



April 19, 2018

Board of Immigration Appeals- Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 20530

Re: REQUEST TO APPEAR AS AMICUS CURIAE
Matter of [REDACTED]
File No. A [REDACTED]

Dear Sir/Madam:

Pursuant to 8 C.F.R. § 1292.1(d) and Rule 2.10 of the Board of Immigration Appeals Practice Manual, Immigrant Defense Project ("IDP") hereby requests leave to submit the enclosed brief as *amicus curiae* in support of Respondent [REDACTED] in the above-captioned appeal. Respondent's counsel has consented to this request.

In the enclosed brief, proposed *amicus curiae* urge the Board to conclude that that lawful permanent residents charged with two CIMA removability are eligible for 212(c) relief when one of the predicate convictions dates before the repeal for the 212(c) relief and the other dates after the repeal. The BIA has failed to fulfill its duty to provide a clear and uniform interpretation of how to apply 212(c) relief when an individual faces two CIMA removability. *See* 8 C.F.R. §1003.1(d)(1); BIA Prac. Man. Ch.1 (E.O.I.R.) at §1.2(a), 1999 WL 33435426. Over the course of many years, the BIA has issued inconsistent unpublished decisions on this question, providing as many decisions affirming 212(c) eligibility as those denying it. This amounts to decision making by coin flip. *See Judulang v. Holder*, 565 U.S. 42, 55 (2011).

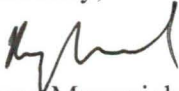
Proposed *amicus* urge the board to end the confusion surrounding 212(c)'s applicability to the two CIMA removability ground by issuing a precedential decision on this question. In addition, proposed *amicus* urge that the BIA resolve the question before it by supporting 212(c) eligibility for lawful permanent residents charged with two CIMA removability. Because the two CIMA removability ground has "two essential pillars", the removal of one of those pillars necessarily "topples the charge." *In re Judulang*, A034-461-941 (BIA Nov. 1, 2012). Many of the Board's past decisions, including all of its recent ones, have taken this position and proposed *amicus* urge the Board to adopt this interpretation in a precedential decision. *See e.g. In re Mercedes*, A093-023-368 (BIA July 14, 2008)(affirming the BIA's decision on motion to reconsider).

Proposed *amicus* is one of the nation's leading non-profit organizations with specialized expertise in the interrelationship of criminal and immigration law. IDP advises and trains criminal defense and immigration lawyers nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. Through a program of the New York State Office of Indigent Legal Services, IDP has been designated the Regional Immigration Assistance Center for New York City charged with advising public defenders about the rights of noncitizens in the state criminal process.

IDP respectfully believes that its considerable expertise representing and advocating for large classes of individuals within the criminal justice and immigration systems render it well-positioned to call the Board's attention to various legal, fairness and due process considerations that support publication of a rule on the application of § 212(c) relief to the two or more CIMA ground of removability.

For the aforementioned reasons, IDP respectfully requests leave of the BIA to file the enclosed brief of *amicus curiae* in this important matter.

Sincerely,



Ryan Muennich
Counsel for Proposed Amicus Curiae



Lee Wang
Counsel for Proposed Amicus Curiae

DETAINED

Lee Wang, Esq.
Ryan Muennich, Esq.
Immigrant Defense Project
40 West 39th Street, Fifth Floor
New York, NY 10018
Tel: (646) 760-0588

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of:

File No: A

In Removal Proceedings.

**BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT
IN SUPPORT OF RESPONDENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
STATEMENT OF INTEREST OF AMICI CURIAE.....	3
ISSUES PRESENTED FOR REVIEW.....	4
STANDARD OF REVIEW	4
SUMMARY OF ARGUMENT	4
ARGUMENT.....	5
I. The BIA’s inconsistent application of § 212(c) to the two CIMT deportability ground is arbitrary and capricious.	5
A. The BIA has issued an almost equal number of decisions in favor of § 212(c) eligibility as those against it.	5
B. The BIA’s failure to treat cases presenting an identical question of law in a uniform manner is arbitrary.	8
C. The BIA should resolve the uncertainty surrounding the application of § 212(c) to the two or more CIMT removability ground by publishing a precedential decision....	12
II. The agency has discretion to grant § 212(c) relief when respondents are charged with two CIMT deportability, and one conviction is a pre-repeal plea.	14
A. Each conviction constitutes one of “two essential pillars” in section 237(a)(2)(A)(ii), and the waiver of one CIMT necessarily defeats the removability charge.	15
B. The holding in <i>Matter of Balderas</i> addressed two CIMT deportability after a post-relief conviction, not § 212(c) eligibility in the first instance.....	16
C. The underlying effect of § 212(c) relief authorizes the Attorney General to waive enforcement of removability determinations, not specific removability grounds.	17
D. <i>Abdelghany</i> requires § 212(c) relief cover pre-repeal pleas that form the basis of two CIMT deportability.....	17
CONCLUSION	18
EXHIBIT A - Index of Unpublished BIA decisions.....	20
CERTIFICATE OF SERVICE	132

TABLE OF AUTHORITIES

Cases

<i>Billeke-Tolosa v. Ashcroft</i> , 385 F.3d 708 (6th Cir. 2004).....	8, 12
<i>Connally v. General Constr. Co.</i> , 269 U.S. 385 (1926).....	8
<i>Davila-Bardales v. INS</i> , 27 F.3d 1 (1st Cir. 1994)	9
<i>Di Pasquale v. Karnuth</i> , 158 F.3d 878 (2d. Cir. 1947).....	8
<i>Galvez-Vergara v. Gonzales</i> , 484 F.3d 798 (5th Cir. 2007)	10
<i>Henry v. INS</i> , 74 F.3d 1 (1st Cir. 1996)	9
<i>In re: Garcia</i> , A090-348-182 (BIA Aug 6, 2007) (unpublished)	14
<i>In re: Joel Judulang</i> , A034-461-941 (BIA Nov. 1, 2012) (unpublished).....	14
<i>In re: Ramon Mercedes</i> , A093-023-368 (BIA July 14, 2008) (unpublished).....	15
<i>In re: Romero</i> , A017-176-264 (BIA June 10, 2014) (unpublished)	14, 15, 16
<i>Indep. Petroleum Ass’n of Am. v. Babbitt</i> , 92 F.3d 1248 (D.C. Cir. 1996)	8
<i>Judulang v. Holder</i> , 565 U.S. 42 (2011).....	7, 8, 12, 16
<i>Kreis v. Sec’y of Air Force</i> , 406 F.3d 684 (D.C. Cir. 2005)	8
<i>Matter of Abdelghany</i> , 26 I&N Dec. 254 (BIA 2014)	5, 16, 17
<i>Matter of Balderas</i> , 20 I&N Dec. 389 (BIA 1991).....	6, 15, 16
<i>Mellouli v. Lynch</i> , 135 S. Ct. 1980 (2015).....	11
<i>Montano Cisneros v. U.S. Atty. Gen.</i> , 514 F.3d 1224 (11th Cir. 2008)	9
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)...	8
<i>Njuguna v. Ashcroft</i> , 374 F.3d 765 (9th Cir. 2004)	9
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010)	8, 11
<i>See In re: Joel Judulang</i> , A034-461-941 (BIA July 23, 2013) (unpublished)	14

Sessions v. Dimaya, 584 U. S. ____, No. 15-1498 (Apr. 18, 2018).....	8
<i>Zhang v. Gonzales</i> , 452 F.3d 167 (2d. Cir. 2006).....	9

Statutes

INA § 237(a)(2)(A)(ii).....	14
-----------------------------	----

Other Authorities

BIA Practice Manual, Chapter 1.2(a)	9, 11, 12
---	-----------

Regulations

8 C.F.R. § 1003.1(d)(3)(ii).....	3
8 C.F.R. § 1212.3(d)	15
8 C.F.R. § 212.3(b) (1991).....	15
8 C.F.R. §1003.1(d)(1).....	9, 11
8 C.F.R. §1003.1(g)	11

STATEMENT OF INTEREST OF AMICI CURIAE

Immigrant Defense Project (“IDP”) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. Through a program of the New York State Office of Indigent Legal Services, IDP has been designated the Regional Immigration Assistance Center for New York City charged with advising public defenders about the rights of noncitizens in the state criminal process. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights.

IDP has submitted *amicus curiae* briefs in many key cases before the U.S. Supreme Court and Courts of Appeals involving the interplay between criminal and immigration law and the rights of immigrants in the criminal legal and immigration systems. *See, e.g., Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

IDP submits this brief to apprise the BIA of important legal, due process and fairness considerations that support publication of a decision holding that lawful permanent residents charged with two CIMT removability are eligible for 212(c) relief when one of the predicate convictions dates after the repeal of § 212(c) relief.

ISSUES PRESENTED FOR REVIEW

1. Whether a grant of former § 212(c) relief allows the agency to waive execution of two CIMT deportability when there are pleas to one predicate conviction before repeal of § 212(c) and one predicate conviction after the repeal of § 212(c).

STANDARD OF REVIEW

The BIA reviews questions of law, including questions of statutory interpretation, *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

SUMMARY OF ARGUMENT

Congress has tasked the Board of Immigration Appeals with a solemn duty: to provide clear and uniform guidance on the interpretation and application of our nation's immigration laws and regulations. This duty is owed not only to Immigration Judges who are tasked with adjudicating thousands of cases a year, but also to the public. Indeed, for countless noncitizens who face the possibility of lifelong banishment from their families, the BIA's mandate to provide consistent interpretations of our immigration laws could not be more vital.

Here, the BIA has failed to fulfill its duty to provide a clear and uniform interpretation of how to apply 212(c) relief when an individual faces two CIMT removability and one of their predicate convictions dates before the repeal of 212(c) and one after. The Board's approach to this clear question of law has been nothing short of schizophrenic. In twenty-five unpublished cases, the BIA has issued virtually the same number of decisions finding 212(c) relief eligibility as not. The fate of lawful permanent residents like Mr. [REDACTED] has literally been left to a coin flip. The BIA can and should remedy its arbitrary decision-making by issuing a published decision.

The BIA need not look far to find a resolution to this question. Many of the BIA's own unpublished decisions, and all recent decisions, have correctly resolved this issue, finding that that the two CIMT convictions necessary to sustain deportability are "two essential pillars." The elimination of one of those pillars necessarily defeats the entire charge. These Board's decisions also correctly distinguish *Matter of Balderas* as inapposite to the question at hand since it addressed the prospective effect of 212(c) relief on individuals had already been granted such relief.

The current state of the law on how to apply 212(c) relief to 2 CIMT removability is simply untenable. The agency should fulfill its statutory mandate to provide clear and uniform guidance on this question by correctly finding that individuals like Mr. [REDACTED] remain eligible to seek 212(c) relief.

ARGUMENT

I. The BIA's inconsistent application of § 212(c) to the two CIMT deportability ground is arbitrary and capricious.

The consistent treatment of similarly situated individuals is essential to rational agency decision-making. Yet, when presented with an identical question of law, the BIA has acted arbitrarily, issuing almost as many unpublished decisions supporting § 212(c) eligibility as those against it. To extricate from this morass, the BIA must issue a published decision finally settling the agency on a reasoned course of action.

A. The BIA has issued an almost equal number of decisions in favor of § 212(c) eligibility as those against it.

Amicus sought to identify all BIA decisions addressing the question of whether an individual who is charged with two CIMT deportability under INA § 237(a)(2)(A)(ii) is eligible to apply for former § 212(c) relief when at least one of the predicate convictions dates before the

repeal of § 212(c) and one dates after the repeal of § 212(c). Through comprehensive searches of BIA decisions in the Lexis and Westlaw databases, as well as AILA's internal database, amicus has identified twenty-five unpublished decisions that date back to 2003.¹ It appears that these twenty-five unpublished decisions represent all BIA opinions on the question at hand. The attached chart, Exhibit A, identifies the twenty-five decisions found by *amicus* and details the outcome of each case. As the chart indicates, though all 25 decisions presented an identical question of law, the BIA's decisions are divided nearly fifty-fifty, with thirteen decisions finding against § 212(c) eligibility and twelve decisions finding in favor. See *Exhibit A*, Index of Unpublished BIA decisions.

In each of the twenty-five cases identified, the individual respondents presented the same legally relevant facts and sought appeal on the same pure question of law. Each respondent was charged with removability under § 237(a)(2)(A)(ii) for having been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Each respondent was a lawful permanent resident who had at least one predicate conviction that was entered before the repeal of § 212(c) and only one predicate conviction that was entered after the repeal. In each case, the respondent met the statutory requirements for § 212(c) relief of their pre-April 24, 1996 conviction(s) and sought relief from removability on this basis. See *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014) (identifying requirements for § 212(c) eligibility). In every case, there was no dispute as to whether the individual would otherwise qualify for § 212(c) relief. The BIA was thus presented with an identical question of law in all twenty-five cases: is an individual who is charged with two CIMT deportability under INA 237(a)(2)(A)(ii)

¹ Amicus was unable to locate any Board decisions issued before 2003 and was not able to identify a reason for the absence of decisions before that date.

eligible to apply for § 212(c) relief when one of the predicate convictions dates after the repeal of § 212(c)?

As the attached chart indicates, faced with the identical legal question, the BIA has issued nearly as many cases in the affirmative as in the negative. *See Exhibit A*. The difference in resolutions has largely hinged on a conflicting interpretation of another published BIA decision, *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991), which held that a conviction that had previously been the basis for a deportability charge may be alleged as one of the two crimes involving moral turpitude in a second proceeding, even though the first proceeding terminated by a grant of § 212(c) relief. In the cases that found respondents ineligible for § 212(c) relief, the decisions found that *Matter of Balderas* was controlling, while those finding respondents eligible for § 212(c) relief found that *Balderas* was inapposite. *Compare Exhibit A-10, In re Baptista*, A041-959-497 (BIA Oct. 3, 2005) with *Exhibit A-23, In re Judulang*, A 034-461-941 (BIA July 23, 2013)(affirming BIA’s judgment on motion to reconsider).

Notably, the BIA’s decisions appear to be trending toward affirming § 212(c) eligibility. Since 2007, the BIA has issued eight decisions in favor of § 212(c) eligibility and one against.² This over decade-long trend favoring § 212(c) eligibility is bolstered by the fact that two of the eight decisions were denials of motions to reconsider filed by the DHS on this precise issue. One decision and denial of motion to reconsider by DHS was in the Supreme Court’s *Judulang*

² The eight BIA decisions affirming § 212(c) eligibility since 2007 are: *In re Garcia*, A090-348-182 (BIA Aug. 6, 2007); *In re Melo*, A017-275-734 (BIA Mar. 24, 2008); *In re Mercedes*, A093-023-368 (BIA May 16, 2008); *In re Mercedes*, A093-023-368 (BIA July 14, 2008) (Denied DHS motion to reconsider); *In re Judulang*, A034-461-941 (BIA Nov. 1, 2012); *In re Judulang*, A 034-461-941 (BIA July 23, 2013) (Denied DHS motion to reconsider); *In re Quintero-Tabares*, A034-760-977(BIA May 12, 2014); *In re Romero*, A017-176-264 (BIA June 10, 2014). The one BIA decision finding against 212(c) eligibility since 2007 is *In re Bencosme Angeles*, A037-649-561 (BIA Apr. 22, 2008) (decision issued by a temporary BIA member, David W. Crosland).

decision after remand. *See* Exhibit A-22, *In re Judulang*, A 034-461-941 (BIA Nov. 1, 2012); Exhibit A-23, *In re Judulang*, A 034-461-941 (BIA July 23, 2013). In amicus’s analysis of decisions issued by current members of the BIA, amicus found that seven of the current roster of sixteen permanent BIA members have participated in decisions issued over the last decade that favor § 212(c) eligibility while none have issued decisions against. The decision history of current BIA members and the trend in recent cases appears to establish a track-record favoring § 212(c) eligibility. However, since the BIA has not elected to publish any of these recent cases, amicus and litigants cannot conclusively state what the agency believes to be the controlling interpretation of § 212(c) and its applicability to the two CIMT deportability ground.

B. The BIA’s failure to treat cases presenting an identical question of law in a uniform manner is arbitrary.

As the previous section details, long-time lawful permanent residents like Mr. [REDACTED] have been subjected to what is literally decision-making by the “flipping of a coin.” *See Judulang v. Holder*, 565 U.S. 42, 55 (2011).³ This approach to agency adjudication is patently arbitrary, and, particularly so, because every case considered by the BIA has involved an identical question of law.

Consistent application of the law to similarly situated individuals is fundamental to rational agency decision-making. Although an agency may change course, when it does so, it

³ Although it was the Board’s comparable grounds approach to interpreting § 212(c) that the Supreme Court held to be arbitrary and capricious in *Judulang v. Holder*, the Supreme Court made a point of observing that the Board’s arbitrary approach was preceded by a history of “vacillating.” 565 U.S. at 61. As the Court observed, the Board had a history of issuing decisions that were “all over the map” *Id.* at 62 (citing published and unpublished Board opinions). *Cf. Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (noting the agency’s long history of vacillation over automobile safety rule in finding that agency’s decision to rescind the rule was arbitrary and capricious.)

“must supply a reasoned analysis.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). It is therefore “axiomatic” that an agency “must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.” *Kreis v. Sec’y of Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005)(internal citations omitted). When an agency runs afoul of this foundational principle and treats similar cases differently without reasoned explanation, this is “the very meaning of the arbitrary and capricious standard.” *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996).

Regularity in agency decision-making serves the “critical purpose” of providing fair notice to individuals subject to agency decisions. *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712 (6th Cir. 2004). Unexplained fluctuations in agency-decision make it impossible for individuals to understand what the law demands and violate the “first essential of due process.” See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court has recognized, fair notice is crucial in the immigration context because individuals face “particularly severe” penalties that include “exile from this country and separation from their families.” See *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010) (holding that noncitizens have a Sixth Amendment right to be advised of the immigration consequences of a criminal plea); see also slip op. at 5-6, *Sessions v. Dimaya*, 584 U. S. ____, No. 15-1498 (Apr. 17, 2018) (finding that because of the “grave nature of deportation” the most “exacting vagueness standard” applies to removal proceedings). In cases with such grave consequences, decisions “cannot be made a sport of chance.” *Judulang*, 565 U.S. at 58 (quoting Judge Learned Hand’s decision in *Di Pasquale v. Karnuth*, 158 F.3d 878, 879 (2d. Cir. 1947)).

Given the importance of fair notice, the fundamental principle that agencies treat similar cases the same applies with no less force to immigration proceedings. While courts have

recognized that immigration officials may exhibit “a certain amount of asymmetry,” variation among immigration officials cannot create conflicting rules in identical cases. *Henry v. INS*, 74 F.3d 1, 5-6 (1st Cir. 1996) (internal citations omitted). The agency cannot “flit serendipitously from case to case, like a bee buzzing from flower to flower, making up rules as it goes along.” *Id.* Indeed, a “rational system of law” demands consistent treatment of identical claims by the BIA, or, at the very least, an explanation for the inconsistency. *Zhang v. Gonzales*, 452 F.3d 167, 174 (2d. Cir. 2006). The demand for consistency and predictability in agency decision-making is equally true of nonprecedential agency action. *See, e.g., Davila-Bardales v. INS*, 27 F.3d 1, 5–6 (1st Cir. 1994) (“[W]e see no earthly reason why the mere fact of nonpublication should permit the agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases, without explaining why it is doing so”).

Here, there is no reason for the BIA to treat cases differently when they each present the same question of law. A reasonable agency fulfilling its statutory mandate to provide “clarity and uniformity” in the interpretation of our immigration laws should reach the same conclusion in every case presenting the exact same question of law. *See* 8 C.F.R. §1003.1(d)(1); BIA Prac. Man. Chapter 1.2(a). We know this is true because even in cases where the BIA exercises discretion, federal courts have repeatedly found that the agency acts arbitrarily when it treats similarly situated individuals differently without explanation. *See, e.g., Zhang v. Gonzales*, 452 F.3d at 174 (holding that BIA decision to deny asylum to wife based on future fear of persecution was arbitrary and capricious when her husband was granted asylum on identical facts); *Njuguna v. Ashcroft*, 374 F.3d 765, 771 n.4 (9th Cir. 2004) (describing agency’s erratic decision-making on identical asylum applications as “disturbing”); *Montano Cisneros v. U.S. Atty. Gen.*, 514 F.3d 1224, 1227 (11th Cir. 2008) (holding that BIA abused discretion when it

denied a motion to reopen in a case that was “highly similar” to a prior case that granted the motion); *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 802-03 (5th Cir. 2007) (same).⁴ A fortiori, the BIA acts arbitrarily when it resolves cases differently that present no application of discretion whatsoever and present an identical question of law.

In respondent’s case, the Immigration Judge’s decision below illustrates the confusion caused by the BIA’s inconsistent interpretation of § 212(c)’s application to the two CIMT deportability ground. While rejecting respondent’s citation to an unpublished BIA decision from 2014 that supported 212(c) eligibility, the Immigration Judge went on to cite four contrary BIA decisions from 2004, 2005, and 2008. I.J. Removal Proceedings Decision at 12 (Nov. 30, 2017). In fact, as section A indicates, the BIA’s decisions have split down the middle, presenting Immigration Judges with an equal number of unpublished decisions to support conflicting interpretations of the law. While the Immigration Judge found respondent ineligible for a § 212(c) waiver, another jurist would have found just as much support from BIA decisions to support the opposite conclusion. The BIA’s flip-flopping interpretations not only encourage disuniformity among adjudicators but have become a recipe for inequitable treatment.

