U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

KARA HARTZLER, ESQUIRE
P.O. Box 654
Florence, AZ 85232-0000

U.S. DHS-Trial Attorney Unit/EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: OLIVAS-MOTTA, MANUEL JESUS **A021-179-705**

Date of this notice: 8/9/2010

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:
Mullane, Hugh G.

Returned

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

OLIVAS-MOTTA, MANUEL JESUS
ICE, 1705 E. HANNA RD.
A#021-179-705
ELOY, AZ 85231

U.S. DHS-Trial Attorney Unit/EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: OLIVAS-MOTTA, MANUEL JESUS **A021-179-705**

Date of this notice: 8/9/2010

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:
Mullane, Hugh G.

File: A021 179 705 - Eloy, AZ Date: AUG 09 2010

In re: MANUEL JESUS OLIVAS-MOTTA a.k.a. Manuel Jesus Olivas-Notta

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kara Hartzler, Esquire

ON BEHALF OF DHS: Shawn McAllister
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, has timely appealed the Immigration Judge's April 8, 2010, decision denying cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1229b(A). The appeal will be dismissed.

We review the Immigration Judge's findings of fact, including as to the credibility of testimony, under the "clearly erroneous" standard, while we review *de novo* questions of law, discretion and judgement. *See Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); 8 C.F.R. § 1003.1(d)(3). Given that the respondent's application was filed after May 11, 2005, these proceedings are governed by the provisions of the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). Hence, the amendments made by the REAL ID Act to section 240(c) of the Act, 8 U.S.C. § 1229a(c), apply to this case.

Upon *de novo* review, we agree with the Immigration Judge that the respondent is removable as an alien convicted of two or more crimes involving moral turpitude (CIMT) under section 237(a)(2)(A)(ii) of the Act (I.J. at 5-6). The respondent does not dispute that his conviction for facilitation (unlawful possession of marijuana for sale), in violation of Arizona Revised Statute (ARS) § 13-1004, 3405(B)(6) (Exh. 4-C) is a CIMT (Exh. 4). However, he disagrees with the Immigration Judge's conclusion that his conviction for endangerment, in violation of ARS § 13-1201 (Exh. 4-D), was a CIMT (Respondent's Brief at 6-13).

In determining whether a particular offense involves moral turpitude, we apply the framework set forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). We first apply a categorical approach to determine whether there is a "realistic probability" that the alien's

statute of conviction would be applied to reach conduct that does not involve moral turpitude. *Id.* at 689-90. Where the categorical analysis does not resolve the issue, we proceed with a modified categorical inquiry and examine the alien's record of conviction including documents such as the charging document, judgment, jury instructions, signed guilty plea, and plea transcript for indication that the offense involved moral turpitude. *Id.* at 690. Finally, if the record of conviction is inconclusive, we may to the extent necessary and appropriate, consider evidence beyond the formal conviction documents to discern the nature of the underlying conviction. *Id.*

A crime is a CIMT if it involves reprehensible conduct committed with some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Silva-Trevino*, *supra* at 706 & n.5.

Under ARS § 13-1201, a person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury. We cannot conclude that the offense is categorically a crime involving moral turpitude strictly because of the reckless mens rea element. We had held that an offense involving a reckless state of mind will not be deemed a crime involving moral turpitude absent the presence of some aggravating factor such as the death of a person or the infliction of bodily injury. *See Matter of Fulaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976). However, ARS § 13-1201 does not have as an element such aggravating factors. Thus, the categorical approach does not answer the question of whether the offense is a crime involving moral turpitude, and the modified categorical approach is to be applied. *See Matter of Silva-Trevino, supra.*

The Immigration Judge went beyond the formal conviction documents to discern that the respondent's conviction was a CIMT. In determining that the respondent's conviction was for "reprehensible conduct," she reviewed the police report which showed that during a dispute, the respondent shot his wife in the abdomen with a hunting rifle (Exh. 5). We agree with the Immigration Judge that these findings are sufficient to show "reprehensible conduct." *See Matter of Silva-Trevino, supra*, at 706 & n.5. In going beyond the record of conviction, the Immigration Judge did not improperly consider the respondent's "conduct." *See Tokatly v. Ashcroft*, 371 F.3d 613, 622 (9th Cir. 2004). (Respondent's Brief at 11-13). Regardless of whether the shooting was an accident or not (Respondent's Brief at 12), the respondent was convicted under a statute that criminalizes reckless conduct, not mere accidental conduct. Thus, the mens rea of recklessness, when coupled with the "reprehensible conduct" of the respondent's wife being shot with a rifle during an argument is sufficient to establish the morally turpitudinous nature of the respondent's offense, despite the absence of a specific intent on the respondent's part to harm his wife. Accordingly, we agree with the Immigration Judge that the respondent is removable as an alien who has committed two crimes involving moral turpitude.

