**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

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**Name: PETITDOR, LUSCA**

**A 024-667-417**

**Date of this notice: 4/24/2017**

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.
Pauley, Roger
Greer, Anne J.

Userteam: Docket

File: A024 667 417 – Miami, FL

Date: APR 24 2017

In re: LUSCA PETITDOR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Catherine A. Lee, Esquire

ON BEHALF OF DHS: Angel L. Fleming
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] -
Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

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

The respondent, a native and citizen of Haiti, appeals the Immigration Judge's October 29, 2015, decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded for further proceedings consistent with this decision.

The record reflects that, on September 19, 2012, the respondent pled no contest to aggravated child abuse pursuant to Florida Penal Code ("FLA. PEN. CODE") § 827.03 (2012), and was sentenced to 12 years of probation (I.J. at 1, 3; Exhs. 1, 2, 2B). Applying the modified categorical approach, the Immigration Judge found that the respondent's conviction constituted sexual abuse of a minor under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A), and, thus, an aggravated felony that rendered him ineligible for cancellation of removal (I.J. at 3-4). *See* section 240A(a)(3) of the Act (stating that an alien who has been convicted of an aggravated felony is not eligible for cancellation of removal). On appeal, the respondent asserts that the Immigration Judge erred in this determination (Respondent's Brief at 9-14).[1]

[1] The Immigration Judge assessed the respondent's competency because Counsel stated that the respondent had significant memory problems. The Immigration Judge found the respondent competent (I.J. at 2). Counsel, who has represented the respondent throughout these proceedings, has raised no issue in this regard, and we find no basis to disturb the Immigration Judge's competency determination. *See Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015) (holding that the Board reviews competency findings for clear error).

Section 101(a)(43)(A) of the Act defines an aggravated felony as "murder, rape, or sexual abuse of a minor." We have previously relied on the definition of "sexual abuse" in 18 U.S.C. § 3509(a)(8) (1994) for "useful guidance" on the generic definition of sexual abuse of a minor. *See Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 470-71 (BIA 2015) (citing *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995-96 (BIA 1999)). The Federal statute defines sexual abuse as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." *Id.*

The Supreme Court has approved the modified categorical approach, a "variant" of the categorical approach, to determine whether an offense under a divisible State statute constitutes an aggravated felony under the Act. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *see also Vassell v. U.S. Att'y Gen.*, 839 F. 3d 1352, 1356 (11th Cir. 2016) (employing the categorical approach to make an aggravated felony determination). Pursuant to the modified categorical approach, when a State statute is divisible, an Immigration Judge may review a limited class of documents to determine which alternative formed the basis of the alien's conviction. *See Descamps v. United States*, *supra*, at 2281. Nevertheless, this approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Descamps v. United States*, *supra*, at 2285; *see also Mathis v. United States*, 136 S. Ct. 2243, 2251-57 (2016).

Here, the Immigration Judge erred in her application of the modified categorical approach, as she incorrectly reviewed the conduct underlying the respondent's plea (I.J. at 3-4). Namely, she reviewed the respondent's charging document to find that the respondent engaged in sexual conduct with a person less than 12 years old (I.J. at 4; Exhs. 2, 2B). Further, the Immigration Judge found that the respondent was initially charged with sexual battery upon a child, but that this case ended in a hung jury (I.J. at 4; Tr. at 52-53; Exh. 2B). Based on these facts, the Immigration Judge concluded that the respondent engaged in conduct that matched the generic definition of sexual abuse of a minor (I.J. at 4). *See Matter of Esquivel-Quintana*, *supra*, at 470-71. Because the Immigration Judge's review extended beyond an identification of which alternative formed the basis of the respondent's conviction and to the facts of the case, her conclusion was erroneous. *See Mathis v. United States, supra*, at 2251-57; *Descamps v. United States*, *supra*, at 2281, 2285.

Upon our de novo review, we conclude that an offense under FLA. PEN. CODE § 827.03 is not an aggravated felony. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (stating that the Board may review questions of law de novo). When applying the categorical approach, we must presume that the conviction rested upon nothing more than the least of the acts criminalized. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013). Moreover, there must be "a realistic probability," not a "theoretical possibility," that the State "would apply its statute to conduct that falls outside the generic definition of a crime." *Id.*; *see also Vassell v. U.S. Att'y Gen.*, *supra*, at 1362 (applying the "realistic probability" test).