The consequence of the BIA’s schizophrenic approach to § 212(c) relief is that long-time lawful permanent residents are deprived of fair notice, a foundational element of due process. Since deportation is “the equivalent of banishment or exile” and “sometimes the most important part [] of the penalty” imposed on criminal defendants, the Supreme Court has recognized that

⁴ The United States Citizenship Immigration Service (USCIS) has faced similar condemnation for treating applications for investor visas differently when the applicants submitted “equivalent” applications connected to the same investments. *See Doe v. United States Citizenship & Immigration Servs.*, 239 F. Supp. 3d 297 (D.D.C. 2017); *Chiayu Chang v. United States Citizenship & Immigration Servs.*, No. CV 16-1740 (JDB) 2018 WL 746081 (D.D.C. Feb 7, 2018).

noncitizens have a constitutional right to be advised of the immigration consequences of their plea. *Padilla v. Kentucky*, 559 U.S. at 364. In order to be effectively advised, however, there needs to be clarity on what the immigration consequences of a plea could be. Here, a lawful permanent resident with an open criminal matter who has one pre-1996 conviction that could be charged as a CIMT would be unable to “anticipate the immigration consequences of [a] guilty plea[.]” *See Mellouli v. Lynch*, 135 S. Ct. 1880, 1887 (2015). Indeed, lawful permanent residents who face the potential of exile from their families now have no reliable gauge of whether the BIA would deem them eligible for § 212(c) relief should they enter a plea to a second CIMT. Their fate rests with the flip of a coin.

C. The BIA should resolve the uncertainty surrounding the application of § 212(c) to the two or more CIMT removability ground by publishing a precedential decision.

Continued uncertainty on the question at hand is untenable and will deny long-time lawful permanent residents who seek § 212(c) relief the fair notice that is essential to due process. In considering respondent’s appeal, the BIA should publish a precedential decision that resolves the persistent confusion about whether a § 212(c) waiver can be applied to the two CIMT deportability ground.

As the highest administrative body for interpreting immigration laws and regulations, the BIA is tasked with providing “clear and uniform guidance to Immigration Judges, DHS, and the general public” throughout the United States. 8 C.F.R. §1003.1(d)(1); BIA Prac. Man. Chapter 1.2(a). Providing binding interpretations of immigration laws and regulations through precedential decisions is central to the BIA’s mission of ensuring uniform application of the Immigration and Nationality Act and its implementing regulations. *See* 8 C.F.R. §1003.1(g). The duty to publish binding precedent is particularly strong when the BIA considers questions of law

that present issues of “first impression” and that implicate issues of “significant public interest.” See BIA Prac. Man. Chapter 1.4(d)(i)(A). At the heart of respondent’s case and the twenty-five unpublished cases issued by the BIA, is one legal question of “first impression” that requires definitive resolution by the BIA. See *id.* Namely, whether an individual charged with two CIMT deportability is eligible to apply for § 212(c) relief when one of the predicate convictions dates after the repeal of § 212(c). Although this is a question of pure statutory construction, the BIA has been unable to give consistent answers. The fifty-fifty split in BIA decisions on this question have largely centered on the interpretation of *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Compare Exhibit A-10, *In re Baptista*, A041-959-497 (BIA Oct. 3, 2005), with Exhibit A-23, *In re Judulang*, A034-461-941 (BIA July 23, 2013) (affirming BIA’s judgment after DHS motion to reconsider). This clear split in the agency’s interpretation of its own precedent demands resolution through a published opinion.

Although strictly legal, the question of whether Mr. [REDACTED] and others will be eligible for § 212(c) relief implicates the weightiest of public interests. See BIA Practice Manual, Chapter 1.4(d)(i)(A). The BIA’s failure to provide a uniform interpretation of immigration laws will “tend[] to cause unjust discrimination and deny adequate notice” which may compromise an “individual’s constitutional right to due process.” *Billeke-Tolosa v. Ashcroft*, 385 F.3d at 712. For respondent and countless others like him, the importance of fair notice cannot be overemphasized. They are lawful permanent residents who have made their home in the United States for decades and face permanent separation from their families and communities. Given the “grave nature” of the consequences at issue, the need for a clear and consistent agency interpretation could not be greater. See *Judulang v. Holder*, 565 U.S. at 58.

Moreover, by allowing the issue to continue unresolved, the BIA's arbitrary decision-making may very well demand judicial review. Any individual respondent who loses in an unpublished decision can seek review from the federal courts and will have a record of 25 more unpublished decisions to demonstrate how the agency has flip-flopped on this question. Given the agency's long history of arbitrary and capricious action, a reviewing court would not be obligated to show the BIA deference. *See Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d at 1258 (noting that a finding that agency action is arbitrary and capricious is "functionally equivalent" to a decision to that the agency is unreasonable under Chevron). Indeed, a reviewing court would have no agency decision to which it could offer deference since the BIA has provided an equal number of conflicting interpretations. Until the BIA discharges its duty to provide clarity on this question of law, a reviewing court will be compelled to offer its own interpretation.

By publishing a binding precedent on the question at hand, the BIA would provide uniform guidance on a critical question of first impression and offer countless individuals the fair notice that they are due.

II. The agency has discretion to grant § 212(c) relief when respondents are charged with two CIMT deportability, and one conviction is a pre-repeal plea.

In ordering respondent removed, the Immigration Judge found § 212(c) relief "would provide Respondent with incomplete relief from removal." I.J. at 13. In so holding, the court ignored all recent unpublished BIA decisions that applied the "two pillar" analysis, and incorrectly applied *Matter of Balderas*. The court also failed to recognize the effect of the Supreme Court's holding in *Judulang* and ignored the BIA's clear holding in *Abdelghany*. The

BIA should issue a precedential decision finding § 212(c) relief applies to two CIMT deportability even when one predicate conviction is post-repeal.

A. Each conviction constitutes one of “two essential pillars” in section 237(a)(2)(A)(ii), and the waiver of one CIMT necessarily defeats the removability charge.

The BIA has repeatedly held that each CIMT conviction necessary to sustain two CIMT deportability is one of “two essential pillars” under § 237(a)(2)(A)(ii). That is, “a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them by the grant of a section 212(c) waiver necessarily topples the entire charge.” Exhibit A-22, *In re: Joel Judulang*, A034-461-941 (BIA Nov. 1, 2012).

This holding relies on the nature of a “finding of deportability” pursuant to § 237(a)(2)(A)(ii), which requires the agency to sustain two predicate convictions as CIMTs not part of a single criminal scheme. See § 237(a)(2)(A)(ii). Because § 212(c) relief indisputably applies to crimes involving moral turpitude, any pre-repeal conviction covered by § 212(c) relief (based on the plea date) waives the predicate CIMT conviction.

In the BIA’s own words, “a section 212(c) waiver eliminates the inadmissibility stemming from the conviction at which the waiver is directed.” Exhibit A-17, *In re: Garcia*, A090-348-182 (BIA Aug 6, 2007). “For once it is hypothesized that the respondent is eligible for 212(c) relief with respect to one of the two pillars supporting the charge of deportability, the two CIMT charge must necessarily fall, because the remaining... conviction or pillar--standing alone--would not support the charge.” Exhibit A-25, *In re: Romero*, A017-176-264 (BIA June 10, 2014).

As discussed *supra*, the BIA has rejected DHS motions reconsider on this discrete point twice. See Exhibit A-21, *In re: Judulang*, A034-461-941 (BIA July 23, 2013); Exhibit A-23, *In*

re: Ramon Mercedes, A093-023-368 (BIA July 14, 2008). The BIA has also never distinguished the “two pillar” analysis or explained why it was incorrect in a decision.

B. The holding in *Matter of Balderas* addressed two CIMT deportability after a post-relief conviction, not § 212(c) eligibility in the first instance.

Instead of applying the “two pillar” analysis, discussed above, the Immigration Judge and decisions finding ineligibility for § 212(c) relief relied on *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991).

The central holding in *Balderas* is that “a conviction which has once been relied upon in a charge of deportability may be alleged as one of the ‘two crimes involving moral turpitude’ in a second proceeding” despite a prior grant of § 212(c) relief. *Id.* at 392. There are two aspects to this holding: (1) a two CIMT deportability charge is sustainable in a *subsequent proceeding*, and (2) deportability is sustainable despite a *prior grant* of § 212(c) relief on one predicate conviction.

The requirement of a “subsequent proceeding” stemmed from regulatory guidance that required “a new application” if a respondent “subsequently becomes excludable or deportable on other grounds” resulting in “a new basis of excludability or deportability.” *Id.* at 393 (relying on former 8 C.F.R. § 212.3(b) (1991), now codified at 8 C.F.R. § 1212.3(d)). In a respondent’s first proceeding, this aspect of the regulation would be inapplicable.

The requirement of a “prior grant” concerned the “prospective effect of section 212(c) relief” and not “eligibility for section 212(c) relief” in the first instance. *See* Exhibit A-25, *In re: Romero*, A017-176-264 (BIA June 10, 2014). For eligibility in the first instance, “the regulations make it clear that the grant of relief is specific to the grounds stated at the time of the grant of relief.” *Balderas* at 393. When a respondent seeks to waive two CIMT deportability as part of an initial grant of § 212(c) relief, *Balderas* is also inapplicable.

When a respondent has not previously been granted § 212(c) relief and has no subsequent conviction or new removal proceedings, *Balderas*' holding that an offense that was previously waived may be used in subsequent removal proceedings is inapplicable. Accordingly, a successful application for § 212(c) relief will waive the ground of removal for two CIMTs such that respondent's unwaived, post-repeal conviction will not render him removable.

C. The underlying effect of § 212(c) relief authorizes the Attorney General to waive enforcement of removability determinations, not specific removability grounds.

To the extent that *Balderas* relied on § 212(c) relief waiving "specific grounds," that has been overruled by the Supreme Court. While invalidating the statutory counterpart rule as arbitrary and capricious in *Judulang*, the Supreme Court clarified that § 212(c) relief does not waive "a particular exclusion ground." *Judulang* at 60. Instead, as long as the offense does not fall under specified exceptions, a grant of § 212(c) relief waives "the simple denial of entry." *Id.* It does *not* waive any particular "ground[] of excludability or deportability." *Balderas* at 391.

In other words, granting § 212(c) relief allows the agency to "waive enforcement or execution of removability determinations." Exhibit A-25, *In re: Romero*, A017-176-264 (BIA June 10, 2014). The agency "has authority under former section 212(c) to waive the execution of any removability determination made pursuant to section 237(a)(2)(A)(ii) of the Act that depends, in whole or in part, on a conviction that resulted from a plea agreement made before April 1, 1997." *Id.*

D. *Abdelghany* requires § 212(c) relief cover pre-repeal pleas that form the basis of two CIMT deportability.

Respondent also qualifies for § 212(c) relief under the more recently formulated § 212(c) relief eligibility standard in *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). In *Abdelghany*, the BIA held that a permanent resident "removable or deportable *by virtue of* a plea or conviction

entered before April 24, 1996, is eligible to apply for section § 212(c) relief in removal or deportation proceedings” unless subject to specified inadmissibility grounds or imprisoned five years as a result of an aggravated felony conviction. 26 I&N Dec. at 272 (emphasis added). Self-evidently, sustaining § 237(a)(2)(A)(ii) deportability based on a pre-April 24, 1996 conviction means the non-citizen is deportable “by virtue of” that conviction, and the non-citizen is eligible for relief.

Indeed, on pleas entered prior to April 24, 1996: “otherwise qualified applicants may apply for section 212(c) relief in removal proceedings to waive *any* ground of deportability, *unless* the applicant is subject to the [specified] grounds of inadmissibility.” 26 I&N Dec. at 266 (emphasis in original). Because “any” deportability ground includes 237(a)(2)(A)(ii), the holding in *Abdelghany* is controlling. Respondent is thus eligible to apply for § 212(c) relief.

This requirement is overlooked entirely by the Immigration Judge, who held that § 212(c) “relief only waives the removability grounds that stem from” respondent’s conviction. I.J. at 12. Of course, two CIMT deportability *is* a removability ground that “stems from” respondent’s pre-repeal conviction, is covered under the clear language in *Abdelghany*, and waivable if respondent is granted § 212(c) relief.

CONCLUSION

The BIA should recognize, in a published decision, that § 212(c) relief is available to a respondent charged with deportability under § 237(a)(2)(A)(ii) when one predicate conviction resulted from a plea entered prior to the repeal of § 212(c).

DATED this 19th day of April, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ryan Muennich', is positioned above a horizontal line.

By: Ryan Muennich, Esq. (EOIR ID KY305482)

Lee Wang, Esq.

Immigrant Defense Project

40 West 39th Street, Fifth Floor

New York, NY 10018

Tel: (646) 358-4285

Fax: (800) 391-5713

BIA DECISIONS

#	NAME	212(c) ELIGIBILITY	PANEL MEMBERS
1	<i>In re Da Rosa Silva</i> , A036-784-312 (BIA Nov. 17, 2003)	No	Unknown
2	<i>In re Martinez</i> , A022-166-294 (BIA Feb. 18, 2004)	No	Unknown
3	<i>In re Mikhail</i> , A036-995-088 (BIA Apr. 9, 2004)	No	Unknown
4	<i>In re Aoun</i> , A072-824-506 (BIA Nov. 10, 2004)	No	Unknown
5	<i>In re Pritchard</i> , A031-397-362 (BIA Mar. 30, 2005)	No	Pauley
6	<i>In re Smith</i> , A043-581-995 (BIA Apr 12, 2005)	Yes	Osuna, Filppu (Dissent), Pauley
7	<i>In re Knust de Meester</i> , A021-022-950 (BIA June 21, 2005)	No	Grant, Holmes, Miller
8	<i>In re Roa</i> , A023-098-518 (BIA Aug. 8, 2005)	No	Osuna
9	<i>In re Hinojos</i> , A034-574-483 (BIA Sept. 7, 2005)	No	Pauley
10	<i>In re Baptista</i> , A041-959-497 (BIA Oct. 3, 2005)	No	Hess
11	<i>In re Lomu</i> , A030-501-763 (BIA Nov. 25, 2005)	No	Hess
12	<i>In re Dickens</i> , A041-456-508 (BIA Feb. 8, 2006)	Yes	Cole, Osuna, Pauley
13	<i>In re Izouierdo-Torres</i> , A013-846-053 (BIA Feb. 22, 2006)	No	Pauley
14	<i>In re Valencia-Gil</i> , A090-125-723 (BIA Apr. 11, 2006)	No	Hess
15	<i>In re Ortiz-Peres</i> , A090-026-579 (BIA Sept. 20, 2006)	Yes	Fillpu, O'Leary, Pauley
16	<i>In re Bazuaye</i> , A024-359-599 (BIA Oct. 6, 2006)	Yes	Unknown
17	<i>In re Garcia</i> , A090-348-182 (BIA Aug. 6, 2007)	Yes	Cole, Filppu (Dissent), Pauley
18	<i>In re Melo</i> , A017-275-734 (BIA Mar. 24, 2008)	Yes	Cole, Filppu, Pauley
19	<i>In re Bencosme Angeles</i> , A037-649-561 (BIA Apr. 22, 2008)	No	Crosland
20	<i>In re Mercedes</i> , A093-023-368 (BIA May 16, 2008)	Yes	Grant, Hess, Kendall-Clark
21	<i>In re Mercedes</i> , A093-023-368 (BIA July 14, 2008)[Motion to	Yes	Grant

	Reconsider]		
22	<i>In re Judulang</i> , A034-461-941 (BIA Nov. 1, 2012)	Yes	Cole, Greer, Pauley
23	<i>In re Judulang</i> , A 034-461-941 (BIA July 23, 2013)[Motion to Reconsider]	Yes	Cole, Greer, Pauley
24	<i>In re Quintero-Tabares</i> , A034-760-977(BIA May 12, 2014)	Yes	Cole, Pauley, Wendtland
25	<i>In re Romero</i> , A017-176-264 (BIA June 10, 2014)	Yes	Guendelsberger

1

2003 WL 23521922 (BIA)

**** THIS IS AN UNPUBLISHED DECISION - NOT
INTENDED FOR CITATION AS PRECEDENT ****

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: MANUEL DA ROSA SILVA A.K.A. MANUEL DASILVA

File: A36 784 312 - York
November 17, 2003

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS:

Jeffrey T. Bubier
Assistant Chief Counsel

CHARGE:

*1 Notice: Sec. 237(a)(2)(A)(iii), I&N Act ;8 U.S.C. § 1227(a)(2)(A)(iii)^o - Convicted of aggravated felony

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

APPLICATION: Section 212(c) waiver

ORDER:

PER CURIAM This matter comes to the Board on certification pursuant to the Immigration Judge's September 26, 2003, decision. *See* 8 C.F.R. § 1003.1(c). On May 7, 2003, the United States District Court for the Eastern District of Pennsylvania granted the respondent's petition for writ of habeas corpus in part, and directed that the administrative record be remanded for consideration of the respondent's application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The record reflects, however, that the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) physically removed the respondent from the United States to Cape Verde in February 2003. It is unclear whether the district court was aware of this fact when it issued its May 7, 2003, decision. In light of the respondent's physical absence from the United States, the Immigration Judge cannot presently determine whether he is eligible for a section 212(c) waiver or whether he merits such relief in the exercise of discretion. We note, moreover, that neither this Board nor the Immigration Judge possess authority to compel the DHS to return the respondent to the United States. Therefore, we find it impossible to implement the district court's directive to have the Immigration Judge hold a 212(c) hearing.

In any event, assuming that the respondent would be granted a section 212(c) waiver with respect to his aggravated felony charge (because it is based upon a pre-1996 criminal conviction), the granting of such a waiver would in no way affect the respondent's ability to remain in the United States. Specifically, even if such a waiver were granted he would remain deportable and removable under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two or more crimes involving moral turpitude, while his aggravated felony conviction — although waived as a ground of deportability — would continue to prevent him from obtaining any relief from removal, such as cancellation of removal, asylum, or voluntary departure. *See Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991) (convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes upon a grant of relief under section 212(c)). We continue to agree with the Immigration Judge's May 9, 2002, decision, that the respondent is removable from the United States and that no relief from removal is available to him. Accordingly, the respondent is ordered removed to Cape Verde.¹

<Signature>

FOR THE BOARD

Footnotes

- 1 In deference to the district court's mandate and in light of the exceptional circumstances surrounding the respondent's removal, this Board will consider any motion filed by the respondent to reopen and remand for the purpose of seeking section 212(c) relief.

2003 WL 23521922 (BIA)

2

2004 WL 1167082 (BIA)

**** THIS IS AN UNPUBLISHED DECISION - NOT
INTENDED FOR CITATION AS PRECEDENT ****

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: MARIA CONCEPCION MARTINEZ

File: A22 166 294 - New York
February 18, 2004

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:

Irwin Berowitz, Esquire

ON BEHALF OF DHS:

George J. Ward, Jr.
Assistant District Counsel

CHARGE:

*1 Notice: Sec. 237(a)(2)(A)(iii), I&N Act ̳8 U.S.C. ̳ 1227(a)(2)(A)(iii)^o - Convicted of aggravated felony

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

APPLICATION: Termination; waiver of inadmissibility under section 212(c) of the Act

The respondent, a native and citizen of Spain who is a lawful permanent resident, has appealed an Immigration Judge's November 22, 2002, decision which found her removable as charged and pretermitted her application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(c). On appeal, the respondent has requested a new form of relief, cancellation of removal. We will construe this request as a motion to remand since such a claim was not raised before the Immigration Judge. The appeal will be dismissed and the motion to remand will be denied.

On January 22, 1993, the respondent was convicted in a New York state court of second-degree burglary and received a sentence of 3 to 6 years incarceration. On September 3, 1993, deportation proceedings were commenced against the respondent with the filing of an Order to Show Cause. On October 19, 1994, for unclear reasons, proceedings were terminated without prejudice by an Immigration Judge. On July 19, 2000, the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) initiated these removal proceedings by issuing a Notice to Appear (Form I-862). *See* Exh. 1. The aggravated felony removability charge is based upon the 1993 second-degree burglary conviction. Subsequently, the DHS lodged the additional removability charge related to the respondent having committed two crimes involving moral turpitude; this was based upon the burglary and upon a 1999 conviction in New York for petty theft.

Although the respondent denied before the Immigration Judge that she was removable on the aggravated felony charge, she has not contested on appeal the Immigration Judge's finding that she is removable on that basis. Moreover, she conceded below that she is removable under the lodged charge (Tr. at 85-86). We find the conviction documents are sufficient to show that the respondent's burglary conviction was for a theft offense for which she was sentenced to at least 1 year in prison; thus it is an aggravated felony. *See* sections 101(a)(43) (G) and 101(a)(48) of the Act.¹ The respondent does not dispute that her burglary offense is an aggravated felony. Similarly, we find that the burglary and the later petty theft offense are both crimes involving moral turpitude and thus the respondent is removable under the lodged charge too.² *See e.g., Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966) (petty theft is a crime involving moral turpitude); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (burglary is a crime involving moral turpitude). We find that the DHS has met its burden by clear and convincing evidence that the respondent is removable as charged. *See* section 240(c)(3) of the Act.

*2 We agree with the Immigration Judge that the respondent is ineligible for a waiver under former section 212(c) of the Act. While it does appear that section 212(c) could waive the burglary offense, it cannot waive the 1999 crime because section 212(c) was repealed from the Act, effective in 1997. Thus, the respondent cannot reasonably claim she detrimentally relied upon the existence section 212(c) when she pled guilty to the petty theft offense in 1999. See *INS v. St. Cyr*, 533 U.S. 289 (2001). That relief was no longer available when she was convicted.

The respondent nonetheless maintains that 8 C.F.R. § 1212.3(g) makes her eligible for a section 212(c) waiver. That regulation states that the AEDPA,³ a statute which placed limitations on the availability of section 212(c) waivers, could only be applied to aliens whose proceedings commenced after AEDPA's passage in April 1996. Since she was initially in deportation proceedings prior to AEDPA's passage, the respondent argues that 212(c) relief is therefore available to her. We agree with the Immigration Judge that 8 C.F.R. § 1212.3(g) does not render the respondent eligible for section 212(c) relief. Aside from that regulation's clear contemplation that it applies in deportation proceedings, as opposed to the removal proceedings here, the regulation in no way affords section 212(c) relief after the waiver was completely removed from the Act by IIRIRA,⁴ long after an alien such as the respondent could have reasonably relied upon the waiver's existence. Cf. *INS v. St. Cyr*, *supra*. As the Immigration Judge noted, the respondent's interpretation of the regulation would allow for potentially indefinite use of 212(c) for all future crimes, even decades from now, merely because some time ago she happened to have been in deportation proceedings. We find no such authority in this regulation. Further, as this regulation does not address the ultimate repeal of section 212(c), and as the respondent's approach would represent an unwarranted expansive reading of *INS v. St. Cyr*, *supra*, we decline to find that she is eligible for the waiver.