We also agree with the Immigration Judge's decision to deny the respondent's application for cancellation of removal under section 240A(a) of the Act (I.J. at 7-17). The respondent contends that the Immigration Judge erred in not granting the respondent discretionary relief (Respondent's Brief at 14-15; I.J. at 9-17). The Immigration Judge correctly set forth the legal standards for conducting a discretionary evaluation, and thoroughly and adequately discussed and balanced the positive and

negative factors in the respondent's situation. *See Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (stating that the general standards developed in *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978), for the exercise of discretion under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), which was the predecessor provision to section 240A(a) of the Act, are applicable to the exercise of discretion under section 240A(a) of the Act). Reviewing the Immigration Judge's discretionary denial *de novo*, we find no basis to reverse the Immigration Judge's determination that the respondent does not merit the relief of cancellation of removal in the exercise of discretion. *See id.*; *Matter of Sotelo*, 23 I&N Dec. 201 (BIA 2001).

Among the factors deemed adverse to an alien are the nature and underlying circumstances of the removability ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, and a history of employment. Additional favorable factors include the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives). *Matter of C-V-T-, supra*, at 12, *citing Matter of Marin, supra.*

There are significant negative factors that militate against a favorable exercise of discretion in the respondent's case. Specifically, the respondent was convicted in August 2003 for facilitation (unlawful possession of marijuana), for which he received 3 years probation, and in November 2007 for endangerment, for which he received a jail sentence of 2 years. *See* Exhs. 4C and 4D.

A respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. *See Matter of Marin, supra*, at 588; *see also Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). However, applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990). We have held that a showing of rehabilitation is not an absolute prerequisite in every case involving an alien with a criminal record. *Matter of C-V-T-, supra*, at 12. However, the respondent's criminal record is very serious. Regarding the facilitation conviction, as the Immigration Judge alluded to, the Attorney General has stated that few crimes are more exploitative than drug trafficking (I.J. at 14). *See Matter of Y-L-*, 23 I&N Dec. 27-, 275-76 (A.G. 2002). The circumstances of the crime are that the respondent allowed a friend to store over 200 pounds of marijuana at the house he shared with his wife and two small children (Tr. at 73-74; 83-87). The respondent's endangerment conviction is also troubling in that the facts show that his wife was shot in the abdomen during the course of an argument, and the respondent kept a loaded rifle in a house where his two small children stayed. In light of the seriousness of the respondent's criminal record, rehabilitation is an important factor in this case. However, the respondent did not take any rehabilitation courses during his 2 years in prison (I.J. at 13; Tr. at 93).

As the Immigration Judge determined, the respondent has substantial equities in this country, including residence in the United States since he was 10 days old (I.J. at 9; Exh. 2). The respondent also has family ties to lawful permanent residents and United States citizens, including his wife, two children, father, and three sisters (I.J. at 9-10). We have no reason to doubt that the respondent's removal to Mexico would cause him very substantial personal hardship, and his relatives in the United States would also suffer hardship, both emotional and economic, in connection with his removal. The respondent has a reasonably solid employment history considering his criminal record, does not own property, has not served in the Armed Forces, and has not been a person of particular value to his community.

In balancing the various factors in the respondent's case, we take note of his substantial favorable equities. However, the respondent's criminal record is recent and very serious. The Immigration Judge weighed the positive and negative factors in this case, but correctly determined that the negative factors outweighed the positive factors.

Accordingly, the following order shall be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Eloy, Arizona

File A 21 179 705 Date: April 8, 2010

In the Matter of

MANUEL JESUS OLIVAS-MOTTA) IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act - convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct

APPLICATION: Cancellation of Removal for Lawful Permanent Resident under Section 240A(a) of the Act, Voluntary Departure

2010 MAY 27 PM 3:08

APPEARANCES:

ON BEHALF OF RESPONDENT: Elizabeth Juarez, Esquire

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY: Shawn McAllister, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 33-year-old married male, native and citizen of Mexico. The United States Department of Homeland Security 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 with the Immigration Court on April 6, 2009. See Exhibit 1.