FLA. PEN. CODE § 827.03(2), which defined "aggravated child abuse" at the time of the respondent's offense, has three subsections, each of which provides an independent definition of the offense.[2] Namely, an individual can violate the statute by (a) committing aggravated battery on a child; (b) willfully torturing, maliciously punishing, or willfully and unlawfully caging a child; or (c) knowingly or willfully abusing a child and in so doing causing great bodily harm, permanent disability, or permanent disfigurement to the child. In order to establish the crime, the State must separately allege each subsection and then prove that the defendant violated the subsection's elements. *See Pethtel v. State*, 177 So.3d 631, 634 (Fla. Dist. Ct. App. 2015) (indicating that the jury is provided instructions as to only one subsection of the offense).

A review of Florida case law reveals that there is a "realistic probability" that the State would apply each of the three subsections of FLA. PEN. CODE § 827.03(2) to conduct that is not sexual in nature and, thus, falls outside the generic definition of sexual abuse of a minor. *See, e.g., Lukehart v. State*, 776 So.2d 906, 922 (Fla. 2000) (finding that the defendant violated FLA. PEN. CODE § 827.03(2)(a) by forcibly pushing a baby onto the floor); *Graham v. State*, 169 So.3d 123, 130 (Fla. Dist. Ct. App. 2015) (finding that the defendant violated FLA. PEN. CODE § 827.03(2)(b) by locking a child in a room and binding her to a bed with plastic cuffs); *Witt v. State*, 780 So.2d 946, 946-47 (Fla. Dist. Ct. App. 2001) (finding that the defendant violated FLA. PEN. CODE § 827.03(2)(c) by punching a child in the head, resulting in the child's death). FLA. PEN. CODE § 827.03(2) therefore "sweeps more broadly" than the generic definition of sexual abuse of a minor. *Descamps v. United States*, *supra*, at 2283. As such, the statute does not define an aggravated felony under section 101(a)(43)(A) of the Act.

Based on the foregoing, we conclude that the respondent's conviction for aggravated child abuse pursuant to FLA. PEN. CODE § 827.03 does not define an aggravated felony under section 101(a)(43)(A) of the Act. We therefore reverse the Immigration Judge's determination that the respondent's conviction bars his eligibility for cancellation of removal under section 240A(a) of the Act and remand for further proceedings consistent with the foregoing decision. Accordingly, the following order shall be entered.

ORDER: The appeal is sustained and the record of proceedings is remanded for further proceedings consistent with this decision.

FOR THE BOARD

[2] We note that the Immigration Judge incorrectly relied on FLA. PEN. CODE § 827.03(1), which, at the time of the respondent's offense, defined "child abuse" (I.J. at 3). Although the respondent's record of conviction does not indicate which section of the statute the respondent pled to, the fact that he pled to "aggravated child abuse" indicates that FLA. PEN. CODE § 827.03(2) (as it existed at the time of the respondent's offense) is at issue (Exhs. 2, 2B).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF:

Lusca Petitdor
A# 024-667-417

IN REMOVAL PROCEEDINGS

Respondent
_____/

CHARGE(S): 237(a)(02)(E)(i) of the Immigration & Nationality Act, as amended, as an alien who at any time after entry has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

APPLICATIONS: 240A(a) Cancellation of Removal for Permanent Resident

On Behalf of the Respondent:
Catherine A. Lee, Esq.
633 N.E. 167th Street
Suite 503
N. Miami Beach, FL 33162

On Behalf of the DHS:
Olga Villa, Esq.
Assistant Chief Counsel, DHS
333 S. Miami Avenue, Ste. 200
Miami, FL 33130

## DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 63-year-old male, native and citizen of Haiti and lawful permanent resident of the United States. On September 19, 2012, the Department of Homeland Security ("Department") issued and personally served on the Respondent a Notice to Appear ("NTA") alleging that his conviction on September 19, 2012, for Aggravated Child Abuse made him removable under section 237(a)(1)(E)(i) of the Act. The NTA has been marked and admitted into the record of proceedings as Exhibit 1. Conviction records are in the record of proceedings as Exhibits 2A and 2B. The Respondent, through Counsel, admitted the allegations on the NTA. The Respondent's admissions and the conviction records support a finding that the Respondent is removable as charged. Haiti has been designated as the country of removal.