On appeal, the respondent asserts that she may obtain cancellation of removal to “waive” her petty theft conviction and may simultaneously use section 212(c) to waive her burglary conviction. The respondent, however, did not apply for cancellation of removal before the Immigration Judge, and she has offered no reason why she did not do so. Partly for this reason, we decline to remand the record as this would be inefficient and would result in an unnecessary delay. The respondent could have requested this relief earlier. Moreover, even if the respondent's burglary conviction could be waived under section 212(c) for removability purposes, that would simply mean that she could not be removed as an aggravated felon for the burglary crime. The waiver does not erase the existence conviction, nor does it render her eligible for forms of relief that are unavailable to those convicted of aggravated felonies. See *Matter of Balderas*, 20 I&N 389 (BIA 1991) (section 212(c) relief is not a pardon or expungement of a conviction, and such conviction does not disappear from the

alien's record for immigration purposes). Cancellation of removal is statutorily unavailable to this respondent because she was convicted of an aggravated felony. *See* 240A(a)(3) of the Act. The respondent's argument that she could simultaneously apply for section 212(c) and cancellation relief is moot in light of the foregoing analysis. *See* section 240A(c)(6) (prohibiting cancellation of removal for an alien "who has been granted relief" under section 212(c)). Thus, we decline to remand the record for consideration of this new request for cancellation of removal.⁵

*3 In light of the foregoing, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

<Signature>

FOR THE BOARD

Footnotes

- 1 The respondent has not disputed the Immigration Judge's additional finding that the burglary offense is also an aggravated felony because it is a crime of violence. *See* section 101(a)(43)(F) of the Act.
- 2 We note that there is no applicable petty offense exception for the section 237 charge involving two crimes involving moral turpitude.
- 3 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214.
- 4 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996; effective April 1, 1997).
- 5 We also observe that the respondent, as a lawful permanent resident, is ineligible for section 212(h) relief because of the aggravated felony conviction. *See Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996, 1997).

2004 WL 1167082 (BIA)

3

2004 WL 1398737 (BIA)

**** THIS IS AN UNPUBLISHED DECISION - NOT
INTENDED FOR CITATION AS PRECEDENT ****

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: IHAB MIKHAIL A.K.A EDWARD WAHBA, IHAN MIKHAI WAHBA

File: A36 995 088 - Oakdale

April 9, 2004

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Abraham Kay, Esquire

ON BEHALF OF DHS:

Lorraine L. Griffin
Assistant District Counsel

CHARGE:

*1 Notice: Sec. 237(a)(2)(A)(i), I&N Act ̳8 U.S.C. ̳ 1227(a)(2)(A)(i)° - Convicted of crime involving moral turpitude

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

Sec. 237(a)(2)(a)(iii), I&N Act ;8 U.S.C. § 1227(a)(2)(A)(iii)^o - Convicted of aggravated felony as defined in sections 101(a)(43)(F) (crime of violence) and 101(a)(43)(G) (theft offense) of the Act, 8 U.S.C. §§ 1101(a)(43)(F) and (G)

APPLICATION: Cancellation of removal; remand; waiver of inadmissibility

The respondent appeals from an Immigration Judge's December 9, 2003, decision finding him removable on all charges and pretermission of his applications for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1995).¹ In the alternative, the respondent moves to remand his case due to the vacatur of his most recent conviction. The motion will be denied. The appeal will be sustained in part and dismissed in part. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e) (2003).

The respondent is a native and citizen of Egypt. On November 23, 1980, he was admitted to the United States as a lawful permanent resident. The respondent was issued a Notice to Appear on June 5, 2003, charging him as removable due to a series of convictions for receipt of stolen property, sexual battery and unauthorized use of a motor vehicle in violation of Ohio Rev. Code. Ann. §§ 2913.51, 2907.03(A)(1), 2913.03, respectively. On September 19, 1985, the respondent was convicted of receiving stolen property and was sentenced to 1 year imprisonment. On December 23, 1985, the respondent was convicted of receiving stolen property and was sentenced to 6 months' imprisonment. On December 14, 1992, the respondent was convicted of sexual battery and sentenced to 1 year imprisonment, to run consecutive with CR-271767. On January 4, 1993, the respondent was convicted of receiving stolen property and was sentenced to 1 year imprisonment, to run concurrently with CR-285771, CR-283995 and CR-271767. On January 4, 1993, the respondent was convicted of two additional counts of receiving stolen property and was sentenced to 1 year imprisonment, to run concurrently with CR-285537, CR-283995 and CR-271767. On May 12, 2003, the respondent was convicted of receiving stolen property. The respondent was given a suspended sentence of 6 months in the county jail and placed on probation for 3 years. On May 12, 2003, the respondent was also convicted of unauthorized use of a motor vehicle. For this offense, the trial court imposed a community control sanction in which the respondent was sentenced to 3 years of community control under the supervision of the adult probation department.

***2** We first consider the respondent's motion to remand. The respondent claims tha this conviction on May 12, 2003, is no longer a conviction for immigration purposes because the

Ohio Trial Court allowed him to withdraw his guilty plea. The respondent argues that he should now be allowed to apply for a waiver of inadmissibility under section 212(c) of the Act for the remaining convictions. We disagree.

The United States Court of Appeals for the Fifth Circuit has held that a criminal conviction which has been vacated by either a state or federal court remains a conviction for immigration purposes pursuant to section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A). *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002). Accordingly, the respondent's conviction remains a conviction for purposes of this proceeding and his motion will be denied. For the same reason, we also find that the respondent's December 14, 1992, conviction for sexual battery remains a conviction for immigration purposes.² *Renteria-Gonzalez v. INS*, *supra*.

We now turn to the respondent's appeal. The respondent argues that the Immigration Judge's failure to change venue was an abuse of discretion and that none of his convictions can sustain the charges of removability. In the alternative, the respondent argues that he is eligible for a section 212(c) waiver for all of his convictions except the May 12, 2003, conviction. With respect to the May 12, 2003, conviction the respondent argues that this conviction is not enough to sustain the charges of removability and even if it is, the conviction falls within the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act or that he remains eligible for cancellation of removal in conjunction with the waiver under section 212(c) of the Act.

With respect to the issue of venue, we find that the Immigration Judge considered all of the relevant factors and correctly denied the respondent's motion to change or refuse venue. *See Matter of Rahman*, 20 I&N Dec. 480, 483 (BIA 1992) (considering such factors as administrative convenience, expeditious treatment of the case, the location of the witnesses, and the costs of transporting witnesses or evidence to a new situs); *Matter of Velasquez*, 19 I&N Dec. 377, 382-83 (BIA 1986); 8 C.F.R. § 1003.20(b); I.J. at 3-4 (July 14, 2003).

With respect to the other issues on appeal, we agree with the Immigration Judge that even if the respondent were granted relief under section 212(c) of the Act, he is still removable due to the presence of his May 12, 2003, conviction and ineligible for cancellation of removal because several of his convictions are aggravated felonies. I.J. at 2 (December 9, 2003); I.J. at 4-7 (July 14, 2003). First, we will discuss the charges of removability, then we will discuss the issue of relief.

*3 The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) alleges that the respondent is removable for having been convicted

of crimes involving moral turpitude and aggravated felonies as defined in sections 101(a)(43)(F) (crime of violence) and 101(a)(43)(G) (theft offense) of the Act.

Receipt of stolen property in violation of Ohio Rev. Code Ann. § 2913.51 is a theft offense and a crime involving moral turpitude. In *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000), we held that the reference to receipt of stolen property in section 101(a)(43)(G) of the Act was intended to include the category of offenses involving knowing receipt, possession, or retention of property from its rightful owner. The respondent argues that a person can be convicted of receipt of stolen property in Ohio without knowledge that the goods were stolen because the statute includes “reasonable cause” language.³ The statute at issue in *Matter of Bahta*, *supra*, also included “reasonable cause” language.⁴ Yet, we still found that the respondent's conviction in that case fell within the “category of offenses involving knowing receipt, possession, or retention of property from its rightful owner.” *Matter of Bahta*, *supra* at 1391 (emphasis added). Accordingly, pursuant to *Matter of Bahta*, *supra*, the respondent's convictions for receipt of stolen property are theft offenses under section 101(a)(43)(G) Act.⁵ For the same reason, these convictions are crimes involving moral turpitude. *Matter of Salvail*, 17 I&N Dec. 19 (BIA 1979) (holding that possession of stolen goods is a conviction for a crime involving moral turpitude where the statute under which the alien was convicted specifically requires knowledge of the stolen nature of the goods); *see also Matter of R*, 6 I&N Dec. 772 (BIA 1955).

Sexual battery in violation of Ohio Rev. Code Ann. § 2907.03(A)(1) is not a crime of violence as defined in section 101(a)(43)(F) of the Act. However, we agree with the Immigration Judge that the respondent's conviction for sexual battery is a crime involving moral turpitude. I.J. at 6-7 (July 14, 2003). Under section 101(a)(43)(F) of the Act, the term “aggravated felony” means a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 1 year. The term “crime of violence” is defined in 18 U.S.C. § 16 as:

***4** (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In determining whether the respondent's offenses fit within this definition, we must look to the language of the statute under which he was convicted. Ohio Rev. Code Ann. § 2907.03(A)(1) states, in pertinent part:

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

The Immigration Judge found that Ohio Rev. Code Ann. § 2907.03(A)(1) is not a crime of violence under 18 U.S.C. § 16(a), but that it is a crime of violence of 18 U.S.C. § 16(b). The Immigration Judge held that “the nature of § 2907.03(A)(1) is such that its commission would ordinarily present a risk that physical force would be used against the person of another and it is, therefore, a crime of violence under 18 U.S.C. § 16(b).” I.J. at 5 (July 14, 2003). In making this conclusion, the Immigration Judge cited to *State v. Tolliver*, 360 N.E.2d 750 (Ohio Ct. App. 1976). However, that case specifically states in reference to § 2907.03(A)(1), that “‘L^o coercion by any means that would prevent resistance by a person of ordinary resolution’ does not by necessity include force or threat of force....” *State v. Tolliver*, *supra* at 754. In fact, according to the legislative commission which drafted § 2907.03(A)(1), coercion can mean any threat other than threat of force, provided the threat is such that a person of ordinary resolution finds irresistible. *State v. Tolliver*, *supra* at 755 n.4. Thus, Ohio recognizes that a person can be convicted of sexual battery under § 2907.03(A)(1) without the use or threat of physical force.

Where the state statute under which an alien has been convicted is divisible, meaning it encompasses offenses that constitute crimes of violence as defined under 18 U.S.C. § 16 (1994) and offenses that do not, it is necessary to look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes an aggravated felony as defined in section 101(a)(43)(F) of the Immigration and Nationality Act. *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999). We find that there is not enough evidence in the record to determine whether the respondent's violation of § 2907.03(A)(1) constitutes an aggravated felony. The record only contains the original indictment, which was later amended, the entry of the respondent's plea and the entry of the respondent's sentence. Accordingly, the DHS did not prove by clear and convincing evidence that the respondent is removable as an aggravated felon for his sexual battery conviction. *See* 8 C.F.R. § 1240.8 (2003); *see also Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966).

*5 The last offense at issue is unauthorized use of a motor vehicle. We find that even if unauthorized use of a motor vehicle is a crime of violence, the respondent's conviction was not for an aggravated felony because he was not sentenced to at least 1 year imprisonment. Section 101(a)(43)(F) of the Act. The respondent was sentenced to 3 years of community control. The Ohio Rev. Code Ann. describes the sentence of "community control" as a sanction which may be imposed by a court where the court is not required to impose a prison term. Ohio Rev. Code. Ann. § 2929.15(A)(1) (2003). Based on this description, we find that the respondent's sentence for community control was not for a period of incarceration or confinement as defined in section 101(a)(48)(B) of the Act⁶ and is, therefore, not a term of imprisonment.

We also agree with the Immigration Judge that unauthorized use of a vehicle is not a crime involving moral turpitude because the statute at issue does not define a crime in which moral turpitude necessarily inheres.⁷ *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); I.J. at 7.

Based on the foregoing, we conclude that the respondent is removable under section 237(a)(2)(A)(i) of the Act for his September 19, 1985, conviction for receipt of stolen property. The respondent is removable under section 237(a)(2)(A)(ii) of the Act for his 1985, 1993, and 2003, convictions for receipt of stolen property and his 1992 conviction for sexual battery. The respondent is removable under section 237(a)(2)(A)(iii) of the Act, as defined in section 101(a)(43)(G) of the Act (theft offense), for his 1985 and 1993 convictions for receipt of stolen property. However, the respondent is not removable under 237(a)(2)(A)(iii) of the Act, as defined in section 101(a)(43)(F) of the Act (crime of violence).

Finally, we turn to the issue of relief. We agree with the Immigration Judge that even if the respondent were granted relief under section 212(c) of the Act, he is still removable for having been convicted of two or more crimes involving moral turpitude any time after admission due to the existence of his May 12, 2003, conviction. Section 237(a)(2)(A)(ii) of the Act; *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991) (holding that a waiver under section 212(c) does not act as an expungement of the crime for immigration purposes because it merely "waives" the finding of deportability, not the basis of deportability itself). The respondent claims that his May 12, 2003, conviction falls within the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. However, the respondent is not being charged as inadmissible under section 212(a)(2)(A)(i) of the Act, which is the section to which this exception applies. The respondent is being charged as deportable under section 237(a)(2)(A)(i) of the Act, which includes no such exception. In fact, the only waiver authorized for section 237(a)(2)(A)(i) of the Act is "if an alien subsequent to the criminal conviction has been granted a full and

unconditional pardon by the President of the United States or by the Governor of any of the several States.” Section 237(a)(2)(A)(v).

*6 In addition, even if the respondent were granted 212(c) relief, his aggravated felony convictions for receipt of stolen property continue to bar him from eligibility for cancellation of removal under section 240A(a)(3) of the Act.

Accordingly, the following orders will be entered.

ORDER: The respondent's motion to remand is denied.

FURTHER ORDER: The respondent's appeal is sustained with respect to the charge of removability under section 237(a)(2)(A)(iii) of the Act, as defined in section 101(a)(43)(F) of the Act (crime of violence).

FURTHER ORDER: The respondent's appeal is dismissed with respect to the remaining issues.

FURTHER ORDER: The respondent is ordered removed from the United States to Egypt.

<Signature>

FOR THE BOARD

Footnotes

- 1 The Immigration Judge also issued a decision on July 14, 2003. That decision denied the respondent's motion to change venue and to terminate proceedings, however, it also includes a substantive analysis of the removability charges.
- 2 The respondent submitted evidence to the Immigration Judge that his conviction for sexual battery had been vacated. The Immigration Judge rejected this argument and the respondent has again raised it on appeal.
- 3 The Ohio “Receiving stolen property” criminal provision provides, in pertinent part, (A) No person shall receive, retain, or dispose of property of another *knowing or having reasonable cause to believe* that the property has been obtained through commission of a theft offense. Ohio Rev. Code Ann. § 2913.51 (emphasis added).
- 4 A person commits an offense involving stolen property if the person, for his own gain or to prevent the owner from again possessing his property, buys, receives, possesses or withholds property:
(a) Knowing that it is stolen property; or
(b) Under such circumstances as should have *caused a reasonable person to know* that it is stolen property. Nev. Rev. Stat. § 205.275(1) (1997) (emphasis added).
- 5 We note that although the respondent's May 12, 2003, conviction is a theft offense, it is not an aggravated felony as defined in section 101(a)(43)(G) of the Act because he was not sentenced to at least 1 year imprisonment. However, he was sentenced to at least 1 year imprisonment for his 1985 and 1993 convictions.

- 6 “Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.
- 7 The Ohio “Unauthorized use of a vehicle” criminal provision provides:
- (A) No person shall knowingly use or operate an aircraft, motor vehicle, motorcycle, motorboat, or other motor propelled vehicle without the consent of the owner or person authorized to give consent.
- (B) No person shall knowingly use or operate an aircraft, motor vehicle, motorboat, or other motor propelled vehicle without the consent of the owner or person authorized to give consent, and either remove it from this state or keep possession of it for more than forty eight hours. Ohio Rev. Code Ann. § 2913.03 (2003).

2004 WL 1398737 (BIA)

4

2004 WL 2952182 (BIA)

**** THIS IS AN UNPUBLISHED DECISION - NOT
INTENDED FOR CITATION AS PRECEDENT ****

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: MOHAMMAD AHMAD AOUN

File: A72 8224 506 - Houston
November 10, 2004

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Linda L. Walker, Esquire

ON BEHALF OF DHS:

Erica J. McGuirk
Assistant Chief Counsel

CHARGE:

*1 Notice: Sec. 237(a)(2)(A)(iii), I&N Act 8 U.S.C. § 1227(a)(2)(A)(iii)^o - Convicted of aggravated felony (section 101(a)(43)(B) of the Act) (withdrawn)
Sec. 237(a)(2)(A)(iii), I&N Act 8 U.S.C. § 1227(a)(2)(A)(iii)^o - Convicted of aggravated felony (section 101(a)(43)(F) of the Act) (withdrawn)

Lodged: Sec. 237(a)(2)(A)(i), I&N Act 8 U.S.C. § 1227(a)(2)(A)(i)^o - Convicted of crime involving moral turpitude

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

APPLICATION: Cancellation of removal; waiver of inadmissibility

ORDER:

PER CURIAM. We affirm the Immigration Judge's June 30, 2004, decision finding the respondent removable from the United States and premitting his applications for cancellation of removal and a waiver of inadmissibility.

The respondent is a native and citizen of Lebanon who adjusted his status to that of a lawful permanent resident of the United States on June 17, 1995. He has two criminal convictions that are pertinent to these proceedings. First, on September 27, 1996, he was convicted in Texas of the offense of attempted credit card abuse in violation of section 32.31 of the Texas Penal Code (TPC), based on an offense committed on January 16, 1996, and was sentenced to 30 days in prison. Second, on July 28, 2003, he was convicted in the United States District Court for the District of Arizona of the offense of misprision of a felony in violation of 18 U.S.C. § 4, and was sentenced to a term of imprisonment of 12 months and 1 day and a 1-year term of supervised release.

The respondent does not dispute the Immigration Judge's conclusion that his attempted credit card abuse offense involved moral turpitude, and we agree with the Immigration Judge that the respondent's commission of that offense rendered him deportable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude committed within 5 years after the date of admission for which a sentence of 1 year or longer may be imposed.¹ Moreover, because the respondent committed the offense in January 1996 less than 7 years after his initial lawful admission to the United States we agree with the Immigration Judge that he is statutorily ineligible for cancellation of removal pursuant to sections 240A(a)(2) and 240A(d)(1) of the Act, 8 U.S.C. §§ 1229b(a)(2) and 1229b(d)(1). See *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

***2** We also agree with Immigration Judge that the respondent's two convictions, considered together, render him deportable under section 237(a)(2)(A)(ii) of the Act, as an alien convicted at any time after admission of two or more crimes involving moral turpitude not arising from a single scheme of criminal misconduct. *See generally Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992). The respondent disputes the Immigration Judge's conclusion that the offense of misprision of a felony involves moral turpitude. However, we associate ourselves with the reasoning of *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002), in which the United States Court of Appeals for the Eleventh Circuit held that the offense of misprision of a felony under 18 U.S.C. § 4 involved moral turpitude because it “necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.” *See also Smalley v. Ashcroft*, 354 F.3d 332, 339 & n.6 (5th Cir. 2003) (expressing agreement with *Itani v. Ashcroft*, *supra*, and recognizing that this Board's prior contrary decision in *Matter of Sloan*, 12 I&N Dec. 840 (BIA 1966, A.G. 1968), had been vacated by the Attorney General).²

We reject the respondent's contention that the status of his offense as a crime involving moral turpitude should be determined by reference to the substantive law of the federal circuit court of appeals in whose territorial jurisdiction the conviction was entered—in this case, the Ninth Circuit. Removal proceedings are governed by a unitary system of federal law, and although variations undoubtedly exist in how different circuits interpret provisions of the Act, “no litigant has a right to have the interpretation of one federal court rather than that of another determine his case.” *See Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) (quoting *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963)). The Immigration and Nationality Act provides that petitions for review from orders of removal are to be filed with the court of appeals for the judicial circuit in which the Immigration Judge completed the proceedings, *see* section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2), and therefore it is that circuit's law that must be applied in removal proceedings. While the substantive law of the relevant circuit may reasonably be interpreted to encompass the circuit's applicable choice of law rules, if any, the respondent has not suggested that the Fifth Circuit—in whose jurisdiction this proceeding arises—would be inclined to apply the substantive law of the Ninth Circuit to determine whether the federal offense of misprision of a felony involves moral turpitude.

***3** Finally, because the respondent was convicted of his misprision of a felony offense pursuant to a plea agreement entered after the repeal of former section 212(c) of the Act, 8 U.S.C. § 1182(c), section 212(c) is unavailable to him as a basis for waiving the section 237(a)(2)(A)(ii) ground of deportability. We note, moreover, that even if such a waiver were available with respect to the section 237(a)(2)(A)(i) charge it would not avail the respondent

because the crime underlying that charge the Texas attempted credit card abuse offense would continue to serve as a valid factual predicate for both the section 237(a)(2)(A)(ii) charge and the termination of continuous residence under section 240A(d)(1). *See Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991).

Accordingly, the respondent's appeal is dismissed.

<Signature>

FOR THE BOARD

Footnotes

- 1 Because credit card abuse is classified as a “state jail felony” under Texas law, *see* TPC § 32.31(d), the respondent's attempt to commit that offense was classified as a “class A misdemeanor,” *see* TPC § 15.01(d), and as such, it was punishable under Texas law by a maximum term of imprisonment of 1 year. *See* TPC § 12.21. Thus, the offense renders the respondent deportable under section 237(a)(2)(A)(i)(II) of the Act despite the fact that he was sentenced to only 30 days' imprisonment.
- 2 While the Attorney General did not formally reverse *Matter of Sloan* in relation to 18 U.S.C. § 4, the rationale supporting the Board's ruling was rejected and we see no continuing life to *Matter of Sloan* aside from the views set forth by the Attorney General.