Respondent through Counsel admitted the factual allegations contained in the charging document. He however denied the charge referenced above. Respondent designated Mexico as the country of removal should that become necessary.

On June 2, 2009, Respondent filed an application for cancellation of removal pursuant to Section 240A(a) of the Act. See Exhibit 2. On October 26, 2009, Respondent motioned to terminate removal proceedings. See Exhibit 6. The Department of Homeland Security's opposition to the Respondent's motion to terminate is contained in Exhibit 7.

The Department of Homeland Security submitted authenticated documentation to establish the alleged convictions and the charge, contained in Exhibit #4. The Department of Homeland Security has the burden to prove by clear and convincing evidence that the Respondent is removable as charged. No decision on deportability shall be valid unless it is based upon reasonable substantial and probative evidence. Based upon the Court's review of the conviction documents, the applicable statute and utilizing the framework promulgated by the Attorney General in Silva-Trevino, citations omitted, in analyzing the two convictions this Court denied the Respondent's motion to terminate and sustained the single charge of removability, finding that the Department of Homeland Security had met its burden of clear and

convincing evidence.

The documents submitted by the Department of Homeland Security in Exhibit #4 establish that on August 11, 2003, Respondent was convicted in the Superior Court of Arizona for the offense of facilitation, unlawful possession of marijuana for sale, in violation of Arizona Revised Statute Section 13-1004, 3405(B). The documents also establish that Respondent, on November 26, 2007, was also convicted of the offense of endangerment, in violation of Arizona Revised Statute Section 13-201.

To determine whether Respondent's convictions qualify as crimes involving moral turpitude, this Court follows the Attorney General's recent framework set forth in Matter of Silva-Trevino, citation omitted. The Attorney General in that case promulgated the following definition of a crime involving moral turpitude: "to qualify as a crime involving moral turpitude, the crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." The Attorney General made it clear that this general definition of moral turpitude sought to encompass and describe existing Board precedent holding us to various species of fraud and corruption as well as conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.

The scienter requirement is met by conduct that is

intentional, willful, or reckless, where reckless requires an actual awareness of the risk created by the criminal violator's actions. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that at a Court's deference to the decisions of the Board of Immigration Appeals interpreting whether a particular offense qualifies as a crime involving moral turpitude under the Immigration Laws. See Marmolejo-Campo v. Holder, 558 F.3d 903 (9th Cir. 2009).

Utilizing the Silva-Trevino approach to determine the nature of the offense, first, a categorical approach must be employed under which the criminal statute at issue is examined to ascertain whether moral turpitude is intrinsic to all offenses that have a realistic probability of being prosecuted under that statute. In conducting that analysis, the Immigration Judge is to determine whether there's a realistic probability that the state or federal criminal statute pursuant to which Respondent was convicted would be applied to reach conduct that does not involve moral turpitude. The Court must determine if at the time of the alien's removal proceeding, any actual case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case, including the Respondent's case, the Immigration Judge can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.

Second, if the issue cannot be resolved under the categorical approach, a modified categorical approach is to be undertaken, which requires inspection of specified documents comprising of the alien's record of conviction to discern the nature of the underlying conviction. Finally, if the record of conviction is inconclusive, the Attorney General has held that, because moral turpitude is not an element of the crime, evidence beyond the record of conviction may be considered in evaluating whether an alien's offense constitutes a crime involving moral turpitude. The scope of such review is not subject to the evidentiary limitations of Taylor v. United States or Shepherd v. United States. The Attorney General makes clear that the goal of the modified categorical inquiry is to discern the nature of the underlying conviction where a mere examination of the statute itself does not yield the necessary information. It is not an occasion to re-litigate facts or to present any and all evidence bearing on an alien's conduct lead into the conviction.

This Court found that the offense of facilitation contained an essential element, some degree of voluntary action towards the completion of the crime constituting the underlying offense. In Respondent's case, the underlying offense was possession for sale of marijuana. Arguably, the same analysis would apply as in a solicitation and unlawful possession of marijuana for sale, which the Ninth Circuit Court of Appeals has found to be a morally turpitudinous offense relating to the sale

of marijuana. See Barragan-Lopez v. Mukasey, 508 F.3d 899, 903-04 (9th Cir. 2007). Based upon the above, this Court therefore found that Respondent's offense of facilitation, unlawful possession of marijuana for sale is a crime involving moral turpitude.