The Respondent seeks cancellation of removal for permanent residents pursuant to section 240A(a) of the Act as relief from removal. The application, Form EOIR-42A, is contained in the record as Exhibit 3. The Respondent submitted documentary evidence in support of his cancellation application which have been marked and admitted into the record as Exhibits 4, 5, 6 and 7. There is no other documentation in the record of proceedings. The Respondent testified on his own behalf, and he also presented the

testimony of several family members, specifically his daughter, Cherly Dervil, and his wife, Gertha Petitdor.

On the day of the Respondent's individual hearing, Counsel for the Respondent raised the Respondent's mental competency as a potential issue. Counsel for the Respondent stated that she was concerned with the Respondent's mental competency because she believed the Respondent had significant memory problems. However, Counsel for the Respondent did not submit any evidence documenting that the Respondent has any memory problems and further acknowledged that no mental health evaluation or neurological assessment had been prepared for the Respondent.

The Court carefully observed and listened to the Respondent throughout his removal hearing. The Court finds that the Respondent was rational and coherent and was able to understand the nature of the immigration proceedings instituted against him due to his criminal conviction. The Respondent was able to meaningfully participate in his case. He appropriately answered all questions asked of him and showed no signs of mental illness. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). The Respondent testified regarding many details which are corroborated by the documentary evidence in the record as well as the testimony of his two witnesses. For example, the Respondent offered clear testimony regarding his immigration status, his family members, employment history, his medical condition as well as the medical condition of his son, Ernest, and significantly, the circumstances of his arrest and the disposition. Therefore, the Court finds that the Respondent was competent to handle his hearing before the Court. The Court finds little, if any, evidence that the Respondent has any significant memory problems. Having concluded that the Respondent presented no issue as to mental competency, the Court now turns to the Respondent's claim for relief from removal.

## STATEMENT OF THE LAW UNDER §240A(a) OF THE ACT

Section 240A(a) of the Act provides that the Attorney General may cancel the removal in the case of an alien who is inadmissible or deportable from the United States if the alien has been an alien lawfully admitted for permanent residence for not less than 5 years, has resided in the United States continuously for 7 years after having been admitted in any status, and has not been convicted of any aggravated felony. The statutory language clearly indicates that it is within the discretion of the Attorney General to grant cancellation of removal to an alien who meets these three requirements.

In order to establish eligibility for relief under section 240A(a) of the Act, the applicant carries the burden of establishing that he merits a favorable exercise of discretion. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998); *see also Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990). In determining whether the respondent merits a favorable exercise of discretion, the Immigration Judge must weigh favorable and adverse factors to determine whether, on balance, the totality of the evidence demonstrates that the alien is entitled to such relief. *See Matter of Sotelo-Sotelo*, 23 I&N Dec. 201 (BIA 2001). In making such a determination, favorable discretionary factors would include, but are not limited to;

existence of family ties in the United States, residence of long duration in the United States, and evidence that the alien or the family would suffer a hardship if the respondent were deported. *See Matter of C-V-T-*, supra. In determining what negative factors exist in a case, the Immigration Judge must consider such things as the nature and underlying circumstances of the grounds of removability, the nature and seriousness of the criminal record, and the presence of other evidence indicative of the alien's bad character or undesirability as a lawful permanent resident. *Matter of C-V-T-, supra.*

As an alien who is removable under section 237(a)(2)(E)(i) of the Act, the Respondent must be removed unless he demonstrates that he "satisfies the applicable eligibility requirements" for some form of relief from removal. *See* Section 240(c)(4)(A)(i) of the Act. The only form of relief the respondent seeks is cancellation of removal for lawful permanent residents, a benefit that may be granted by the Attorney General only with respect to an alien who "has not been convicted of any aggravated felony." *See* Section 240A(a)(3) of the Act. When the evidence before the Court indicates that this (or any other) ground for mandatory denial of relief may apply, the applicant for relief bears the burden of proving by a preponderance of the evidence that the ground is inapplicable. 8 C.F.R. § 1240.8(d); *see generally Chen v. U.S. Atty. Gen.*, 513 F.3d 1255, 1257 (11th Cir. 2008) (discussing 8 C.F.R. § 1240.8(d) in the asylum and withholding of removal context).

## FINDINGS AND ANALYSIS

In order to establish his statutory eligibility for cancellation of removal under section 240A(a) of the Act, the Respondent must show that he has not been convicted of an aggravated felony. The burden is therefore on the Respondent to show that his conviction for aggravated child abuse does not constitute an aggravated felony conviction as defined in section 101(a)(43)(A) of the Act (sexual abuse of a minor). The Court finds that the Respondent has failed to meet his burden.