2004 WL 2952182 (BIA)

5

2005 Immig. Rptr. LEXIS 4726

Board of Immigration Appeals

Date: MAR 30, 2005

File: A031-397-362 - New York

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 4726 *

In re: KIRK DAVID PRITCHARD

Core Terms

involving moral turpitude, petit larceny, reopen, constitute crime, grand larceny, petty theft, eligibility

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Pro se

Opinion

IN REMOVAL PROCEEDINGS

MOTION

APPLICATION: Reopening

The respondent moves to reopen and remand his case to the Immigration Court to apply for a waiver of inadmissibility under *section 212(c) of the Immigration and Nationality Act*, 8 U.S.C. § 1182(c) (repealed), in accordance with the recently promulgated regulations to implement the Supreme Court's decision in [INS v. St. Cyr](#), [533 U.S. 289 \(2001\)](#).

The respondent has the burden to prove his eligibility. See [69 Fed. Reg. 57826, 57833](#) (September 28, 2004) (to be codified at [8 C.F.R. § 1003.44\(b\)](#)). The respondent is not eligible to apply for a section 212(c) waiver of the petit larceny conviction pursuant to the St. Cyr regulations because he has not proven that his plea agreement to the crime, committed in violation of [section 155.25 of the New York Penal Law](#), occurred prior to April 1, 1997 (Exh. RR 3; Tr. at 22-23 (April 7, 2003)). See [69 Fed. Reg. 57826, 57833, 57835](#) (September 28, [*2] 2004) (to be codified at [8 C.F.R. §§ 1003.44\(a\), \(b\)\(2\); 1212.3\(h\)](#)). See [Michel v. INS](#), [206 F.3d 253,265 \(2nd Cir. 2000\)](#) (noting that the Board has held that the seriousness of the offense is not determinative of whether a crime involves moral turpitude); [Matter of Alarcon](#), [20 I&N Dec. 557,558-59 \(BIA 1992\)](#) (finding that a California petty theft conviction constitutes a crime involving moral turpitude); [Matter of Esfandiary](#), [16 I&N Dec. 659,661 \(BIA 1979\)](#) (finding that petit larceny is

a crime involving moral turpitude); [Matter of S-, 5 I&N Dec. 678, 680-81](#) (finding that Canadian petty theft convictions constitute crimes involving moral turpitude because they involved a permanent taking).

Furthermore, even if the respondent's earlier 1982 New York conviction for grand larceny could be waived under section 212(c) of the Act, this form of relief does not act as a pardon or expungement of the conviction. Therefore, he is removable under the lodged charge under section 237(a)(2)(A)(ii) of the Act, [8 U.S.C. § 1227\(a\)\(2\)\(A\)\(ii\)](#), [*3] for having been convicted of two crimes involving moral turpitude - the 1982 grand larceny conviction and the 1999 petit larceny conviction. See [Matter of Balderas, 20 I&N Dec. 389, 393 \(BIA 1991\)](#) (the Board held that a conviction which has once been relied in a charge of deportability may be alleged as one of the two crimes involving moral turpitude where the second crime is a subsequent conviction). Accordingly, we enter the following order.

Order: The motion to reopen is denied.

Panel Members: PAULEY, ROGER

BIA & AAU Non-Precedent Decisions

Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

6

2005 Immig. Rptr. LEXIS 5180

Board of Immigration Appeals

Date: APR 12, 2005

File: A043-581-995 - San Diego

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 5180 *

In re: AYINDE NWABUDIKE SMITH

Core Terms

involving moral turpitude, cancel, immigrate, petty theft, alien, voluntary departure, guilty plea, petit theft, inadmissibility, deportability, accessory, waives, burglary

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Edward W. Pilot, Esquire

ON BEHALF OF DHS:

Jesus Clemente

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

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: Section 212(c) waiver; cancellation of removal; voluntary departure; remand

The respondent appeals the Immigration Judge's February 1, 2005, decision finding him removable as charged and premitting his applications for cancellation of removal and a waiver of inadmissibility under *section 212(c) of the Immigration and Nationality Act*, 8 U.S.C. § 1182(c) (repealed 1996), and granting him the alternative relief of voluntary departure. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization

Service) filed a statement in support of the Immigration Judge's decision. The respondent has also filed a motion to remand, which the DHS opposes. The appeal will be sustained, and the record will be remanded.

The respondent is [*2] a native and citizen of Trinidad and Tobago. He was admitted to the United States as a lawful permanent resident in 1994. On February 2, 1996, the respondent was convicted upon a plea of guilty of one count of petit theft in violation of [Cal. Penal Code § 490.5](#) (Deering 1996). On December 17, 1998, the respondent was convicted upon a plea of guilty to one count of petit theft with a prior in violation of [Cal. Penal Code §§ 666, 484](#) (Deering 1996).

We agree with the respondent that his request for a section 212(c) waiver with respect to his 1996 conviction should have been addressed on the merits. The respondent is statutorily eligible for section 212(c) relief with respect to the 1996 conviction. Moreover, if the respondent were granted a section 212(c) waiver he would no longer be removable as charged, and thus would not need cancellation of removal with respect to his 1998 conviction. That is because a section 212(c) waiver eliminates the inadmissibility stemming from the conviction at which the waiver is directed. When the sole removability charge [*3] is for having been convicted after admission of two crimes involving moral turpitude, the grant of a section 212(c) waiver with respect to one of the underlying convictions precludes that conviction from being a basis for removal pursuant to the section 237(a)(2)(A)(ii) charge. In other words, because a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them by the grant of a section 212(c) waiver necessarily topples the entire charge of removability.

We note that the situation presented in this case is different from the one we addressed in [Matter of Balderas, 20 I&N Dec. 389 \(BIA 1991\)](#). In *Matter of Balderas*, the alien was charged, in an earlier proceeding, with having committed two crimes involving moral turpitude: one a conviction for petty theft in 1983 and the other a conviction for accessory to burglary in 1988. The alien was granted section 212(c) relief. He was thereafter convicted in 1989 of another petty theft offense. As a result, he was again charged with removability for having committed two crimes involving moral turpitude, namely the 1988 accessory to burglary crime for which he had been granted section 212(c) relief, [*4] and the new 1989 petty theft offense. The Board held that, "since a grant of section 212(c) relief 'waives' the finding of excludability or deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes," *id.* at 391, and therefore that the charge was valid notwithstanding that one of the two convictions had previously been the subject of a section 212(c) waiver.

Here, by contrast, there is no new charge based on an intervening conviction for a crime involving moral turpitude. There is a single charge in a single proceeding. The charge is that the respondent has been convicted of *two* crimes involving moral turpitude. Once it is hypothesized that on one of those convictions the respondent succeeds in obtaining section 212(c) relief, the charge is no longer viable. Accordingly, we need not reach the issue of whether the respondent could receive both a section 212(c) waiver with respect to his 1996 conviction and cancellation of removal with respect to his 1998 conviction.

For these reasons, we will sustain the respondent's appeal and [*5] will remand the record for consideration of the merits of his application for section 212(c) relief. We note that if such relief is granted, that ends the matter because he would no longer be removable as charged. If, however, the respondent is denied section 212(c) relief, then his 1998 conviction terminates his period of continuous residence, rendering him ineligible for cancellation of removal. Section 240A(d)(1) of the Act, [8 U.S.C. § 1229b\(d\)\(1\)](#). In that event, the respondent can pursue his application for adjustment of status on remand. Therefore, and in light of our disposition of his appeal, it is unnecessary for us to address the respondent's motion to remand.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Board Member Filppu concurs in the remand, to allow consideration of the adjustment of status claim, but dissents as to the majority's interpretation of *Matter of Balderas*, *supra*. A section 212(c) waiver does not eliminate a

conviction and is unavailable to waive a charge [*6] of removability which is based in part on a conviction arising after the repeal of section 212(c).

Panel Members: FILPPU, LAURI S. OSUNA, JUAN P. PAULEY, ROGER

BIA & AAU Non-Precedent Decisions

Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

7

2005 Immig. Rptr. LEXIS 13704

Board of Immigration Appeals

Date: JUN 21, 2005

File: A021-022-950 - San Francisco

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 13704 *

In re: NYLE FRANCISCO KNUST DE MEESTER

Core Terms

immigrate, controlled substance, forgery conviction, inadmissibility, alien, further proceedings, conjunction, eligibility, expungement, ineligible, accessory, aggravate, felon, waive

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Rhoda Wilkinson Domingo, Esquire

ON BEHALF OF DHS:

Kevin Lashus

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility pursuant to section 212(c) of the Act

The Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service) appeals from the Immigration Judge's April 15, 2003, decision granting the respondent a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The appeal will be sustained and the record will be remanded for further proceedings.

The respondent, initially served with a Notice to Appear on April 9, 1997, was charged with removability as a controlled substance violator, pursuant to section 237(a)(2)(B)(i) of the Act, on account of his August 29, 1996 conviction for possession of methamphetamine (Exh. 1). On May 24, 2002, the DHS lodged a second charge of removability, charging the respondent as an aggravated felon under section 237(a)(2)(A)(iii) of [*2] the Act for his conviction, on April 29, 1994, for accessory (Exh. 1A). Lastly, on October 11, 2002, the DHS charged the respondent for having been convicted of two or more crimes involving moral turpitude (CIMT), under section 237(a)(2)(A)(ii) of the Act. As a basis for this CIMT charge, the DHS alleged that the respondent was convicted, on January 6, 1992, for driving without a license and property damage, on January 10, 1994, for battery, on April 29, 1994, for accessory to robbery, on January 4, 1995, for petty theft, on January 17, 1995, for willful infliction of injury and for resisting, delaying or obstructing an officer, and on May 6, 1999, for forgery (Exh. IB).

The Immigration Judge found the respondent removable as charged, as a controlled substance violator, an aggravated felon, and an alien having been convicted of two or more CIMTs (I.J. at 2). Moreover, the Immigration Judge found that the respondent had demonstrated statutory eligibility for section 212(c) relief, and granted this relief as a matter of discretion (I.J. at 9). Specifically, the Immigration Judge found that while the respondent could waive all convictions except for his May 6, 1999, forgery conviction under [*3] a section 212(c) waiver, the respondent did not need an accompanying waiver in conjunction with section 212(c) because the remaining 1999 forgery conviction did not stand alone to sustain a removability or inadmissibility charge (I.J. at 3,4). The DHS appeals this portion of the Immigration Judge's decision, arguing that the respondent remains removable under section 237(a)(2)(A)(ii) of the Act, and that, notwithstanding his grant of section 212(c) relief, he remains ineligible for any waiver to waive this outstanding section 237(a)(2)(A)(ii) of the Act.¹

We agree with the DHS that the respondent remains removable under section 237(a)(2)(A)(ii) of the Act, notwithstanding the waiver of his pre-April 24, 1996 convictions.² In *Matter of Balderas*, 20 I&N Dec. 389,391 (BIA 1991), we indicated that a grant of section 212(c) [*4] relief "does not issue a pardon or expungement of the conviction itself ... the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." In the instant case, the Immigration Judge appears to employ her grant of a section 212(c) waiver as an informal expungement of the respondent's convictions, in contradiction to our holding in *Matter of Balderas*, supra. However, as the DHS correctly argues, the respondent's 1992, 1994, and 1995 convictions still remain on the respondent's criminal record subsequent to the Immigration Judge's grant of a section 212(c) waiver, and, in conjunction with the respondent's unwaived 1999 forgery conviction, these convictions support the respondent's ongoing removability, under section 237(a)(2)(A)(ii), as an alien who has been convicted for two or more CIMTs. Moreover, given that the respondent appears ineligible for any form of relief from removability under this charge, we will sustain the DHS's appeal and remand the record to allow the Immigration Judge to enter further findings regarding the respondent's removability. See *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003).

Accordingly, the following orders will be entered.

ORDER: The DHS appeal is sustained and the Immigration Judge's April 15, 2003, decision is vacated.

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

Panel Members: GRANT, EDWARD R. HOLMES, DAVID B. MILLER, NEIL P.

Return to Text

[*6]

¹ Footnote 1. Given that we agree with the DHS argument in this regard, we need not address the remaining appellate arguments regarding the respondent's section 212(c) application.

² Footnote 2. All parties agree that the respondent is eligible to apply for a waiver of inadmissibility pursuant to section 212(c) for all of his convictions to which he pled guilty or *nolo contendere* prior to April 24, 1996. See *INS v. St. Cyr*, 533 U.S. 289 (2001).

BIA & AAU Non-Precedent Decisions

Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

8

2005 Immig. Rptr. LEXIS 12351

Board of Immigration Appeals

Date: AUG 08, 2005

File: A023-098-518 - San Diego

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 12351 *

In re: NORMA ROA

Core Terms

ineligible, inadmissibility, immigrate, alien, theft

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Frank T. Morrell, Esquire

ON BEHALF OF DHS:

Kathleen M. Zapata

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

ORDER:

PER CURIAM. The respondent appeals from the Immigration Judge's May 21, 2004, discretionary denial of her request for a waiver of inadmissibility pursuant to section 212(c) of the Act. The Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service), in its response brief, argues that the respondent is statutorily ineligible for section 212(c) relief. We agree with the DHS, and dismiss the respondent's appeal on that basis.

The respondent, initially served with a Notice to Appear on April 4, 2001, was charged with removability as an aggravated felon, pursuant to section 237(a)(2)(A)(iii) of the Act, on account of her November 8, 1991 conviction for grand theft of personal property (Exh. 1). The DHS argues that because the respondent also received a conviction, on March 17, 1997, for attempted fraudulent use of a credit card (Exh. 15), she is ineligible for section 212(c)

because she remains removable under section 237(a)(2)(A)(ii) of the Act, and no relief is [*2] available to her to waive this outstanding removability charge. In Matter of Balderas, 20 I&N Dec. 389, 391 (BIA 1991), we indicated that a grant of section 212(c) relief "does not issue a pardon or expungement of the conviction itself... the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." As such, even if the respondent's 1991 conviction is waivable, in conjunction with the respondent's unwaived 1997 theft conviction, these convictions support the respondent's ongoing removability, under section 237(a)(2)(A)(ii), as an alien who has been convicted for two or more crimes involving moral turpitude. As such, we find the respondent ineligible for a waiver of inadmissibility pursuant to section 212(c) of the Act, and the appeal is dismissed."

Panel Members: OSUNA, JUAN P.

BIA & AAU Non-Precedent Decisions
Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

9

2005 Immig. Rptr. LEXIS 15834

Board of Immigration Appeals

Date: SEP 07, 2005

File: A034-574-483 - El Paso

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 15834 *

In re: MIGUEL P. SOTO HINOJOS a.k.a. Miguel Soto

Core Terms

cancel, alien, aggravated felony, inadmissibility, form of relief, grant relief, deportability, ineligible, immigrate, conviction for purposes, removal proceedings, statutorily

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Carlos Spector, Esquire

ON BEHALF OF DHS:

Michael R. Leppala

Assistant Chief Counsel

Opinion

DSf REMOVAL PROCEEDINGS

APPEAL

CHARGE:

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

Lodged: 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: Waiver of inadmissibility under 212(c); cancellation of removal under 240A(a)

ORDER:

PER CURIAM. On May 12, 2005, the Immigration Judge certified his March 22, 2005, decision to the Board. The Immigration Judge pretermitted the respondent's simultaneous applications for a waiver of inadmissibility and cancellation of removal under sections 212(c) and 240A(a) of the Immigration and Nationality Act. We concur with the result of the Immigration Judge's decision in this matter. There is no dispute that the respondent's 1993 conviction constitutes an aggravated felony, as defined in section 101(a)(43)(G) of the Act. We agree that, as a result of [*2] the decision of the United States Supreme Court in *INS v. St. Cyr*, 533 U.S. 289 (2001), the respondent is eligible to apply for a waiver of inadmissibility for his 1993 conviction for Theft under former section 212(c) of the Act. That conviction was obtained pursuant to the respondent's plea of guilty in 1993. However, even if the respondent were to obtain a waiver of inadmissibility under section 212(c) of the Act for his 1993 aggravated felony conviction, the conviction would nevertheless still statutorily bar him from receiving cancellation of removal, despite the waiver of the aggravated felony ground of removal. See 8 U.S.C. § 1229b(a)(3) of the Act; 8 C.F.R. § 1212.3(d).

In particular, the Board has held that a grant of a waiver under section 212(c) of the Act does not act to eliminate the conviction for purposes of applications for other forms of relief. See *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). In *Matter of Balderas*, supra, the DHS sought to use a criminal conviction to form the basis of a second set of deportation proceedings wherein the prior [*3] proceedings, based upon the same conviction, had previously been terminated by a grant of relief under section 212(c) of the Act. The Board held that since a grant of section 212(c) relief waives the finding of excludability or deportability rather than the basis of the excludability itself, "the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." See *Matter of Balderas*, supra, at 391. Inasmuch as the grant of a waiver under section 212(c) of the Act does not act to eliminate the conviction for purposes of applications for other forms of relief, the respondent would be statutorily ineligible for cancellation of removal, due to his aggravated felony conviction.

Furthermore, as noted by the Immigration Judge, section 240A(c)(6) of the Act provides that an alien who has been granted relief under section 212(c) of the Act is ineligible for cancellation of removal under section 240A(a) of the Act. However, the Immigration Judge found that this section of the Act is not applicable in this matter, inasmuch as the respondent has not been previously granted 212(c) relief and the Board has precedent [*4] decisions permitting an alien to seek simultaneous waivers in removal proceedings. While we are cognizant of the fact that Board case law permits an alien to apply for simultaneous waivers, in none of those cases has there been a statutory counterpart to section 240A(c)(6) of the Act that would have affected our analysis on a criminal alien's applications for multiple forms of relief, which he or she sought to be adjudicated simultaneously. The enactment of section 240A(c)(6) of the Act precludes aliens, such as the respondent, from simultaneously applying for, or being granted, a waiver of inadmissibility under section 212(c) of the Act and for cancellation of removal under section 240 A(a) of the Act.

For the foregoing reasons, we find that the respondent is ineligible for a simultaneous grant of relief under sections 212(c) and 240A(a) of the Act. Accordingly, the result of the Immigration Judge's decision is affirmed.

Panel Members: PAULEY, ROGER

10

2005 Immig. Rptr. LEXIS 2208

Board of Immigration Appeals

Date: OCT 03, 2005

File: A041-959-497 - Boston

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 2208 *

In re: JOSE ANTONIO ALVES BAPTISTA

Core Terms

immigrate, inadmissibility, eligibility

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Jose Espinosa, Esquire

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

ORDER:

PER CURIAM. The respondent appeals from the Immigration Judge's May 11, 2004, denial of his request for a waiver of inadmissibility pursuant to section 212(c) of the Act. The appeal is dismissed.

The respondent, initially served with a Notice to Appear on July 13, 2000, was charged with, and conceded, removability for having been convicted of two crimes involving moral turpitude (CIMTs), pursuant to section 237(a)(2)(A)(ii) of the Act, on account of his May 15, 1996 and October 17, 1996 convictions for malicious destruction of property, as well as his May 15, 1996 conviction for receiving stolen property (Exh. 1, 1-A).¹ The respondent now argues that he should not be found removable under section 237(a)(2)(A)(ii) of the Act, because his May 15, 1996, convictions may be waived pursuant to section 212(c) of the Act. We disagree. As an initial matter, the respondent conceded removability below, [*2] and we therefore find this argument outside the scope of proper appellate review. Moreover, inasmuch as the respondent now argues that he is eligible for a waiver of

¹ Footnote 1. The Department of Homeland Security thereafter lodged further allegations and charges on August 17, 2000 (Exh. 1-A).

inadmissibility pursuant to section 212(c) of the Act, we note that his October 17, 1996 conviction is not waivable under section 212(c) and that he therefore remains removable under section 237(a)(2)(A)(ii) of the Act. See *Matter of Balderas*, 20 I&N Dec. 389, 391 (BIA 1991) (a grant of section 212(c) relief "does not issue a pardon or expungement of the conviction itself... the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes"). Lastly, notwithstanding the respondent's appellate argument, he is ineligible for cancellation of removal because, as an immigrant who entered the United States on November 21, 1989 and was thereafter convicted of a CIMT on May 15, 1996 he can not demonstrate the requisite continuous physical presence necessary for eligibility under section 240A(a) of the Act.

Accordingly, the appeal is dismissed.

Panel Members: HESS, FRED

[Return to Text](#)

BIA & AAU Non-Precedent Decisions

Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

11

2005 Immig. Rptr. LEXIS 1387

Board of Immigration Appeals

Date: NOV 25, 2005

File: A030-501-763 - Salt Lake City

BIA & AAU Non-Precedent Decisions

Reporter

2005 Immig. Rptr. LEXIS 1387 *

In re: SIONE KAI FILO LOMU

Core Terms

immigrate, inadmissibility, aggravated, involving moral turpitude, assault conviction, ineligible, inasmuch, assault, alien

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Lynn C. McMurray, Esquire

ON BEHALF OF DHS:

Weldon S. Caldbeck

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

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

APPLICATION: Waiver of inadmissibility pursuant to section 212(c) of the Act**ORDER:**

PER CURIAM. The Department of Homeland Security (the "DHS", formerly the Immigration and Naturalization Service) has appealed from the Immigration Judge's decision dated June 22, 2004. The respondent has also appealed the Immigration Judge's decision inasmuch as he determined the respondent's 2001 conviction to be a crime involving moral turpitude. Reversal of the decision is required by an intervening Board precedent pursuant to 8 C.F.R. § 1003.1(e)(5). Given our recent decision *in* Matter of Brieva, 23 I&N Dec. 766 (BIA 2005), the respondent

is ineligible for a section 212(c) waiver of inadmissibility inasmuch as his conviction for attempted aggravated assault, and his resulting removability as an aggravated felon under section 101(a)(43)(F) of the Immigration and Nationality Act [*2] , has no statutory counterpart in inadmissibility under section 212(a) of the Act.