Respondent's conviction for endangerment in violation of Arizona Revised Statute Section 1201, reads: a person commits endangerment by recklessly endangering another person with the substantial risk of imminent death or physical injury. Endangerment has a substantial risk of imminent death or with a substantial risk of imminent death is designated as a Class 6 felony under which Respondent was convicted. The scienter element of reckless is evident in the statutory language. Regarding whether Respondent's offense can be classified as a reprehensible conduct, the Court found that under the categorical approach, moral turpitude is not intrinsic to all offenses that have a realistic probability of being prosecuted under the statute. Under the modified categorical approach, the Court found that an inspection of the record of conviction contained in Exhibit 4 also does not or did not resolve the nature of the underlying conviction. And therefore this Court found that it must consider evidence beyond the record of conviction. Under the Third Step as permitted under Silva-Trevino, the Court considered the police report contained in Exhibit #5. Those documents revealed that during a dispute, Respondent shot his wife in the abdomen with a

hunting rifle. Based upon the Court's review of the additional documents, this Court found that Respondent's conduct was reprehensible and therefore the offense of endangerment constituted a crime involving moral turpitude and thereby sustained the above referenced charge.

STATEMENT OF THE LAW

To be eligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act, an alien must demonstrate that he has been lawfully admitted with permanent residence for not less than five years, has resided in the United States continuously for seven yeas after having been admitted in any status, and has not been convicted of an aggravated felony.

In addition to satisfying these three statutory eligibility requirements, an applicant for relief under Section 240A(a) of the Act must establish that he warrants such relief as a matter of discretion. The general standards developed in Matter of Marin, 16 I&N Dec. 581 (BIA 1978) for the exercise of discretion under 212(c) of the Act are applicable to the exercise of discretion under Section 240A(a). See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). An Immigration Judge, upon review of the record as a whole, must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of relief appears in the best interest of this country. The applicant for cancellation, however, need not first

meet the threshold test of showing unusual or outstanding equities. See Matter of Sotelo, 23 I&N Dec. 201 (BIA 2001).

Favorable considerations include such factors as family ties within the United States, residence of long duration in this country, particularly when the inception of residence occurred at a young age, evidence of hardship to the Respondent and his family if removal occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a Respondent's good character.

Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of removal that are at issue, the presence of additional significant violations of this country's Immigration Laws, the existence of a criminal record and if so its nature, recency, and seriousness, and the presence of other evidence indicative of a Respondent's bad character or undesirability as a permanent resident of this country. With respect to the issue of rehabilitation, a Respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. However, applications involving convicted aliens must be evaluated on a case by case basis, with rehabilitation a factor to be considered in the exercise of discretion.

FINDINGS AND ANALYSIS

The Respondent has been a lawful permanent resident for more than five years, and he also has resided in the United States continuously for seven years after having been admitted in any status. Although the Respondent has been convicted, his convictions are not for an aggravated felony. The issue in this case therefore is the discretionary balancing of factors within the framework of Matter of C-V-T-.

Prior to the commencement of the Merits Hearing, the Department of Homeland Security informed the Court that all biometric checks had been completed and that a decision could be rendered in this matter. Also, 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 is correct, that it was all true and correct to the best of his knowledge.

In rendering a decision in this matter, the Court has taken into consideration the documentary evidence contained as part of the record marked and admitted from Exhibits 1 through 9. In addition to the documentary evidence, the Court has also considered the testimony of the Respondent, his father, and his sister.

Respondent, having entered the United States when he was 10 days old, as an immigrant, has established longevity in this country. He also has extensive family ties to the United States

consisting of, but not limited to, his United States citizen wife of three-and-a-half years, two United States citizen children, his lawful permanent resident father and three sisters who are all legally present in this country. Although Respondent has family in Mexico, he stated that he does not have any contact with them. Respondent attended school, up to the ninth grade, in the United States. He has worked full-time at Diamond Produce, loading trucks and taking inventory.