Although the Respondent in the instant matter plead No Contest to "aggravated child abuse," which is delineated in section 827.03 of the Florida Statutes, the documents comprising the record of conviction establish that this particular crime constituted both child abuse and the sexual abuse of a minor. Section 827.03(1) of the Florida Statutes, entitled "Abuse, aggravated abuse, and neglect of a child" provides that:

> (1) "Child abuse" means:
>
> (a) Intentional infliction of physical or mental injury upon a child;
>
> (b) An intentional act that could reasonably be expected to result in physical or mental injury to a child; or
>
> (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child...

Fla. Stat. Ann. §827.03(1). Application of a modified categorical approach is necessary, as the statute describes more than one type of conduct, some of which may, and some of which may not, constitute "sexual abuse of a minor." *See Jaggernauth v. U.S. Att'yGen.*, 432 F.3d 1346, 1353 (11th Cir. 2005)(citing *Taylor v. United States*, 495 F.3d 575 (1990).

The record reflects that the Respondent was initially charged with Sexual Battery Upon a Child. The charging document, or Information, which is part of the record of conviction, indicates that the Respondent on one or more occasions between January 1, 1990 and October 20, 1990 (although it appears to have been later amended to 1992), engaged in sexual conduct "by causing his penis to penetrate or unite with the vagina" of a person less than twelve (12) years of age. *See* Exhibit 2B. The amended Information in the record appears to have the initial charge of Sexual Battery Upon A Child crossed out and Aggravated Child Abuse written instead; the section of the Florida State violated changed from 794.011(2)(a) to 827.03, a 1st Degree felony; and initialed in two places on two separate dates (seemingly to amend the commission end date from 1990 to 1992 and to amend the charge).

The Respondent testified that his jury trial ended in a hung jury. He was then offered the plea to the aggravated child abuse charge, which he accepted because "his heart could not take it anymore." The Respondent did not offer any other factual basis for his plea. Based on the amended Information, the record supports a finding that the Respondent engaged in sexual conduct with a child under the age of twelve, criminal activity which clearly falls within definition of sexual abuse of a minor provided by the Board of Immigration Appeals in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). The Court additionally notes that the Disposition Order, in the area next to charges, states "Sex Battery" and further states that the Information was amended to Aggravated Child Abuse 827.03. According to the Disposition Order, the Respondent was ordered to undergo a Psycho Sexual Evaluation and follow up treatment, and he was to not have unsupervised contact with minors under the age of 18 years.

The Court finds that the Respondent's plea of no contest under §827.03(1) constitutes sexual abuse of a minor under section 101(a)(43)(A) of the Act. The amended Information establishes that the underlying abuse was "sexual" and the Respondent's crime falls within the scope of 101(a)(43)(A). *See DuFresne v. State*, 86 So.2d 272, 278-79 (Fla. 2002)(discussing meaning of "abuse" and linking 827.03 to any act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired; *see also United States v. Ramirez-Garcia*, 646 F.3d 778 (11th Cir. 2011)(discussing scope of 101(a)(43)(A)). Additionally, for a crime to constitute child abuse under Fla. Stat. Ann. §827.03(1), the victim must have been 18 years of age. *See* Fla. Stat. Ann. §827.01(2). Accordingly, the evidence in the record supports a finding that the Respondent has been convicted of a crime involving sexual abuse of a minor. The Court must therefore conclude that the Respondent is not eligible for cancellation of removal under section 240A(a) of the Act.

Accordingly, the following Order will be entered:

**IT IS HEREBY ORDERED** that Respondent's Application for Cancellation of Removal for Certain Permanent Residents pursuant to Section 240A(a) is **DENIED.**

**IT IS FURTHER ORDERED** that the Respondent shall be **REMOVED** from the United States to **HAITI** on the charge contained in the Notice to Appear.

**DATED** this 29th day of October, 2015.

Maria Lopez Enriquez
United States Immigration Judge

**APPEAL RIGHTS**: A notice of appeal must be filed with the Board of Immigration Appeals within 30 calendar days of the issuance date of this decision. If the final date for filing the notice of appeal occurs on a Saturday, Sunday, or legal holiday, the time period for filing will be extended to the next business day. If the time period expires and no appeal has been filed, this decision becomes final.

cc: Assistant Chief Counsel
Counsel for Respondent
Respondent
Mailed out 10/30/15 By: AA