Moreover, we agree with the DHS, that the respondent remains removable under section 237(a)(2)(A)(ii) of the Act for his December 13, 2001 assault conviction, notwithstanding the waiver of his pre-April 24, 1996 convictions.¹ As such, we find no merit to the respondent's cross-appeal. *In Matter of Balderas*, 20 I&N Dec. 389,391 (BIA 1991), we indicated that a grant of section 212(c) relief "does not issue a pardon or expungement of the conviction itself... the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." Thus, as the DHS correctly argues, the respondent's 1996 attempted assault conviction still remain on the respondent's criminal record subsequent to the Immigration Judge's grant of a section 212(c) waiver, and, in conjunction with the respondent's unwaived 2001 assault conviction, these convictions support the respondent's [*3] ongoing removability, under section 237(a)(2)(A)(ii), as an alien who has been convicted for two or more crimes involving moral turpitude. Moreover, given that the respondent appears ineligible for any form of relief from removability under this charge, we will sustain the DHS's appeal and order the respondent removed as charged in the Notice to Appear.

Accordingly, the Immigration Judge's decision, dated June 22, 2004, is vacated.

FURTHER ORDER: The respondent is ordered removed from the United States to Tonga.

Panel Members: HESS, FRED

Return to Text

BIA & AAU Non-Precedent Decisions
Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

¹ Footnote 1. All parties agree that the respondent is eligible to apply for a waiver of inadmissibility pursuant to section 212(c) for all of his convictions to which he pled guilty or *nolo contendere* prior to April 24, 1996. See *INS v. St. Cyr*, 533 U.S. 289 (2001) .

12

2006 Immig. Rptr. LEXIS 11087

Board of Immigration Appeals

Date: FEB 08, 2006

File: A041-456-508 - Atlanta

BIA & AAU Non-Precedent Decisions

Reporter

2006 Immig. Rptr. LEXIS 11087 *

In re: JERRY DICKENS

Core Terms

reopen, involving moral turpitude, theft, cancel

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Socheat Chea, Esquire

ON BEHALF OF DHS:

Alfie Owens

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

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: Reopening; section 212(c) waiver; cancellation of removal

The respondent appeals the Immigration Judge's November 9, 2004, decision denying his motion to reopen. The Department of Homeland Security (the "DHS." formerly the Immigration and Naturalization Service) has filed an opposition. The respondent has also filed a special motion to reopen under recently enacted regulations relating to section 212(c) waivers. The appeal will be sustained, the motion will be granted, and the record will be remanded.

The respondent is a native and citizen of Jamaica who entered the United States as a lawful permanent resident in 1988. On July 10, 1989, the respondent was convicted upon a plea of guilty of one count of third-degree grand theft in violation of Fla. Stat. ch. 812.014 (1989). On December 19, 2000, the respondent was convicted by a jury [*2] of one count of petit theft in violation of Fla.Stat. ch. 812.014 (2000). Neither crime qualifies as an aggravated felony because of the sentences the respondent received.¹ The respondent seeks a section 212(c) waiver and cancellation of removal.

As a procedural matter, we note that while the respondent's appeal was pending new regulations were enacted that allowed certain aliens to seek reopening to pursue waivers of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c) (repealed 1996). The respondent filed such a motion. Under the new regulations, special motions to reopen to pursue section 212(c) relief are exempt from the time and numerical limitations of 8 C.F.R. § 1003.2(c)(2). Accordingly, we will address the merits of the respondent's request for a section 212(c) waiver without regard to the timeliness requirement of 8 C.F.R. § 1003.2(c)(2).

We agree with the respondent that he is statutorily eligible for a section 212(c) waiver with respect to his 1989 conviction. Moreover, we [*3] conclude that if the respondent were granted a section 212(c) waiver he would no longer be removable as charged, and thus would not need cancellation of removal with respect to his 2000 conviction. That is because a section 212(c) waiver eliminates the inadmissibility stemming from the conviction at which the waiver is directed. When the sole removability charge is for having been convicted after admission of two crimes involving moral turpitude, the grant of a section 212(c) waiver with respect to one of the underlying convictions precludes that conviction from being a basis for removal pursuant to the section 237(a)(2)(A)(ii) charge. In other words, because a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them by the grant of a section 212(c) waiver necessarily topples the entire charge of removability.

We note that the situation presented in this case is different from the one we addressed in *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). In *Matter of Balderas*, the alien was charged,, in an earlier proceeding, with having committed two crimes involving moral turpitude: one a conviction for petty theft in 1983 and the other a conviction [*4] for accessory to burglary in 1988. The alien was granted section 212(c) relief. He was thereafter convicted in 1989 of another petty theft offense. As a result, he was again charged with removability for having committed two crimes involving moral turpitude, namely the 1988 accessory to burglary crime for which he had been granted section 212(c) relief, and the new 1989 petty theft offense. The Board held that, "since a grant of section 212(c) relief 'waives' the finding of excludability or deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes," *id.* at 391, and therefore that the charge was valid notwithstanding that one of the two convictions had previously been the subject of a section 212(c) waiver.

Here, by contrast, there is no new charge based on an intervening conviction for a crime involving moral turpitude. There is a single charge in a single proceeding. The charge is that the respondent has been convicted of *two* crimes involving moral turpitude. Once it is hypothesized that on one of those convictions the respondent [*5] succeeds in obtaining section 212(c) relief, the charge is no longer viable. Accordingly, we need not reach the issue of whether the respondent could receive both a section 212(c) waiver with respect to his 1989 conviction and cancellation of removal with respect to his 2000 conviction.

We note that, in this case, the disposition of the respondent's application for section 212(c) relief is determinative of these proceedings. A grant of a section 212(c) waiver would provide the respondent relief from the charged grounds of removability and thus would the end the matter. However, if the respondent is denied section 212(c) relief, then

¹ Footnote 1. The Immigration Judge's August 1, 2003. order of removal states that the 1989 conviction is an aggravated felony, but does so without analysis. The DHS has not charged the respondent with removability for an aggravated felony, and the respondent aptly points out that each of his convictions resulted in a sentence of less than 1 year in jail. See section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(43)(G) (deeming an aggravated felony to arise from a theft offense that resulted in at least a sentence to imprisonment of 1 year).

his 1989 conviction terminates his period of continuous residence, rendering him ineligible for cancellation of removal. Section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1).

For these reasons, we conclude that reopening is warranted to address the merits of the respondent's applications for section 212(c) relief. Therefore, the appeal will be sustained.

ORDER: The appeal is sustained.

FURTHER ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the [*6] foregoing opinion and for the entry of a new decision.

Panel Members: COLE, PATRICIA A. OSUNA, JUAN P. PAULEY, ROGER

Return to Text

BIA & AAU Non-Precedent Decisions
Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

13

2006 Immig. Rptr. LEXIS 8452

Board of Immigration Appeals

Date: FEB 22, 2006

File: A013-846-053 - Oakdale

BIA & AAU Non-Precedent Decisions

Reporter

2006 Immig. Rptr. LEXIS 8452 *

In re: DARIO ANTONIO RAFAEL IZOUIERDO-TORRES a.k.a. Daniel Torres

Core Terms

involving moral turpitude, endanger

Counsel

[*1]

ON BEHALF OF RESPONDENT:

H. Todd Nesom, Esquire

ON BEHALF OF DHS:

Robert B. Weir

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

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

Lodged 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, neglect, or abandonment

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: Waiver pursuant to section 212(c) of the Act

The respondent appeals from the Immigration Judge's December 5, 2005, decision. In that decision, the Immigration Judge pretermitted the respondent's application for a waiver pursuant to *section 212(c) of the Immigration and Nationality Act* ("Act") and ordered him removed from the United States to the Dominican Republic. The respondent's appeal will be dismissed.

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization [*2] Service) served the respondent with a Notice to Appear (Form 1-862) on April 3, 2004, alleging that on March 9, 1993, the respondent was convicted of the crime of Attempted Burglary in the First Degree, in violation of New York State Penal Law section 110/140.30. Based on the foregoing allegation, the DHS charged the respondent as removable pursuant to section 237(a)(2)(A)(iii) of the Act, as an aggravated felon as described in sections 101(a)(43)(G) and (U) of the Act (Exh. 1). On August 5, 2004, the DHS lodged an additional charge of removability pursuant to section 237(a)(2)(E)(i) of the Act, alleging that on February 25, 2004, the respondent was convicted for the offense of attempted endangering the welfare of a child in violation of New York Penal Code section 110/260.10. Finally, on October 12, 2004, the DHS lodged an additional charge of removability pursuant to section 237(a)(2)(A)(ii) of the Act, alleging that on April 27, 1992, the respondent was convicted for the offense of Attempted Burglary in the third degree, in violation of New York State Penal Law section 110/140.20.

The respondent does not dispute the charge of removability under section 237(a)(2)(A)(iii) of the [*3] Act. Nor does the respondent dispute that his 1992 and 1993, burglary convictions are crimes involving moral turpitude. However, the respondent does argue that his 2004, conviction for the offense of attempted endangering the welfare of a child in violation of New York Penal Law section 110/260.10 is not a crime involving moral turpitude. Specifically, the respondent argues that it was improper for the Immigration Judge to consider the sworn statements of the police officer in making her determination that the respondent's 2004 conviction was one of moral turpitude. In addition, the respondent argues that he is not removable pursuant to section 237(a)(2)(E)(i) of the Act. In this regard, the respondent notes that the Immigration Judge did not adequately, if at all, address the section 237(a)(2)(E)(i) of the Act charge of removability in his decision. Based on the foregoing, the respondent argues that he is eligible for a waiver under section 212(c) of the Act. We disagree.

The issue of whether the respondent's 2004, conviction for the offense of attempted endangering the welfare of a child in violation of New York Penal Law section 110/260.10 is a crime involving moral turpitude, [*4] is a question of law within the regulatory parameters of our jurisdiction which we will review de novo. See [8 C.F.R. § 1003.1\(d\)\(3\)\(ii\)](#). Initially, we agree with the respondent that the Immigration Judge's reliance on the police officer's statement, made part of exhibit 5 A, was improper. See generally [Matter of Short, 20 I&N Dec. 136, 137 \(BIA 1989\)](#) (stating "[t]he statute under which the conviction occurred controls"). However, we find the Immigration Judge's reliance on these statements is harmless error. See [Matter of Santos, 19 I&N Dec. 105 \(BIA 1984\)](#). The respondent concedes on appeal that he was convicted under part 1 of New York Penal Law section 110/260.10. That portion of the New York statute provides:

A person is guilty of endangering the welfare of a child when:

1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health.

New York Penal Law § 110/260.10. Given the language of the statute, it [*5] was unnecessary for the Immigration Judge to look behind the record to determine whether the respondent's individual conduct was turpitudinous, as the nature of the criminal conduct described in the statute under which the respondent was convicted is inherently turpitudinous. See *Matter of Short*, supra (stating, "[i]f [the statute] defines a crime in which turpitude necessarily inhere, then the conviction is for a crime involving moral turpitude"). Considering, among other things, the nature of this crime, we find that it satisfies the definition of a crime involving moral turpitude. See [Matter of Perez-Contreras, 20 I&N Dec. 615 \(BIA 1992\)](#); [Matter of Danesh, 19 I&N Dec. 669 \(BIA 1988\)](#) (defining turpitudinous conduct as inherently base, vile, or depraved, and contrary to the accepted rules of morality).

Finally, we acknowledge that the Immigration Judge failed to adequately address whether the respondent was removable pursuant to section 237(a)(2)(E)(i) of the Act, on account of his 2004 conviction for the offense of

attempted endangering the welfare of a child in violation of New York Penal Law section 110/260.10. However, insofar as we have [*6] found the respondent's 2004, offense to be one involving moral turpitude, the respondent is ineligible for a waiver pursuant to section 212(c) of the Act. See [INS v. St. Cyr, 533 U.S. 289 \(2001\)](#) (extending the 212(c) waiver of inadmissibility to aliens with certain criminal convictions prior April 1, 1997); [8 C.F.R. § 1212.3](#). Our finding with respect to this issue is fully dispositive as to the respondent's lack of eligibility for relief and removability. As such, we need not address whether the respondent's 2004, conviction for the offense of attempted endangering the welfare of a child in violation of New York Penal Law section 110/260.10 renders the respondent removable pursuant to section 237(a)(2)(E)(i) of the Act.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal will be dismissed.

Panel Members: PAULEY, ROGER

BIA & AAU Non-Precedent Decisions

Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

14

2006 Immig. Rptr. LEXIS 5147

Board of Immigration Appeals

Date: APR 11, 2006

File: A090-125-723 - Los Angeles

BIA & AAU Non-Precedent Decisions

Reporter

2006 Immig. Rptr. LEXIS 5147 *

In re: ALEJANDRO VALENCIA-GIL

Core Terms

aggravated felony, immigrate, inadmissibility, cancel, alien, theft

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Carlos Cruz, Esquire

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

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

ORDER:

PER CURIAM. The respondent appeals the Immigration Judge's December 2, 2004, decision finding the respondent ineligible for relief and ordering his removal from the United States. The appeal is dismissed.

We agree with the Immigration Judge that the respondent can not obtain a waiver of inadmissibility for his 1993 grand theft conviction, resulting in his removability as an aggravated felon under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, in conjunction with cancellation of removal for his 2003 petty theft conviction which created his additional removability under section 237(a)(2)(A)(ii) of the Act. Former section 212(c) of the Act does not serve to extinguish the existence of the respondent's 1993 aggravated felony conviction. See *Matter of Balderas*, 20 I&N Dec. 389,391 (BIA 1991) (stating that "when section 212(c) relief is granted, the Attorney General [*2] does not issue a pardon or expungement of the conviction" and that "the crimes ... do not disappear from the alien's record for immigration purposes"). Thus, because the respondent's 1993 aggravated felony conviction would

not be quashed or otherwise excused even were he granted a waiver of inadmissibility, the respondent would not be able to apply for cancellation of removal, since section 240A of the Act precludes an alien convicted of *any* aggravated felony from obtaining such relief. See section 240A of the Act, 8 U.S.C. § 1229b (emphasis added). As such, we find no reason to disturb the Immigration Judge's decision, and the appeal is dismissed.

Panel Members: HESS, FRED

BIA & AAU Non-Precedent Decisions

Copyright , Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

15

2006 Immig. Rptr. LEXIS 9158

Board of Immigration Appeals

Date: SEP 20, 2006

File: A090-026-579 - Lancaster

BIA & AAU Non-Precedent DecisionsReporter

2006 Immig. Rptr. LEXIS 9158 *

In re: EZEQUIEL ORTIZ-PERES a.k.a. Ortiz Ezequiel Peres a.k.a. Ezequiel Peres Ortiz

Core Terms

immigration judge, deportability, involving moral turpitude, immigrate, cancel, weapon, pretermittting, eligible, assault, deadly, alien

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Carrye Washington, Esquire

ON BEHALF OF DHS:

Catherine Halliday-Roberts

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [\[8 U.S.C. § 1227\(a\)\(2\)\(A\)\(i\)\]](#) -Convicted of crime involving moral turpitude

APPLICATION: Cancellation of removal; waiver of deportability

The respondent appeals from an Immigration Judge's May 24, 2006, decision sustaining the charge of deportability against him and pretermittting his applications for cancellation of removal under [section 240A\(a\) of the Immigration and Nationality Act](#) (the Act), [8 U.S.C. § 1229a\(a\)](#), and a waiver of deportability under former section 212(c) of the Act, [8 U.S.C. § 1182\(c\) \(1994\)](#). The appeal will be dismissed in part and sustained in part, and the record will be remanded for further proceedings.

The respondent is a native and citizen of Mexico and a lawful permanent resident of the United States, having adjusted his status on April 14, 1989, pursuant to section 245(a) of the Act, [8 U.S.C. § 1255\(a\) \[*2\]](#) (Exh. 1). On September 21, 1993, he was convicted pursuant to a guilty plea of assault with a deadly weapon by means of force likely to produce great bodily injury, a felony in violation of [section 245\(a\)\(1\) of the California Penal Code](#) (Exh. 2).

On the basis of this conviction, the Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization Service, initiated the present removal proceedings, in which the respondent is charged with deportability as an alien convicted of a crime involving moral turpitude committed within 5 years after the date of admission for which a sentence of at least 1 year may be imposed. See section 237(a)(2)(A)(i) of the Act, [8 U.S.C. § 1227\(a\)\(2\)\(A\)\(i\)](#). The respondent, through counsel, conceded the charge of deportability and expressed an intention to apply for relief from removal (Tr. at 19), including a section 212(c) waiver and cancellation of removal. The Immigration Judge sustained the charge and pretermitted both forms of relief, and the respondent now appeals.

On appeal, the respondent argues, among other things, that his conviction [*3] under section 245(a)(1) of the California Penal Code does not qualify as a crime involving moral turpitude. In response to this argument, we would simply note that the respondent, through counsel, expressly admitted all factual allegations contained in the charging document and expressly conceded that he was removable from the United States as charged (Tr. at 19). Applicable regulations, which have the force and effect of law as to the Immigration Judges and this Board, provide in pertinent part that "the immigration judge may determine that removability as charged has been established by the admissions of the respondent." [8 C.F.R. § 1240.10\(c\) \(2006\)](#). Accordingly, we conclude that the distinct and formal concession of removability, made by the respondent's attorney acting in her professional capacity during the respondent's removal hearing, is binding on the respondent as a judicial admission, and he will not now be heard to challenge the factual findings or legal conclusions of the Immigration Judge that arose from that concession. See [Matter of Velasquez, 19 I&N Dec. 377, 382 \(BIA 1986\)](#). Accordingly, that portion of the respondent's [*4] appeal that challenges the Immigration Judge's finding of deportability will be summarily dismissed pursuant to [8 C.F.R. § 1003.1 \(d\)\(2\)\(i\)\(B\)](#) (authorizing summary dismissal of appeals, or portions of appeals, when "[t]he only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding").

Turning to the issue of relief, we begin by affirming the Immigration Judge's determination that the respondent is not eligible for cancellation of removal under section 240A(a). To be eligible for cancellation of removal under section 240A(a), an alien must demonstrate, among other things, that he "has resided in the United States continuously for 7 years after having been admitted in any status." See section 240A(a)(2) of the Act. For purposes of this requirement, moreover, "any period of continuous residence ... shall be deemed to end ... when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2). [*5] ..." Section 240A(d)(1) of the Act. As the respondent conceded below, his California conviction for assault with a deadly weapon by means of force likely to produce great bodily injury is a "crime involving moral turpitude." A crime involving moral turpitude is an offense "referred to" in section 212(a)(2)(A)(i)(I) of the Act, and in this instance the offense "renders" the respondent removable under section 237(a)(2)(A)(i) of the Act. Furthermore, the conviction record reflects that this offense was committed in 1993, less than 7 years after the respondent's only known "admission" to the United States in 1989. Accordingly, we find no reversible error in the Immigration Judge's decision pretermitting the respondent's application for cancellation of removal based on his failure to establish the period of continuous residence required by section 240A(a)(2).

Finally, we address the Immigration Judge's determination that the respondent is not eligible for a section 212(c) waiver. In pretermitting this application, the Immigration Judge noted that the respondent had sustained a conviction in 2006 for making criminal threats in violation of [section 422 of the California Penal Code](#) [*6], another crime involving moral turpitude. Cf. [Matter of Ajami, 22 I&N Dec. 949, 952 \(BIA 1999\)](#) (holding that "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind"). According to the Immigration Judge, this conviction precludes the respondent from obtaining section 212(c) relief because it occurred after the repeal of former section 212(c) in 1997. On the present record, we do not agree.

At the outset, we recognize that the respondent's 2006 California conviction for making criminal threats may be considered by the Immigration Judge in connection with the respondent's eligibility for section 212(c) relief, even though it has not been charged as the factual predicate for any ground of deportability. [United States v. Gonzalez-Valerio, 342 F.3d 1051, 1055-56 \(9th Cir. 2003\)](#). However, because that 2006 conviction does not support any

charge of deportability against the respondent that cannot be waived by former section 212(c), we are persuaded that the Immigration Judge's decision must be reversed to the extent that he pretermitted the respondent's request for such a waiver. We note in this regard that the respondent's 2006 conviction, [*7] standing alone, would not support *any* charge of deportability. Specifically, although the offense is undoubtedly a "crime involving moral turpitude," it is not a valid factual predicate for a charge under section 237(a)(2)(A)(i) of the Act because it was not committed within 5 years after the date of the respondent's admission to lawful permanent residence in 1989. [*Shivaraman v. Ashcroft*, 360 F.3d 1142 \(9th Cir. 2004\)](#). And although the offense could perhaps qualify as a "crime of violence" within the meaning of [18 U.S.C. § 16](#), it is not an "aggravated felony" within the meaning of sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act, [8 U.S.C. §§ 1101\(a\)\(43\)\(F\)](#) and [1227\(a\)\(2\)\(A\)\(iii\)](#), because it did not result in the imposition of a sentence to a term of imprisonment of at least 1 year.

The only ground of deportability that could conceivably encompass the respondent's 2006 conviction would be that set forth at section 237(a)(2)(A)(ii) of the Act, which relates to aliens convicted of two or more crimes involving moral turpitude not arising from a [*8] single scheme of criminal misconduct. Indeed, the respondent's 2006 conviction, when considered in conjunction with his 1993 conviction for assault with a deadly weapon, would likely support such a charge. However, such a charge-founded as it is upon *two* convictions for crimes involving moral turpitude-would cease to be viable if the respondent were granted a section 212(c) waiver with respect to *either* predicate crime. As the Immigration Judge astutely observed, the respondent's 2006 conviction is not waivable because it resulted from a plea agreement entered into after the repeal of former section 212(c) in 1997. However, the other predicate conviction underlying our hypothetical section 237(a)(2)(A)(ii) charge-i.e., the 1993 assault with a deadly weapon offense-is waivable because it arose from a plea agreement entered into prior to the repeal of former section 212(c). Were the respondent to obtain section 212(c) relief with respect to the 1993 conviction, the remaining 2006 conviction would cease to render him deportable at all, and therefore it would have no further effect on his statutory eligibility for section 212(c) relief, although it would of course remain a highly [*9] relevant factor in the discretionary calculus.