Respondent stated that if he is removed from the United States, he has decided that his children would remain in the United States as he would be unable to support them in Mexico. He's also concerned as to how it would affect his father. Prior to his detention, Respondent stated that he saw his father daily and he also assisted his father financially and escorted him to his doctor visits. Respondent testified as to his father's medical condition. According to the Respondent, in addition to the documents contained in Exhibit 8, Respondent's father suffers from lung problems, arthritis, and he has problems with his spinal cord, ailments that he has suffered for quite a while. Respondent described his relationship with his wife as a good one. He testified that although he did not get married until 2006, he had been in a long-term relationship with her prior to their union. Respondent stated that if he were to return to Mexico, he would also have difficulty adjusting to life in that country, as he is unfamiliar with that country. He believes that his detention has

been difficult for his family, especially his son who has some learning disability and has developed a rebellious trait. He believes the family would also suffer financially, as although his wife does hold full-time employment, she's experiencing financial difficulty.

Respondent stated that he does not have any problems with alcohol, has never been arrested for driving under the influence, and has never been affiliated with gangs. Respondent admitted to prior drug use in 2000, and his participation in drug education classes in 2003 which he completed. Respondent stated that he did not take drug classes while in prison, and that he last used drugs on New Year's Day in 2007.

Respondent testified in detail regarding his two convictions. He admitted to being convicted in 2003 for the offense of facilitation, unlawful possession for sale of marijuana. According to the Respondent, a friend of his was experiencing marital difficulties which caused the friend to temporarily reside at the Respondent's home for approximately two to three months. According to the Respondent, the friend asked him to store some cars in Respondent's [illegible] on Respondent's property, a request to which the Respondent consented. Approximately one month after the friend moved into Respondent's residence, Respondent learned that the friend was storing marijuana in the home. Two months after the friend had moved in with the Respondent, Respondent's wife learned of the marijuana

being stored in the home. And according to the Respondent, the wife disapproved of the conduct. The Respondent stated that he then asked his friend to cease the storage of the drugs in his home, but that the friend refused to do so. In order to get the Respondent to remain silent about the drug activity, the Respondent stated that the friend gave him $500 which the Respondent accepted. The storage of the marijuana in Respondent's home continued until Respondent was arrested. A total of approximately 221.3 pounds of marijuana was found in the front room of Respondent's garage. Respondent pled guilty to the offense. According to the Respondent, the offense was subsequently reduced to a misdemeanor and he completed his probation.

Respondent also testified about his 2007 conviction for endangerment. Respondent's wife was the victim of this offense. According to the Respondent, he had previously broken his wife's cellular phone due to jealousy. On this occasion, Respondent requested that his wife produce the bill for the cellular phone in order for him to pay the amount owed and also for him to verify the nature of her calls. According to the Respondent, his wife could not tell him the exact location of the bill, which caused him to become suspicious. Respondent then decided to go over to his father's residence and his wife did not want him to leave the house. Respondent testified that as he proceeded to get dressed, Respondent spotted his father's rifle in his closet and realized

that the rifle had print marks on it. Respondent then proceeded to clean the gun. He stated that as he was cleaning the gun, his wife grabbed the rifle and pointed it towards herself. He attempted to take the rifle away from her when it went off and shot his wife in her abdomen. Respondent stated that he never intended to harm her and he was unaware that the rifle that was in his closet was loaded.

Respondent acknowledged that the statement provided by his wife to the police shortly after the shooting occurred was different from his statement that the shooting was an accident. He believes that his wife's statements at that time were made while she was under the influence of the medications she had been given. Respondent's wife has submitted a letter on Respondent's behalf for these proceedings in which she stated that the 2007 conviction was an accident. Respondent was originally charged with attempted first degree murder and aggravated assault domestic violence. He pled guilty to an amended count of endangerment and was sentenced to two years in prison. During his two-year sentence, Respondent did not take any rehabilitation classes, although there may have been some domestic violence classes offered.

When this Court weighs all of Respondent's positive equities against his negative factors, this Court finds that very serious negative factors militate against the favorable exercise of discretion. As previously noted, Respondent is removable

because he was convicted of a morally turpitudinous offense relating to the sale of marijuana. The record further reflects that the Respondent's conduct was highly culpable, as he was aware of the storage of drugs in his home, wherein his wife and children resided within close proximity. Instead of immediately terminating the storage of the drugs in his home, Respondent accepted $500 from his friend who was storing the drugs at his home, in hopes that Respondent would no longer disapprove of his actions. Respondent did not ask the friend to leave his premises with the controlled substance, but accepted the payment and allowed the friend to remain in the home with the drugs. A total of approximately 221.3 pounds of marijuana was found stored in the front room of Respondent's garage. Respondent pled guilty to facilitation, which in essence means he pled to acting with knowledge that another person was committing or intended to commit an offense and that he knowingly provided the other person with means or opportunity for the commission of the offense, to wit: unlawful possession of marijuana for sale. As the Attorney General has repeatedly emphasized, there are few crimes more exploitative than drug trafficking and fewer yet that are less conducive to the good order and happiness of the American community. See Matter of [illegible], 23 I&N Dec. 270, 275 to 276 (AG 2002). Thus, an alien who has knowingly provided another person with means or opportunity to possess marijuana for sale, with knowledge that the person was committing or intended to commit

