this Court finds that "sexual abuse of a minor" was likely placed in Section 101(a)(43)(A) because Congress thought that particular crime was just as serious as murder or rape. Indeed, myriad cases over the years have found that the laws of this country provide special protections to children, because they *require* special protections for social and biological reasons.

In sum, after weighing the favorable and adverse equities, and after giving full credit and consideration to all equities, both positive and negative, the Court makes the following alternative finding. The Court rules that Respondent has not demonstrated that he merits a favorable exercise of discretion on the present application. See Matter of Edwards, 20 I. & N. Dec. 191 (BIA 1990) (holding that the Immigration Judge and the BIA must conduct a "a

complete review of the favorable factors in his case"). Accordingly, the Court finds that the Respondent does not merit a waiver of removal pursuant to former Section 212(c) of the Act. The following Orders are issued:

ORDER

IT IS ORDERED that the Respondent's application for relief under former Section 212(c) of the Act is denied, for the reasons set forth above.

IT IS FURTHER ORDERED that Respondent, having previously found subject to removal by clear and convincing evidence, and, in the absence of any other viable applications for relief before this Court, be and is hereby ordered removed from the United States to Guatemala based on the charges contained in the NTA.

Dallas, Texas, this 15th day of July, 2016.

James A. Nugent
Immigration Judge