In conclusion, we agree with the Immigration Judge that the respondent's 1993 California conviction for assault with a deadly weapon makes him deportable as charged and statutorily ineligible for cancellation of removal. However, we disagree with the Immigration Judge's determination that the respondent's 2006 conviction for making criminal threats renders him ineligible for section 212(c) relief. Accordingly, the appeal will be dismissed in part and sustained in part, and the record will be remanded to the Immigration Judge for further consideration of the respondent's request for a section 212(c) waiver and for such other matters as the Immigration Judge deems appropriate.

ORDER: The appeal is dismissed in part and sustained in part.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision.

Panel Members: FILPPU, LAURIS. O'Leary, Brian M. PAULEY, ROGER

16

2006 Immig. Rptr. LEXIS 6259

Board of Immigration Appeals

Date: OCT 06, 2006

File: A024-359-599 - New York

BIA & AAU Non-Precedent Decisions

Reporter

2006 Immig. Rptr. LEXIS 6259 *

In re: JEROMI HORNS BAZUAYE a.k.a. Bradley Cain a.k.a. Joromi Bazuaye

Core Terms

involving moral turpitude, removal proceedings, aggravated felony, immigrate, terminate, reset, attempted theft, inadmissibility

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Pro se

Opinion

IN REMOVAL PROCEEDINGS

APPEAL and MOTION

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [\[8 U.S.C. § 1227\(a\)\(2\)\(A\)\(i\)\]](#) - Convicted of crime involving moral turpitude

Lodged: 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

Sec. 237(a)(2)(A)(iii), I&N Act [\[8 U.S.C. § 1227\(a\)\(2\)\(A\)\(iii\)\]](#) -Convicted of aggravated felony under section 101(a)(43)(M)(i)

Sec. 237(a)(2)(A)(iii), I&N Act [\[8 U.S.C. § 1227\(a\)\(2\)\(A\)\(iii\)\]](#) -Convicted of aggravated felony under sections 101(a)(43)(G) and (U)

APPLICATION: Termination, adjustment of status under section 245(a) with 212(c) waiver or 212(h) waiver

This case was last before us on July 30, 2003, when we ordered, *inter alia*, that the removal proceedings against the respondent be reinstated and the record remanded. The respondent was convicted in 1992 for the offense of "possesses with intent to defraud 15 or more counterfeit or unauthorized access devices in affecting interstate commerce," in violation of [18 U.S.C. § 1029\(a\)\(3\)](#), for which he was sentenced to 37 months imprisonment. [*2] (RI,Exh.2atF). In 1997, the respondent was convicted of the offense of attempted grand larceny in the third degree in violation of N.Y. PENAL Law §§ 110,155.35. (RI,Exh.2atE).

The respondent moves the Board to "strike" the Department of Homeland Security's (DHS), formerly known as the Immigration and Naturalization Service, brief on appeal. We point out that there was an omission in the transcription process, such that neither party initially received a copy of the transcript for the proceedings that occurred on March 15, March 27, and April 24, 2006. Because of this error, the Board reset the briefing schedule after the parties received the complete transcript. DHS filed a timely brief based on the reset briefing schedule. The fact that DHS did not file a brief pursuant to the initial briefing schedule does not warrant "striking" its timely brief filed under the reset briefing schedule. Thus, we will deny the respondent's motion to strike DHS's brief on appeal.

As to the merits of the respondent's appeal, we affirm the reasoning and the outcome of the May 1, 2006, written Immigration Judge decision finding the respondent removable as having committed an aggravated felony known [*3] as an attempted theft offense under sections 101 (a)(43)(G) and (U) of the Immigration and Nationality Act (the Act), [8 U.S.C. §§ 1101 \(a\)\(43\)\(G\) and \(U\)](#). In addition, we affirm the Immigration Judge's order denying the respondent's request for relief under section 212(h) of the Act, [8 U.S.C. § 1182\(h\)](#), as well as the Immigration Judge's decision ordering the respondent removed to his native Nigeria.

We also agree that the Immigration Judge properly denied the respondent's motion to terminate. Contrary to the respondent's assertions, the earlier removal proceedings did not and could not reach the merits of the case. As the Immigration Judge pointed out, the earlier removal proceedings were terminated because the prior Immigration Judge found that the merits could not be reached until the procedural prerequisite of rescinding the respondent's adjustment of status had been completed. Thus, *res judicata* does not apply to the instant proceedings because the matters were not and could not have been adjudicated before rescission occurred. See [St. Pierre v. Dyer, 208 F.3d 394,399-400 \(2d Cir. 2000\)](#).

We do point out, however, that the Immigration Judge likely erred in finding [*4] the respondent ineligible for a waiver of inadmissibility under section 212(c) of the Act, [8 U.S.C. § 1182\(c\)](#) (repealed 1996) for his 1992 conviction and, by extension, that he was removable for having committed two crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act, [8 U.S.C. § 1227\(a\)\(2\)\(A\)\(ii\)](#). If the respondent is eligible for a 212(c) waiver, the inadmissibility stemming from his 1992 conviction would be eliminated. When the removability charge is for having been convicted after admission of two crimes involving moral turpitude, the grant of a section 212(c) waiver with respect to one of the underlying convictions precludes that conviction from being a basis for removal pursuant to the section 237(a)(2)(A)(ii) charge. In other words, because a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them by the grant of a section 212(c) waiver necessarily topples the entire charge of removability. We stress that the Immigration Judge's error does not affect the respondent's removability for having committed an aggravated felony known as an attempted theft offense or the Immigration Judge's decision to order the respondent removed [*5] to Nigeria.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed and his motion is denied.

Panel Members: PAULEY, ROGER

17

2007 Immig. Rptr. LEXIS 1818

Board of Immigration Appeals

Date: AUG 06, 2007

File: A090-348-182 - El Paso, TX

BIA & AAU Non-Precedent Decisions

Reporter

2007 Immig. Rptr. LEXIS 1818 *

In re: ABRAHAM GARCIA a.k.a. Abraham Sandoval Garcia

Core Terms

violence, involving moral turpitude, robbery conviction, aggravated felony, criminal conviction, assault, bodily injury, immigrate, reckless, cancel, alien, theft, inadmissibility, eligible, sentence

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Laura Prieto

ON BEHALF OF DHS:

William M. Hunt

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

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, neglect, or abandonment

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

Lodged: 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; waiver of inadmissibility

The respondent appeals from the Immigration Judge's March 16, 2006, decision finding him removable as charged and ineligible for cancellation of removal and a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The appeal will be sustained and the record will be remanded for further proceedings in accordance with this decision.

The respondent is a native and citizen of [*2] Mexico who was admitted to the United States as a lawful permanent resident on February 10, 1989 (Exh. 1). He was convicted of robbery in violation of TEXAS PENAL CODE ANN. § 29.02 (2003) on October 28, 1994, and sentenced to 10 years of probation and community service (Exh. 3). On September 21, 1995, the respondent was convicted of possession of marijuana and sentenced to 5 days confinement (Exh. 7). On September 17, 1998, the respondent's probation for his robbery conviction was revoked and he was sentenced to 5 years confinement (Exh. 14). The respondent was also convicted of the offense of assault on a family victim in violation of TEXAS PENAL CODE ANN. § 22.01(a) (2005) on February 3, 1999, and was sentenced to 180 days confinement (Exh. 4).

The Immigration Judge concluded that the DHS sustained both charges and that the respondent's robbery conviction was an aggravated felony that barred his eligibility for cancellation of removal and a waiver under former section 212(c) of the Act.

We consider first whether the respondent was removable pursuant to section 237(a)(2)(E)(i) of the Immigration and Nationality Act [*3], 8 U.S.C. § 1227(a)(2)(E)(i), for having been convicted of a crime of domestic violence due to his conviction for assault on a family victim under TEXAS PENAL CODE ANN. § 22.01(a). Section 237(a)(2)(E)(i) of the Act references 18 U.S.C. § 16 for the definition of "crime of violence." We conclude that the respondent's conviction for assault on a family victim does not involve the requisite risk of the use of physical force that is required to meet the definition of 18 U.S.C. § 16. The state statute under which the respondent was convicted, TEXAS PENAL CODE ANN. § 22.01(a) provides that a person commits the offense of assault on a family victim if the person:

- 1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; or
- 2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
- 3) intentionally or knowingly causes physical contact with another when the person knows or should [*4] reasonably believe that the other will regard the contact as offensive or provocative.

Subsection (a)(1) involves causing bodily injury through "intentional [], knowing[], or reckless[]" conduct. However, the "intentional use of force" must be an element of an offense in order for it to qualify as a "crime of violence" under 18 U.S.C. § 16(a). See *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (an offense that is described by reference to its ends, i.e., by the causing of bodily injury, cannot be deemed to have the "use of physical force" as "an element" for purposes of the crime of violence definition under section 18 U.S.C. § 16(a)), *cert. denied*, *Vargas-Duran v. United States*, 541 U.S. 965 and 543 U.S. 995 (2004). The Texas statute defines the offense of assault by reference to its ends, i.e., the infliction of injury upon the victim, and not by reference to its means, i.e., the use of force by the offender. See TEXAS PENAL CODE ANN. § 22.01(a). It is not enough to say that because resulting [*5] bodily injury is an element of the statute, intentional physical force must a fortiori be an element as well. See *United States v. Martinez-Mata*, 393 F.3d 625, 629 (5th Cir. 2004) (citing *United States v. Vargas-Duran*, *supra*, at 606 (5th Cir. 2004)). The United States Court of Appeals for the Fifth Circuit has specifically rejected this "outcome-determinative" approach in favor of an approach requiring an examination of the "elements of the offense." See *United States v. Martinez-Mata*, *supra*, at 629. Thus, under current Fifth Circuit law the offense did not have the use of physical force as "an element," which is what is required by 18 U.S.C. § 16(a). *Id.*

The Fifth Circuit also has held that 18 U.S.C. § 16(b) requires intentional use of force or "requires recklessness as regards the substantial likelihood that the offender will intentionally employ force against the person or property of another in order to effectuate the commission of the offense." *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) (emphasis added); see [*6] also *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002) (*overruling* *Matter of Magallanes*, 22 I&N Dec. 1 (BIA 1998)). Thus, in the Fifth Circuit, reckless conduct that results in the employment

of force that is not intentional is not sufficient to render an offense a "crime of violence" under section 16(b). The statute in question requires a minimum of reckless conduct, and that the conduct resulted in bodily injury to another. See TEXAS PENAL CODE ANN. § 22.01(a). The statute does not require that there be any intent to use force or a recklessness with regard to the possibility that force might be intentionally employed in committing the offense. Under the reasoning of *Chapa-Garza*, by which this Board is bound, we thus do not find that the crime of assault on a family victim involves the requisite level of intent. See *United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001) (finding that the Board is bound by circuit precedent, even those decisions issued in the sentence enhancement context). Consequently, we find that the DHS did not sustain the charge under section 237(a)(2)(E)(i) [*7] of the Act for having been convicted of a crime of domestic violence.

The respondent does not contest that he is removable under section 237(a)(2)(A)(ii) of the Act for having been convicted of two or more crimes involving moral turpitude, and we do not find grounds for reversing the Immigration Judge's finding that the DHS sustained that charge.

We next consider whether the respondent is eligible for cancellation of removal. An alien who has been convicted of an aggravated felony is not eligible for cancellation of removal for lawful permanent residents. See section 240A(a)(3) of the Act. We agree with the Immigration Judge that the respondent's robbery conviction is an aggravated felony under section 101(a)(43)(G) of the Act. Under that section, a theft or burglary offense for which the term of imprisonment is at least 1 year is an aggravated felony. The respondent's conviction for robbery includes as an element the commission of theft. See TEXAS PENAL CODE ANN. § section 29.02(a). We find, therefore, that it fits squarely within the definition of a theft offense in section 101 (a)(43)(G) of the Act. Further, although the respondent was initially given probation when [*8] convicted on October 28, 1994 (Exh. 3), that probation was revoked on September 17, 1998, and he was ordered confined for 5 years (Exh. 14). Thus, the respondent's term of imprisonment was for more than 1 year and his conviction was an aggravated felony. As such, the respondent's robbery conviction renders him ineligible for cancellation of removal.

We consider next whether the respondent's convictions also render him ineligible for relief under section 212(c) of the Act. Effective April 1, 1997, former section 212(c) of the Act was repealed by section 304(b) of the *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996 (IIRTRA), Div. C of Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996). The United States Supreme Court decided *in INS v. St. Cyr*, 533 U.S. 289 (2001), that section 212(c) relief remained available to aliens whose criminal convictions resulted from plea agreements prior to April 1, 1997, and who, notwithstanding those convictions, would have been eligible for such relief at the time of their plea under the law then in effect. The record establishes that the respondent's robbery conviction was by a plea of guilty on October 28, 1994, [*9] well before the April 1, 1997, cut-off date. Consequently, the date of the respondent's conviction does not render him ineligible for a waiver under former section 212(c) of the Act.

Further, an alien can only waive a ground of removability for which there is a comparable ground of inadmissibility. See *Matter of Blake*, 23 I&N Dec. 722, 724 (BIA 2005). Here, the respondent is removable under section 237(a)(2)(A)(ii) of the Act for having been convicted of two or more crimes involving moral turpitude. The comparable ground of inadmissibility is for multiple criminal convictions under section 212(a)(2)(B) of the Act.¹

In addition, we agree with the respondent that he is statutorily eligible for a section 212(c) waiver with respect to his 1994 robbery conviction. Moreover, we conclude that if the respondent were granted a section 212(c) waiver he would no longer be removable as charged, and thus would not need relief from his 1999 assault conviction. That is because a section 212(c) waiver [*10] eliminates the inadmissibility stemming from the conviction at which the waiver is directed. When the sole removability charge is for having been convicted after admission of two crimes involving moral turpitude, the grant of a section 212(c) waiver with respect to one of the underlying convictions precludes that conviction from being a basis for removal pursuant to the section 237(a)(2)(A)(ii) charge. In other

¹ Footnote 1. Because the DHS did not charge the respondent with a crime of violence aggravated felony, the respondent is not barred from 212(c) *under* *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005) (finding that section 212(c) relief is not available to respondents convicted of crimes of violence because the crimes of violence aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act).

words, because a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them by the grant of a section 212(c) waiver necessarily topples the entire charge of removability.

We note that the situation presented in this case is different from the one we addressed in *Matter of Balder* as, 20 I&N Dec. 389 (BIA 1991). In *Matter of Balderas*, the alien was charged, in an earlier proceeding, with having committed two crimes involving moral turpitude: one a conviction for petty theft in 1983 and the other a conviction for accessory to burglary in 1988. The alien was granted section 212(c) relief. He was thereafter convicted in 1989 of another petty theft offense. As a result, he was again charged with removability for having committed two crimes [*11] involving moral turpitude, namely the 1988 accessory to burglary crime for which he had been granted section 212(c) relief, and the new 1989 petty theft offense. The Board held that, "since a grant of section 212(c) relief 'waives' the finding of excludability or deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes," *id.* at 391, and therefore that the charge was valid notwithstanding that one of the two convictions had previously been the subject of a section 212(c) waiver.

Here, by contrast, there is no new charge based on an intervening conviction for a crime involving moral turpitude. There is a single charge in a single proceeding. The charge is that the respondent has been convicted of two crimes involving moral turpitude. Once it is hypothesized that on one of those convictions the respondent succeeds in obtaining section 212(c) relief, the charge is no longer viable. Therefore, we conclude that a remand is warranted to address the merits of the respondent's application for section 212(c) relief. Therefore, the appeal [*12] will be sustained.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Board Member Filppu respectfully dissents in relation to the majority's section 212(c) determination, viewing *Matter of Balderas*, *supra*, as precluding relief because the 1999 conviction is not subject to a waiver.

Panel Members: COLE, PATRICIA A. FILPPU, LAURI S. PAULEY, ROGER

FOR THE BOARD

Return to Text

[*13]

18

2008 Immig. Rptr. LEXIS 10959

Board of Immigration Appeals

Date: MAR 24, 2008

File: A017-275-734 - San Francisco, CA

BIA & AAU Non-Precedent Decisions

Reporter

2008 Immig. Rptr. LEXIS 10959 *

In re: ANTONIO DE CHAVES MELO a.k.a. Anthony Mello

Core Terms

involving moral turpitude, aggravated felony, burglary, immigrate, eligible, alien, theft

Counsel

[*1]

ON BEHALF OF RESPONDENT:

James Todd Bennett, Esquire

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

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

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -Convicted of aggravated felony

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: Waiver of inadmissibility

This case was last before the Board on December 18, 2001, when we reopened the respondent's proceedings and remanded the record to the Immigration Judge to allow the respondent the opportunity to apply for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), in accordance with the United States Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) . The respondent now appeals the Immigration Judge's April 4, 2006, decision denying his application for a waiver under former section 212(c) of the

Act. The appeal will be sustained, and [*2] the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

The respondent, a native and citizen of Portugal, was admitted to the United States as a lawful permanent resident on July 5, 1966 (Exh. 1). On March 10, 1989, the respondent was convicted in the Superior Court of California, County of Merced, for the offenses of burglary in the first degree and grand theft in violation of California Penal Code sections 459 and 487.1, respectively (Exh. 4). On December 2, 1997, the respondent was convicted in the Superior Court of California, County of Merced, for the offense of burglary in the second degree in violation of California Penal Code section 459 and sentenced to 32 months' imprisonment (Exhs. 22 and 23). On the basis of the 1997 conviction, the respondent was placed into proceedings with the Notice to Appear in 1999 (Exhs. 1 and 1 A). In addition, the Department of Homeland Security ("DHS") filed a Form 1-261 with the Immigration Court on January 27, 2000, in regard to the respondent's 1989 convictions (Exh. [*3] 1 A).

On February 29, 2000, the Immigration Judge denied the respondent's application for a waiver under former section 212(c) of the Act based upon his conclusion that his 1989 convictions for burglary and grand theft constituted aggravated felonies as that term is defined in sections 101(a)(43)(F) and (G) of the Act, 8 U.S.C. §§ 1101(a)(43)(F) and (G). On July 19, 2000, the Board affirmed the Immigration Judge's decision. Subsequently, the respondent filed an untimely motion to reopen with the Board which was ultimately granted on December 18, 2001 (Exhs. 9 and 10). We found that the Supreme Court's decision in *St. Cyr* represented a fundamental change in law that likely would affect the outcome of the respondent's case. The Board remanded the record to the Immigration Judge in order to allow the respondent the opportunity to apply for the waiver. Notably, the Board did not address the respondent's 1997 conviction.

After the case was re-calendered, the DHS filed additional allegations and charges against the respondent in regard to his 1997 conviction (Exhs. 13 and 23). Specifically, the DHS alleged [*4] that the respondent was convicted as previously mentioned in 1997 and that he was removable under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude, namely his 1989 burglary conviction and his 1997 burglary conviction (Exhs. 13, and 23). As a result, the DHS argued that the respondent was not eligible for a waiver under former section 212(c) of the Act because of his 1997 additional crime involving moral turpitude which is not eligible for treatment under *St. Cyr*. The Immigration Judge agreed and pretermitted the respondent's application (I.J. at 9-10).

On appeal, the respondent contends that the Immigration Judge erred in allowing the DHS to "resurrect" the 1997 conviction which he asserts was withdrawn during his prior proceedings. See Respondent's Brief at 7. According to the respondent, it was a violation of section 239(a)(1)(D) of the Act, 8 U.S.C. § 1229(a)(1)(D), to allow the DHS to "reallege" this conviction as a basis for removal. See Respondent's Brief at 7-8. The respondent also contends that the [*5] DHS should be estopped from asserting this conviction after it previously withdrew the charge and allegations because he contends it constitutes affirmative misconduct on behalf of the DHS. *Id.* at 8 . The respondent asserts that this violates his due process rights. *Id.* at 9 .

Initially, we note, as did the Immigration Judge, that there is some confusion in the record regarding the allegations and removability charges lodged in the Notice to Appear and original Form 1-261 filed with the Immigration Court (Exhs. 1 and 1 A). However, we point out that after the Board remanded the record to the Immigration Judge based upon our conclusion that the respondent was eligible to apply for a waiver under former section 212(c) of the Act under the Supreme Court's decision in *St. Cyr*, the DHS filed new charges against the respondent in regard to his 1997 conviction (Exhs. 13 and 23). In this regard, we note that, at any time during removal proceedings, additional or substituted charges of deportability and/or factual allegations may be lodged by the DHS in writing. See 8 C.F.R. § 1003.30 (2007); see also 8 C.F.R. § 1240.10(e) [*6] . Inasmuch as the respondent remained in removal proceedings during the remanded proceedings, the DHS was permitted to file additional charges of removability.¹ See *id.* As a result, we find that all of the respondent's contentions in regard to his allegations that the DHS was not

¹ [*11] Footnote 1. The respondent conceded the conviction but denied his removability based upon that conviction under section 237(a)(2)(A)(iii) of the Act contending that he was not sentenced to more than 1-year imprisonment (Tr. at 4).

permitted to "resurrect" and/or "reallege" his 1997 conviction after it withdrew those factual allegations during his underlying proceedings are without merit.

However, we find that the respondent is statutorily eligible for a waiver under former section 212(c) of the Act with respect to his 1989 conviction. Moreover, we conclude that if the respondent were granted the waiver he would no longer be removable under section 237(a)(2)(A)(ii) of the Act, and thus would not need cancellation of removal with respect to his 1997 conviction. That is because a waiver under former section 212(c) of the Act eliminates the inadmissibility stemming from the conviction at which the waiver is directed. When the removability charge [*7] is for having been convicted after admission of two crimes involving moral turpitude, the grant of a waiver under former section 212(c) of the Act with respect to one of the underlying convictions precludes that conviction from being a basis for removal pursuant to section 237(a)(2)(A)(ii) of the Act. In other words, because a charge under section 237(a)(2)(A)(ii) of the Act has two essential pillars, the elimination of one of those pillars by the grant of a waiver under former section 212(c) of the Act necessarily topples that entire charge of removability.