such an offense faces a difficult task of demonstrating that he merits discretionary relief. See Matter of ARREGUIN, 21 I&N Dec. 38 (BIA 1995). Indeed, under the circumstances of this case, this Court concludes that the Respondent's crime is so serious that it may only be overcome by evidence of truly compelling countervailing equities.

Respondent has adduced substantial equities as outlined above and they are not disputed. His application for relief is supported by letters from friends and family members, attesting to his good character and expressing the wish that he be permitted to re ain in the United States. In addition, the Respondent also has presented the testimony of his father and his sister. The Court at this time makes an express finding of credibility as it relates to the testimony provided by the Respondent and his family members. The Court does not find that -- does not doubt the overall veracity of the testimonies presented and finds all testimonies presented during these removal proceedings to have been credible. Respondent's application also reveals that he does not own substantial property in the United States and has not served in the Armed Forces or otherwise contributed to his community in any meaningful way.

The hardship that Respondent's family would suffer, specifically his father, wife and children, are in the form of emotional and financial hardship. As to the emotional hardship, it is understandable that due to the close bond between the

Respondent and his father, that his father would suffer emotionally if they were to be separated and Respondent were to be removed. The testimony of the Respondent's father evidenced his desire for Respondent to remain in the United States. A similar emotional bond is obvious between the Respondent, his wife, and children. In assessing the potential hardship that might arise by virtue of the Respondent's removal, this Court cannot discount that Respondent allowed someone to store hundreds of pounds of marijuana in his home, within close proximity to his wife and children. Such poor judgment on the Respondent's part is further exacerbated by the fact that he kept a loaded rifle in his closet, again within close proximity to his wife and children, that he claims he was unaware (sic) was loaded. The Court does not find that the emotional hardship that the family would suffer is outside of the norms of the hardship ordinarily associated with a departure from the United States under these circumstances. Regarding the financial hardship, Respondent's wife is gainfully employed on a full-time basis, and during Respondent's absence from the home, has been able to provide for the home. There is also no indication that Respondent's father is solely dependent upon the Respondent for financial support.

In balancing the various factors in the Respondent's case, this Court does take note of Respondent's favorable equities, which are indeed substantial. However, when this Court weighs those equities against the adverse (sic) factors of record,

especially his 2003 conviction for facilitating possession of marijuana for sale, this Court finds that a favorable exercise of discretion is not warranted. The illicit distribution of drugs has, and continues, to ruin countless lives in the American society on a daily basis. The Court does not find any exceptional mitigating circumstances present in the Respondent's case for this Court to rule otherwise. This Court sympathizes with the Respondent's family members who will undoubtedly experience hardship in connection with his removal. However, this Court must apply the law to the facts, regardless of how sympathetic the nature of the facts as presented are to this Court. In consideration of its duty, this Court must conclude that a favorable exercise of discretion would not be in the best interest of the United States in this instance.

For the above stated reasons, voluntary departure will also be denied in the Court's discretion. In sum, the Court sustains the factual allegations and charge of removability as found in the Notice to Appear, and denies his request for relief as a matter of discretion. The Respondent has not expressed any fear of persecution or torture if removed to Mexico, and has failed to establish his eligibility for any other form of relief. Accordingly, the following orders are entered.

ORDER

IT IS HEREBY ORDERED that the motion to terminate be denied.

IT IS HEREBY ORDERED that Respondent's application for cancellation of removal is denied.

IT IS HEREBY ORDERED that voluntary departure is denied.

IT IS HEREBY ORDERED that Respondent be removed from the United States to Mexico.

Received & Reviewed
by IJ
w/o benefit of ROP

LINDA I. SPENCER-WALTERS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before LINDA I. SPENCER-WALTERS, in the matter of:

MANUEL JESUS OLIVAS-MOTTA

A 21 179 705

Eloy, Arizona

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Keri Seeley, Transcriber

YORK STENOGRAPHIC SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

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