We note that the situation presented in this case is different from that addressed in *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). In *Matter of Balderas*, the alien was charged, in an earlier proceeding, with having committed two crimes involving moral turpitude: one a conviction for petty theft in 1983 and the other a conviction for accessory to burglary in 1988. The alien was granted relief under section 212(c) of the Act. He was thereafter convicted in 1989 of another petty theft offense. As a result, he was again charged with removability for having committed two crimes involving moral turpitude, namely the [*8] 1988 accessory to burglary crime for which he had been granted relief, and the new 1989 petty theft offense. The Board held that, "since a grant of section 212(c) relief 'waives' the finding of excludability or deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes," *id.* at 391, and therefore that the charge was valid notwithstanding that one of the two convictions had previously been the subject of a section 212(c) waiver. Here, by contrast, there is no new charge based on an intervening conviction for a crime involving moral turpitude. There is a single charge in a single proceeding. The charge is that the respondent has been convicted of *two* crimes involving moral turpitude. Once it is hypothesized that on one of those convictions the respondent succeeds in obtaining relief under former section 212(c) of the Act, the charge is no longer viable.

Finally, the respondent contends on appeal that his 1997 conviction does not qualify either as an aggravated felony or a crime involving moral turpitude. See Respondent's Brief [*9] at 9-11. In this regard, the Ninth Circuit has held that a similar statute does not define a categorically turpitudinous offense. See *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005). We note that the Immigration Judge failed to rule on the respondent's removability as an aggravated felon under section 237(a)(2)(A)(iii) of the Act based upon the 1997 conviction.² The respondent asserts that his conviction falls under a statute that is not a categorical aggravated felony and may only be found to be so under a modified categorical approach. Further, the record contains only the charging papers and abstracts of judgments indicating conviction by plea. According to the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, the record must show that the alien was convicted "as charged" in order to rely on the charging papers in concluding that a conviction is one for an aggravated felony. See *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007). The record here does not indicate that the respondent was convicted "as charged" in the criminal charging papers. Thus, we find it necessary to remand the record to the Immigration Judge in order to determine whether the respondent's conviction is for a crime of moral turpitude or an aggravated felony.

Accordingly, the appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

²Footnote 2. The respondent has not filed an application for adjustment of status; thus, we find it unnecessary to address his contention that he is eligible for relief under our decision in *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). The respondent's remaining arguments in regard to the applicability of *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), to his case are also without merit inasmuch as the case was not raised or relied upon in any way by the Immigration Judge. See Respondent's Brief at 12-13.

ORDER: The appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

Board Member Filppu respectfully concurs in the majority's resolution of the issues in this case, except for its interpretation of *Matter of Balder* as, *supra*, to allow the "two crimes of moral turpitude" charge to be waivable. *Balderas* points to the opposite result.

Panel Members: COLE, PATRICIA A.; FILPPU, LAURI S. and PAULEY, ROGER

[Return to Text](#)

BIA & AAU Non-Precedent Decisions
Copyright 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

19

2008 WL 2401073 (BIA)

**** THIS IS AN UNPUBLISHED DECISION - NOT
INTENDED FOR CITATION AS PRECEDENT ****

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: FROILAN LUCIANO BENCOSME ANGELES A.K.A.
FROILAN BENCOSME A.K.A. FRANK LUCIANO ANGELES A.K.A.
FROILAN L. BENCOSME A.K.A. ANGELES BENCOSME A.K.A.
FROILAN LUCIANO BENCOSME A.K.A. FRANK F. ANGELES

File: A37 649 561 - Los Fresnos, TX
April 22, 2008

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Oscar Alvarez, Esquire

ON BEHALF OF DHS:

Lessa N. Whatmough
Assistant Chief Counsel

CHARGE:

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

Sec. 237(a)(2)(A)(iii), I&N Act 8 U.S.C. § 1227(a)(2)(A)(iii)^o - Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility; cancellation of removal; adjustment of status

The respondent appeals from an Immigration Judge's January 24, 2008, decision sustaining the charges of removability and pretermittting his applications for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c); as well as pretermittting his applications for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a); and adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The appeal will be dismissed.

The respondent is a native and citizen of the Dominican Republic who was admitted to the United States as an immigrant on or about April 23, 1983. On May 9, 1996, the respondent was convicted, upon a plea of guilty, in the Supreme Court of the State of New York, Queens County, New York, to a charge of criminal possession of stolen property in the second-degree, a class "C" felony, in violation of N.Y. PENAL LAW § 165.52 (Exh. 4). In addition, the record reflects that on May 9, 1996, the respondent was convicted, upon a plea of guilty, in the Supreme Court of the State of New York, Queens County, New York, to a charge of criminal possession of stolen property in the fourth-degree, a class "E" felony, in violation of N.Y. PENAL LAW § 165.45(5), and for which he was sentenced to serve 1 year in prison, concurrent with the other criminal possession of stolen property conviction (Exh. 2). Moreover, on May 9, 1996, the respondent was convicted, upon a plea of guilty, in the Supreme Court of the State of New York, Queens County, New York, to a charge of unauthorized use of a vehicle in the third-degree in violation of N.Y. PENAL LAW § 165.05 and sentenced to time served (Exh. 2). Finally, the record indicates that on September 17, 2007, the respondent was convicted, upon a plea of guilty, in the District Court, Nassau County, New York, for the offense of criminal possession of a forged instrument in violation of N.Y. PENAL LAW § 170.20, and placed on probation for 3 years (Exh. 3).

*2 The Immigration Judge sustained the charges of removability, concluding that the respondent's 2007 New York criminal possession of a forged instrument conviction, as well as the two 1996 New York criminal possession of stolen property convictions, were for crimes involving moral turpitude. *See Smalley v. Ashcroft*, 354 F.3d 332 (5th Cir. 2003). Moreover, the Immigration Judge also found that the respondent's two 1996 New York criminal possession of stolen property convictions, also constituted aggravated felony theft convictions as defined under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)

(43)(G).^{FN1°} On the basis of these findings, the Immigration Judge found the respondent statutorily ineligible for the requested relief from removal. We find no reversible error in that determination.

The respondent raises three principal arguments on appeal. First, the respondent argues that the Immigration Judge made an erroneous legal determination when he found that the respondent's New York convictions for criminal possession of stolen property and for criminal possession of a forged instrument were for crimes involving moral turpitude because the statutes are overbroad. Moreover, the respondent contends that the Immigration Judge also erred in finding that his two 1996 New York criminal possession of stolen property convictions constituted aggravated felony "theft" convictions as defined under section 101(a)(43)(G) of the Act. Consequently, he maintains that the Immigration Judge erroneously pretermitted his applications for relief, including a waiver of inadmissibility under former section 212(c) of the Act and cancellation of removal under section 240A(a) of the Act.

At the outset, as to the respondent's appellate argument that the New York statutes under which he was convicted are broad enough to encompass some offenses that do not involve moral turpitude, we find this assertion belied by the plain language of the statutes. Specifically, to be convicted of either second-degree or fourth-degree criminal possession of stolen property under N.Y. PENAL LAW §§ 165.52 and 165.45, a defendant must "knowingly possess^f ^o stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof...." Both crimes qualify categorically as species of larceny or theft, a type of offense that has long been recognized as involving moral turpitude. *Michel v. INS*, 206 F.3d 253, 263-64 (2d Cir. 2000) (affirming this Board's determination that fifth-degree criminal possession of stolen property in violation of N.Y. PENAL LAW § 165.40 is a crime involving moral turpitude). Moreover, as to the respondent's 2007 New York misdemeanor conviction for the offense of criminal possession of a forged instrument, we note that whether the offenses underlying the 237(a)(2)(H) removal charge are felonies or misdemeanors is irrelevant. *See Matter of Serna*, 20 I&N Dec. 579, 581-582 (BIA1992) (neither the seriousness of an offense nor the severity of the sentence imposed is determinative of whether a crime is morally turpitudinous). We agree with the Immigration Judge that the elements of the offense set out in N.Y. PENAL LAW § 170.20 establish that it is a crime involving moral turpitude (I.J. at 8).^{FN2°} Moreover, we agree with the Immigration Judge's assessment, noting the different dates of arrest for each of the three CIMT offenses, that they do not arise out of a single scheme of criminal misconduct (I.J. at 6-7), and establish the respondent's removability pursuant to section 237(a)(2)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii).

*3 As to the respondent's appellate contention that his two 1996 New York criminal possession of stolen property convictions are not to be considered aggravated felony "theft" convictions as defined under section 101(a)(43)(G) of the Act, we have found that the "the reference to 'receipt of stolen property' in section 1101(a)(43)(G) of the Act was intended in a generic sense to include the category of offenses involving knowing receipt, possession, or retention of property from its rightful owner." ^{FN3°} See *Matter of Bahta*, 22 I&N Dec. 1381, 1388-1389 (BIA 2000); see also *Hernandez-Mantilla v. INS*, 246 F.3d 1002, 1008-09 (7th Cir. 2001) (the court found "the phrase 'theft offense (including receipt of stolen property)' ought to be broadly construed" and, specifically, that "possession of stolen property constitutes a theft offense under 8 U.S.C. § 1101(a)(43)(G)"). We note the United States Court of Appeals for the Fifth Circuit, the jurisdiction wherein this case arises, recently considered the question and found a New York conviction for criminal possession of stolen property in the fifth degree to constitute an aggravated felony "theft" offense. See *Burke v. Mukasey*, 509 F.3d 695, 697 (5th Cir. 2007) (court found the broad terms used in the generic definition of "theft offense" under 8 U.S.C. § 1101(a)(43)(G) easily embrace the New York criminal statute).

We observe, moreover, the respondent's two 1996 New York possession of stolen property convictions are deemed to be convictions for a class C and E felony, see N.Y. PENAL LAW §§ 165.45 and 165.52 (McKinney 2005), which carry a minimum of 1 year imprisonment and a maximum sentence of 15 and 4 years, respectively. See N.Y. PENAL LAW § 70.00 (McKinney 2005). In this case, the record reflects the respondent was sentenced to serve 1 year in prison to run concurrently for both offenses. Consequently, we agree with the Immigration Judge that the respondent is removable on account of his aggravated felony theft convictions as defined under section 101(a)(43)(G) of the Act. See *Burke v. Mukasey*, *supra*.

Turning to the respondent's appellate arguments as to his eligibility for relief from removal, we note that the respondent bears the exclusive burden of proving all requisite facts pertinent to his eligibility for relief from removal. See 8 C.F.R. § 1240.8(d). Furthermore, where the evidence indicates that a ground for mandatory denial of an application for relief *may* apply, the alien has the burden of demonstrating by a preponderance of the evidence that such grounds do not apply. *Id.*

*4 Even if the respondent was to be granted section 212(c) relief with respect to the aggravated felony ground of removability based on his two 1996 New York possession of stolen property convictions only this would not avail the respondent because he would remain removable for his 2007 New York criminal possession of a forged instrument conviction, even if such relief were granted. Moreover, such a grant of relief would not

prevent the respondent's offenses from operating as aggravated felonies for purposes of precluding his eligibility for cancellation of removal pursuant to section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3). *See Matter of Balderas*, 20 I&N Dec. 389, 391 (BIA 1991) (criminal convictions “do not disappear from the alien's record for immigration purposes” simply because a section 212(c) waiver was previously granted with respect to that conviction). Finally, as an alien who has been previously admitted to lawful permanent residence, the offense is not waivable as a ground of inadmissibility under section 212(h)(2) of the Act, 8 U.S.C. § 1182(h)(2), and therefore the respondent cannot demonstrate that he is admissible as an immigrant for purposes of adjustment of status under any subsection of section 245 of the Act, 8 U.S.C. § 1255.

The respondent has presented no arguments on appeal that would cause us to reverse the Immigration Judge's decision. Based on the record before us, we agree with the Immigration Judge that the respondent is subject to removal from the United States based on the respondent's conviction records submitted in this case (Exhs. 2, 3, 4). *See* section 240(c)(3) (A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Moreover, the respondent has failed to establish his eligibility for any relief from removal.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

David W. Crosland
FOR THE BOARD

Footnotes

- 1 Under the definition given in 8 U.S.C. § 1101 (a)(43)(G), it constitutes: “a theft offense (including receipt of stolen property) for which the term of imprisonment was at least one year.
- 2 A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument. *See* N.Y. PENAL LAW § 170.20.
- 3 New York Penal Law, has obliterated the common law distinctions between criminal possession of stolen property and receipt of stolen property, a crime explicitly enumerated as an aggravated felony by 8 U.S.C. § 1101(a)(43)(G). *See Kendall v. Mooney*, 273 F.Supp.2d 216, 221–222 (E.D. New York 2003). As noted in the discussion above, under New York Penal Law, a person is guilty of criminal possession of stolen property when he “knowingly possesses any of six categories of stolen property “with the intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof. *See Id.* New York Penal Law does not separately penalize receipt crimes, instead proscribing all knowing possession of stolen property under N.Y. Penal Law §§ 165.45, and 165.52. *See Id.* Thus, criminal possession of stolen property under New York law consists of essentially the same elements as receipt of stolen property (as that offense has been defined by the majority of states) and is, therefore, properly categorized as an enumerated offense under 8 U.S.C. § 1101(a)(43)(G). *See Id.*

2008 WL 2401073 (BIA)

End of Document

© 20 8 Thomson Reuters. No c a m to or g na U.S. Government Works.

20

2008 Immig. Rptr. LEXIS 11033

Board of Immigration Appeals

Date: MAY 16, 2008

File: A093-023-368 - New York, NY

BIA & AAU Non-Precedent Decisions

Reporter

2008 Immig. Rptr. LEXIS 11033 *

In re: RAMON MERCEDES

Core Terms

immigrate

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Howard R. Brill, Esquire

Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [\[8 U.S.C. § 1227\(a\)\(2\)\(B\)\(i\)\]](#) -Convicted of controlled substance violation

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

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

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: Remand; waiver of inadmissibility under section 212(c)

By way of procedural history, the matter was previously before this Board on October 5,2006, when we remanded the case to the Immigration Court for consideration of the respondent's application for a waiver of inadmissibility

pursuant to former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). Thereafter, in a decision dated January 29, 2008; [*2] an Immigration Judge found the respondent deportable and pretermitted his request for a 212(c) waiver.¹ The Immigration Judge also found the respondent without any other avenues for relief and ordered that he be removed from the United States. The respondent has filed a timely appeal of that decision. The Department of Homeland Security ("DHS") did not file an appellate brief; The appeal will be sustained in part and the record remanded to the Immigration Court.

On appeal, the respondent presents two arguments. He first argues that his convictions are not final for immigration purposes.² Alternatively, the respondent contends that the Immigration Judge erred in finding his convictions constitute crimes involving moral turpitude.

First, we will consider the respondent's contention that he is not subject to removal [*3] because his convictions are not final for immigration purposes. A conviction is final for the application of this nation's immigration laws once a party exhausts all direct appeals of right. See *Pino v. Landon*, 349 U.S. 901 (1955) (*per curiam*); see also [Matter of Thomas](#), 21 I&N Dec. 20 (BIA 1995); [Matter of Polanco](#), 20 I&N Dec. 894 (BIA 1994). Based upon the record before us, we conclude that the respondent's argument that his convictions could not presently serve as a basis for his removal is without merit. For instance, the record indicates that on June 26, 2007, the New York Supreme Court's Appellate Division did in fact affirm his sexual abuse and assault convictions. See Exh. R-9; see also Tr. at 38-40. Moreover, although the respondent has filed a petition for a writ of habeas corpus contesting the foregoing, as well as a motion to vacate his drug conviction, both actions seek collateral forms of relief. See Exh. B; Exh. C; see generally 28 U.S.C. §§ 2254(b)(1), (c) (requiring a defendant to exhaust his appeals of right before pursuing a writ of [*4] habeas corpus); [NY Crim. Proc. Law § 440.10\(1\)](#) (stating that the court that entered the judgment of conviction may vacate that judgment upon a motion by the defendant). Consequently, we find no error in the Immigration Judge's determination that the convictions are final. We shall now turn to the question of whether the respondent's removability under section 237(a)(2)(A)(ii) of the Act has been shown by clear and convincing evidence.

As we discussed in our prior remand, the respondent is statutorily eligible for a section 212(c) waiver with respect to his 1989 drug conviction. If the respondent were granted such a waiver he would no longer be removable pursuant to section 237(a)(2)(A)(ii) of the Act. That is because a section 212(c) waiver eliminates the inadmissibility stemming from the conviction at which the waiver is directed. Thus, the grant of a section 212(c) waiver for one of the underlying convictions precludes that conviction from being a basis for removal pursuant to the section 237(a)(2)(A)(ii) charge. In other words, because section 237(a)(2)(A)(ii) of the Act has two essential pillars, the elimination of one [*5] of them by the grant of a section 212(c) waiver necessarily topples the entire charge of removability. As such, we find that the Immigration Judge erred in pretermittting the respondent's waiver request. Accordingly, we will sustain the respondent's appeal and remand the record for consideration of the merits of his application for section 212(c) relief. Notably, if such relief is granted, that ends the matter because the respondent would no longer be removable under section 237(a)(2)(A)(ii) of the Act and he would not need to seek any relief for his 2005 convictions.

Based on these considerations, the following orders will be entered.

¹ Footnote 1. The respondent's initial aggravated felony charge has not been sustained. Compare Exh. [*6] R-1, with Exh. 1. The Immigration Judge concluded that because the respondent's 2005 convictions did not result in a term of imprisonment of at least one year neither offense could qualify as an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). See Tr. at 41; see also Exh. 1; Exh. 4 at 1. The DHS has not contested this determination on appeal, and we consider the issue to have been waived.

² Footnote 2. The record reflects that on October 2, 1989, the respondent, a native and citizen of the Dominican Republic, was convicted of criminal sale of a controlled substance in the fifth degree, in violation of [New York Penal Law section 220.31](#). See Exh. 3 at 1; see also Exh. B at 23-25. Then, on July 21, 2005, the respondent was convicted of first degree sexual abuse and third degree assault, in violation of [New York Penal Law sections 130.65\(1\) \[*7\]](#) and [120.00\(1\)](#), respectively. See Exh. 4 at I:Exh. R-I.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Panel Members: GRANT, EDWARD R.; HESS, FRED Kendall-Clark, Molly

[Return to Text](#)

BIA & AAU Non-Precedent Decisions

Copyright 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

21

2008 Immig. Rptr. LEXIS 11034

Board of Immigration Appeals

Date: JUL 14, 2008

File: A093-023-368 - New York, NY

BIA & AAU Non-Precedent Decisions

Reporter

2008 Immig. Rptr. LEXIS 11034 *

In re: RAMON MERCEDES

Core Terms

deportability, reconsideration motion, reconsider, alien, waive

Counsel

[*1]

ON BEHALF OF RESPONDENT:

Howard R. Brill, Esquire

ON BEHALF OF DHS:

Tanya K. Bronsteen

Assistant Chief Counsel

Opinion

IN REMOVAL PROCEEDINGS

MOTION

APPLICATION: Reconsider

The Department of Homeland Security ("DHS") moves the Board pursuant to [8 C.F.R. § 1003.2](#) to reconsider our decision dated May 16, 2008. A motion to reconsider shall state the reasons for the motion by specifying the errors in fact or law in the prior Board decision and shall be supported by pertinent authority. See [8 C.F.R. § 1003.2\(b\)](#). We have reviewed the contentions raised in the DHS's motion, but find that our previous decision in these proceedings was correct.

[Matter of Balderas, 20 I&N Dec. 389, 391-93 \(BIA 1991\)](#), which is the basis of the DHS's motion, is distinguishable from the present matter. *Balderas* involved an alien who had received a section 212(c) waiver of inadmissibility arising out of his commission of two crimes involving moral turpitude ("CIMT"). The Board held that a subsequent deportability charge, in a subsequent proceeding, based on the alien's commission **[*2]** of a separate CIMT, plus

the CIMTs that were the basis of the first proceeding, could be sustained because his prior crimes "[did] not completely disappear from the record for immigration purposes." *Id.* at 391. It was the original ground of deportability, not the crimes themselves, that were waived. Thus, the commission of another CIMT could be charged in conjunction with the prior offenses in a new ground of deportability.

This situation is clearly distinct. The respondent is applying for the first time for a section 212(c) waiver. The ground of deportability - based on the commission of two CIMTs - essentially stands on those two pillars. It is undisputed that the respondent can seek a section 212(c) waiver of a ground of deportability based on his conviction of the first CIMT offense. That waiver having been granted, the charge of deportability itself is waived, notwithstanding the fact that the respondent could not seek a waiver of a charge based solely on his second offense. But neither can he be found removable based on that offense alone.

Thus, if the respondent in this case were to be granted the waiver he seeks, his 1989 conviction could no longer serve as [*3] a basis for his present removability. Accordingly, we shall deny the DHS's motion to reconsider.

In view of the foregoing, the following order will be entered.

ORDER: The motion to reconsider is denied.

Panel Members: GRANT, EDWARD R.

BIA & AAU Non-Precedent Decisions

Copyright 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

End of Document

22



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

**Fleming, Mark C.
WilmerHale
60 State Street
Boston, MA 02109**

**DHS/ICE Office of Chief Counsel - ELC
1115 N. Imperial Ave.
El Centro, CA 92243**

Name: JUDULANG, JOEL

A 034-461-941

Date of this notice: 11/1/2012

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Greer, Anne J.
Cole, Patricia A.

willame

Userteam: Docket

Falls Church, Virginia 22041

File: A034 461 941 - El Centro, CA

Date:

NOV - 1 2012

In re: JOEL JUDULANG a.k.a. Joel Alegre Judulang

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark C. Fleming, Esquire

ON BEHALF OF DHS: Catherine E. Halliday-Roberts
Deputy Chief Counsel

CHARGE:

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

Lodged: 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

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

APPLICATION: Waiver of inadmissibility under section 212(c)

In a decision dated September 28, 2005, an Immigration Judge sustained the charges of deportability against the respondent, denied his application for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and ordered him removed from the United States. The respondent appealed that decision to this Board, and on February 3, 2006, we issued a final order dismissing the appeal. The respondent thereafter sought judicial review in the United States Court of Appeals for the Ninth Circuit and, ultimately, the United States Supreme Court. On December 12, 2011, the Supreme Court issued a precedent decision rejecting the rationale underlying our denial of the respondent's application for section 212(c) relief, *see Judulang v. Holder*, 132 S. Ct. 476 (2011), and the matter is now before us once again on remand from the Ninth Circuit. The record will be remanded to the Immigration Judge for further proceedings.

The respondent, a native and citizen of the Philippines and a lawful permanent resident of the United States, has two convictions that are relevant here: a 1989 conviction for voluntary manslaughter under Cal. Penal Code § 192(a); and a 2003 conviction for grand theft under Cal. Penal Code § 487(a). According to the Department of Homeland Security ("DHS"), these convictions render the respondent deportable from the United States as an alien convicted of (1) a "crime of violence" aggravated felony, *see* sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act,

8 U.S.C. § 1101(a)(43)(F), 1227(a)(2)(A)(iii); (2) a “theft offense” aggravated felony, *see* sections 101(a)(43)(G) and 237(a)(2)(A)(iii) of the Act; and (3) two crimes involving moral turpitude (“CIMT”) not arising from a single scheme of criminal misconduct, *see* section 237(a)(2)(A)(ii) of the Act.

In an oral decision dated September 28, 2005, the Immigration Judge sustained all three of the foregoing charges, found the respondent ineligible for all relief from removal, and ordered him removed to the Philippines. The respondent thereafter filed an appeal to the Board. In our decision of February 3, 2006, we concluded that the respondent’s 1989 voluntary manslaughter conviction established his deportability under the “crime of violence” aggravated felony charge. In addition, we held—pursuant to *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)—that section 212(c) relief was unavailable to the respondent because the “crime of violence” aggravated felony category had no “statutory counterpart” in the grounds of inadmissibility. As we considered the respondent’s 1989 aggravated felony conviction to be dispositive of his deportability and eligibility for relief, we dismissed his appeal without deciding whether he was also removable under the two-CIMT and “theft offense” aggravated felony charges.

Upon judicial review, the Supreme Court rejected the aforementioned “statutory counterpart” requirement as “arbitrary and capricious,” and remanded the record for further consideration of the respondent’s eligibility for section 212(c) relief. *Judulang v. Holder*, *supra*, at 490. On remand, the DHS acknowledges that the effect of *Judulang* is to “permit[] the respondent to apply for a waiver of the aggravated felony crime of violence ground of removal under former INA section 212(c)” (DHS Brief on Remand, at 5).¹ However, the DHS argues that the respondent’s ability to waive the “crime of violence” aggravated felony charge is beside the point because such a waiver would not preclude him from being removed under the remaining two-CIMT and “theft offense” aggravated felony charges, both of which are predicated (in whole or in part) on his 2003 grand theft conviction—a conviction which cannot be waived under former section 212(c) because it is based on a plea agreement entered into after section 212(c) was repealed. The respondent counters that the

¹ In a footnote to its brief on remand, the DHS suggests that the respondent may nonetheless be ineligible for section 212(c) relief under the Ninth Circuit’s decision in *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc), which held that constitutional equal protection principles do not require that section 212(c) waivers be made available to deportable aliens. As the DHS acknowledges, however, we subsequently held that *Abebe* did not invalidate 8 C.F.R. § 1212.3, through which the Attorney General has authorized deportable aliens to apply for section 212(c) waivers. *Matter of Moreno-Escobosa*, 25 I&N Dec. 114, 116-17 (BIA 2009).

The DHS maintains that the Supreme Court’s decision in *Judulang* may undermine the rationale of *Moreno-Escobosa* by casting doubt on the validity of 8 C.F.R. § 1212.3. We respectfully disagree. The Supreme Court’s decision obviously invalidated subsection (f)(5) of § 1212.3 (which embodied the “statutory counterpart” requirement), but the regulation as a whole is presumed to be severable from subsection (f)(5) because it remains “‘fully operative’ and workable administrative machinery” even if the “statutory counterpart” requirement is deleted. *Cf. INS v. Chadha*, 462 U.S. 919, 934-35 (1983) (discussing the severability of statutes). As 8 C.F.R. § 1212.3 has not been repealed or amended by the Attorney General or invalidated by the Supreme Court or the Ninth Circuit, we are obliged to follow it.

DHS's evidence is insufficient to establish that his 2003 conviction was for a "theft offense" under section 101(a)(43)(G) of the Act, and he also maintains that the two-CIMT charge would be vitiated if he were granted section 212(c) relief with respect to his 1989 conviction, since that conviction forms one of the two pillars upon which the charge is based.

At the outset, we agree with respondent that the two-CIMT charge would not be viable if his 1989 conviction is waived as a ground of deportability under former section 212(c). Because a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them by the grant of a section 212(c) waiver necessarily topples the entire charge.

Invoking *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991), the DHS asserts that the respondent's two-CIMT charge would remain effective even if his 1989 conviction is waived under section 212(c). We respectfully conclude that *Balderas* is distinguishable. In *Balderas*, we held that an alien could be found deportable under a two-CIMT charge even if one of the convictions underlying that charge had previously been waived under section 212(c) in an earlier proceeding. Thus, *Balderas* stands for the proposition that a grant of section 212(c) relief does not immunize an alien from being subjected to new deportation proceedings if he subsequently reoffends. In arriving at that holding, we had no occasion to address the very different question presented here, i.e., whether a two-CIMT charge is waived if section 212(c) relief is granted with respect to only one of the underlying convictions.

Unlike the alien in *Balderas*, the present respondent has not applied for section 212(c) relief in the past, nor is he charged with deportability on the basis of a previously-waived conviction. Instead, he is applying for section 212(c) relief for the first time in his first set of removal proceedings. The ground of deportability the respondent seeks to waive requires two CIMT convictions, and it is undisputed that the respondent can seek a section 212(c) waiver with respect to the first of them. If that waiver is granted, the whole ground of deportability will be waived because the remaining conviction—standing alone—would not support the charge.

Although a grant of section 212(c) relief as to the respondent's 1989 conviction would result in a waiver of his two-CIMT and "crime of violence" aggravated felony charges, the DHS is correct that such relief would ultimately be unavailing for the respondent if he is also deportable for a "theft offense" aggravated felony, since that charge is based solely on his 2003 grand theft conviction. Accordingly, we now turn to the merits of that charge.

In the Ninth Circuit, grand theft under Cal. Penal Code § 487(a) is not considered a categorical "theft offense" because it encompasses the theft of labor or services. *E.g.*, *Ramirez-Villalpando v. Holder*, 645 F.3d 1035, 1039 (9th Cir. 2011); *United States v. Espinoza-Cano*, 456 F.3d 1126, 1131 (9th Cir. 2006). Furthermore, because California defines "theft" to include some acts in which property is acquired by fraud, *see* Cal. Penal Code § 484(a), the crime is also not a categorical "theft offense" under our own precedent. *See Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008). Thus, the respondent's 2003 conviction can qualify as an aggravated felony only under "the modified categorical approach."

To determine whether a plea of guilty to grand theft under § 487(a) necessarily admitted all the elements of a "theft offense" under the modified categorical approach, an Immigration Judge is generally limited to consulting "the terms of the charging document, the terms of a plea agreement

or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” See *Shepard v. United States*, 544 U.S. 13, 26 (2005). The DHS proffered three documents to prove the respondent’s grand theft conviction: a Probation Officer’s Report; an Abstract of Judgment; and a Felony Complaint. Further, the Immigration Judge sustained the theft offense aggravated felony charge based on his review of the “conviction records” (I.J. Dec. at 5-6), but made no specific findings as to which documents he consulted.

While it was proper for the Immigration Judge to consult the Felony Complaint under the modified categorical approach, a charging document does not, standing alone, demonstrate that the crime charged and the crime of conviction are one and the same. *E.g.*, *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007). Something else must connect the two. In the Ninth Circuit, a probation officer’s report cannot be used for that purpose, unless the facts set forth therein are specifically adopted by the criminal court to supply the factual basis for a plea or judgment. See *United States v. Lopez-Montanez*, 421 F.3d 926, 932 (9th Cir. 2005). At the time of the Immigration Judge’s decision, moreover, Ninth Circuit precedent squarely held that a notation in a California abstract of judgment was insufficient to identify an offense of conviction under the modified categorical approach. *United States v. Navidad-Marcos*, 367 F.3d 903, 908-09 (9th Cir. 2004). More recently, however, the Ninth Circuit appears to have reversed course with respect to the admissibility of abstracts of judgment. *E.g.*, *United States v. Leal-Vega*, 680 F.3d 1160, 1168-69 (9th Cir. 2012); *Kwong v. Holder*, 671 F.3d 872, 879-880 (9th Cir. 2011); *Ramirez-Villalpando v. Holder*, *supra*, at 1039-41.²

Nearly 7 years have elapsed since the Immigration Judge rendered his decision in this matter. In the interim, Ninth Circuit law has evolved substantially as it relates to the parameters of the modified categorical approach. See *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc). Given those changes in law, and the fact that the Immigration Judge’s modified categorical analysis was both conclusory and (apparently) inconsistent with the legal standards then in effect, we find that a remand is warranted under these circumstances for further consideration of the “theft offense” aggravated felony charge and for the entry of a new decision that applies the modified categorical approach in a manner consistent with current Ninth Circuit requirements.

If the Immigration Judge sustains the “theft offense” aggravated felony charge on remand, it will technically be unnecessary to decide whether the respondent merits a section 212(c) waiver in discretion. Given the long history of this case, however, and the prohibitive administrative and litigation costs associated with piecemeal adjudication, we deem it appropriate to order a comprehensive and global resolution of the respondent’s proceedings. Thus, on remand the Immigration Judge shall conduct a full evidentiary hearing to determine whether the respondent deserves section 212(c) relief in discretion and shall issue a decision fully addressing both the respondent’s deportability under the “theft offense” aggravated felony charge and his discretionary

² The respondent asserts that *Ramirez-Villalpando* and other similar Ninth Circuit cases were wrongly decided to the extent they permit consideration of abstracts of judgment under the modified categorical approach. We express no opinion as to the merits of that argument. This Board does not review Ninth Circuit decisions.

merit for a section 212(c) waiver. *See, e.g., Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

In conclusion, the respondent is deportable as an alien convicted of an aggravated felony based on his 1989 voluntary manslaughter conviction, but he is eligible to have that conviction waived as a ground of deportability under former section 212(c) of the Act. Section 212(c) relief would be unavailable, however, to waive any ground of deportability arising solely from the respondent's 2003 grand theft conviction. For the reasons stated previously, we are unable to review the validity of the aggravated felony charge as it relates to the respondent's 2003 conviction, and therefore the matter will be remanded on an open record for further proceedings. On remand, the Immigration Judge shall determine whether the respondent's 2003 conviction supports the "theft offense" aggravated felony charge and shall also conduct a full evidentiary hearing to determine whether the respondent deserves section 212(c) relief in discretion.

ORDER: The record is remanded for further proceedings and for the entry of a new decision consistent with the foregoing opinion.



FOR THE BOARD

23



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*

**Mark C. Fleming, Esq.
WilmerHale LLP
60 State Street
Boston, MA 02109**

**DHS/ICE Office of Chief Counsel - ELC
1115 N. Imperial Ave.
El Centro, CA 92243**

Name: JUDULANG, JOEL

A 034-461-941

Date of this notice: 7/23/2013

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

Lulseges
Userteam: Docket

Falls Church, Virginia 22041

File: A034 461 941 – El Centro, CA

Date: JUL 23 2013

In re: JOEL JUDULANG a.k.a. Joel Alegre Judulang

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se¹

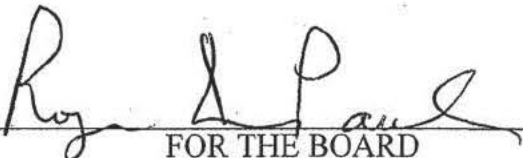
ON BEHALF OF DHS: Catherine E. Halliday-Roberts
Deputy Chief Counsel

APPLICATION: Reconsideration

In a decision dated November 1, 2012, following the Supreme Court's decision in *Judulang v. Holder*, 132 S. Ct. 476 (2011), we remanded this matter to the Immigration Court to determine whether the respondent is eligible for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and also for a hearing on the merits on that waiver request. The Department of Homeland Security ("DHS") has moved for reconsideration, *see* 8 C.F.R. § 1003.2(b), arguing that the respondent's removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), is not waivable under section 212(c) and that our prior decision to the contrary was erroneous as a matter of law.

The DHS's motion will be denied because it merely recapitulates arguments that were fully briefed and fully addressed in our prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) ("[A] motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision"). In any case, we find no merit to the DHS's arguments. As we determined in our prior decision, *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991), is inapposite here. *Balderas* was not about *eligibility* for section 212(c) relief; it was about clarifying an important limitation on the *prospective effect* of section 212(c) relief for repeat offenders. We also reject the DHS's suggestion that our prior decision is in tension with the Supreme Court's decision in *Judulang v. Holder*, *supra*.

ORDER: The motion to reconsider is denied.


FOR THE BOARD

¹ A brief in opposition to the DHS's motion was filed on the respondent's behalf by Mark C. Fleming, Esquire. A courtesy copy of the present order shall be served on Mr. Fleming at his address of record.

24



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Chief Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

**ARROYO, BELINDA
BELINDA ARROYO LAW OFFICE, P.L.L.C
P.O. BOX 136638
FORT WORTH, TX 76136**

**DHS/ICE OFFICE OF CHIEF COUNSEL-DAL
125 E. JOHN CARPENTER FWY., STE 500
IRVING, TX 75062-2324**

Name: QUINTERO-TABARES, HERNANDO

A034-760-977

Date of this Notice: 05/12/2014

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:
Cole, Patricia A.
Pauley, Roger A.
Wendtland, Linda S.

Falls Church, Virginia 20530

File: A034 760 977 - Haskell, TX

Date: MAY 12 2014

In re: HERNANDO QUINTERO-TABARES

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Belinda Arroyo, Esquire

ON BEHALF OF DHS: Craig A. Harlow
Assistant Chief Counsel

CHARGE:

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

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 (sustained)

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

APPLICATION: Section 212(c) waiver; adjustment of status; remand

The respondent, a native and citizen of Colombia and a lawful permanent resident of the United States, appeals the November 5, 2012, decision of the Immigration Judge. The Immigration Judge found the respondent removable based on the above-noted charges. He also found the respondent ineligible for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), and adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). In addition, the respondent has filed new evidence pertaining to his eligibility for adjustment, which we construe as a motion to remand. *See* 8 C.F.R. § 1003.2(c)(4). The record will be remanded.

On March 11, 1991, the respondent was convicted of theft in violation of Texas Penal Code ("TPC") § 31.03 (I.J. at 2; Exh. 2). The respondent was then convicted on September 29, 1995, of burglary of a building in violation of TPC § 30.02(c)(1) (I.J. at 2; Exh. 2). He was sentenced to a term of imprisonment of 10 years, probated for 10 years (I.J. at 2; Exh. 2). Finally, on June 22, 2010, the respondent was convicted of theft of property worth at least \$50 but less than \$500 in violation of TPC § 31.03(e)(2)(A)(i) (I.J. at 2; Exh. 2). On the basis of these convictions, the Immigration Judge found the respondent removable under sections 237(a)(2)(A)(ii) and 237(a)(2)(A)(iii) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii) and 1227(a)(2)(A)(iii) (I.J. at 3).

Regarding relief, the respondent argued that his 1991 and 1995 convictions could be waived under section 212(c). The Immigration Judge concluded that the respondent could not benefit from section 212(c) because his 2010 conviction occurred after the statute was repealed (I.J. at 3). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (effective April 1, 1997). Along these lines, the Immigration Judge rejected the respondent's argument that his 2010 conviction did not trigger a "new ground of removability," as both charges of removability originate and are upheld first in time by his 1991 and 1995 convictions, which occurred prior to April 1, 1997 (I.J. at 3).

The respondent further asserted eligibility for adjustment of status. The respondent conceded that he is ineligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), because he was admitted as a lawful permanent resident in 1975 and his 1995 conviction was for an aggravated felony. *See* section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). However, the respondent argued that he could adjust status by utilizing a section 212(c) waiver in conjunction with the "petty offense" exception of section 212(a)(2)(A)(ii)(II) of the Act. As discussed previously, the Immigration Judge concluded that the respondent's 2010 conviction makes him ineligible for a waiver under section 212(c) (I.J. at 3-4). He also held that the petty offense exception did not apply because it is limited to aliens who have committed only one crime (I.J. at 3). *See* section 212(a)(2)(A)(ii)(II) of the Act.

Since the entry of the decision below, the Board has issued a decision refining the eligibility criteria for a section 212(c) waiver in light of *Judulang v. Holder*, 132 S. Ct. 476 (2011). *See Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). In pertinent part, the Board held that a lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable by virtue of a plea or conviction entered before April 24, 1996, is eligible to apply for discretionary relief under former section 212(c) of the Act unless the applicant has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996. *Matter of Abdelghany, supra*, at 272. The respondent was convicted on September 29, 1995, of burglary of a building in violation of TPC § 30.02(c)(1) and sentenced to a term of imprisonment of 10 years, probated for 10 years (I.J. at 2; Exh. 2). This pre-April 24, 1996, conviction was for an aggravated felony, as defined in section 101(a)(43)(G) of the Act. However, as the respondent's entire 10-year sentence was probated, he did not serve at least 5 years of imprisonment as a result of the conviction, and he is thus *prima facie* eligible for a section 212(c) waiver. *See Matter of Abdelghany, supra*, at 272. Therefore, we reverse the holding that the respondent's 2010 conviction disqualifies him from receiving a section 212(c) waiver. We further remand for a determination of whether the respondent has demonstrated eligibility for a section 212(c) waiver in the exercise of discretion. *See Matter of Abdelghany, supra*, at 272 (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1692 (2013)).

In addition, we observe that this case is distinguishable from *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Balderas was charged in an earlier proceeding with having committed two crimes involving moral turpitude: one a conviction for petty theft in 1983 and the other a conviction for being an accessory to burglary in 1988. Balderas was granted section 212(c) relief and was subsequently convicted of another petty theft offense in 1989. As a result, he was again charged with removability for having committed two crimes involving moral turpitude, to

wit, the 1988 accessory to burglary crime for which he had been granted section 212(c) relief and the new 1989 petty theft offense. The Board held that "since a grant of section 212(c) relief 'waives' the finding of excludability or deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." *Id.* at 391. Thus, the charge was valid notwithstanding that one of the two convictions had previously been the subject of a section 212(c) waiver.

In contrast, here there is no new charge based on an intervening conviction for a crime involving moral turpitude; there is a charge in a single proceeding that the respondent has been convicted of *two* crimes involving moral turpitude. Once it is hypothesized that the respondent succeeds in obtaining section 212(c) relief with respect to his 1991 and 1995 convictions, this charge is no longer viable. In other words, since a section 237(a)(2)(A)(ii) charge has two essential pillars, the elimination of one of them (or in this case, two of them) by the grant of a section 212(c) waiver necessarily topples the entire charge of removability. The section 212(c) waiver would also eliminate the removability under section 237(a)(2)(A)(iii) of the Act stemming from the 1995 conviction at which the waiver is directed. Consequently, should the respondent succeed in his application for a section 212(c) waiver as to his 1991 and 1995 convictions, termination under the current charges would be warranted.

On remand, the parties may submit additional evidence and argument pertaining to any relevant issue.

Accordingly, the following order is entered.

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



FOR THE BOARD

25



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 20530

Hartzler, Kara
2485 Island Ave
San Diego, CA 92102

DHS/ICE Office of Chief Counsel - EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: ROMERO, DEBORAH ANN

A 017-176-264

Date of this notice: 6/10/2014

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

schwarzA
User team: Docket

Falls Church, Virginia 20530

File: A017 176 264 - Eloy, AZ

Date: JUN 10 2014

In re: DEBORAH ANN ROMERO a.k.a. Deborah Ann Wheeler

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kara Hartzler, Esquire

ON BEHALF OF DHS: Christopher S. Kelly
Assistant Chief Counsel

CHARGE:

- Lodged: 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
- Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined by section 101(a)(43)(B))
- Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined by section 101(a)(43)(R))
- Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility under section 212(c); remand

This case is before the Board pursuant to a May 7, 2012, order of the United States Court of Appeals for the Ninth Circuit, granting the Government's unopposed motion to remand. The Government sought a remand for the Board to reevaluate the respondent's eligibility for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), in light of *Judulang v. Holder*, 132 S. Ct. 476 (2011). Following remand, the parties have filed briefs on the merits. The record will be remanded to the Immigration Court for further proceedings and the entry of a new decision.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(i), (ii).

The record reflects that the respondent was admitted to the United States as a lawful permanent resident (LPR) on April 4, 1967. On April 24, 1989, the respondent was convicted of Possession for Sale of a Controlled Substance, methamphetamine, in violation of Cal. Health & Safety Code § 11378. The respondent was sentenced to 2 years' incarceration for this offense. On April 11, 1996, the respondent was convicted of two counts of Forgery of a Check, under

former Cal. Penal Code § 470. She received 40 months' imprisonment for the first count and 8 months' imprisonment for the second count. On April 13, 2005, the respondent was convicted of Shoplifting, in violation of Ariz. Rev. Stat. § 13-1805(A)(1), and she received 12 months' probation for this offense.¹

Based on these convictions, the Department of Homeland Security (DHS) placed the respondent into removal proceedings on September 27, 2010, and charged her with being subject to removal from the United States pursuant to sections 101(a)(43)(B), (R), 237(a)(2)(A)(ii), (iii), and (B)(i) of the Act, 8 U.S.C. §§ 1101(a)(43)(B), (R), 1227(a)(2)(A)(ii), (iii), (B)(i). The Immigration Judge found that the respondent was removable as charged. The Immigration Judge then pretermitted the respondent's application for section 212(c) relief after finding that the respondent's aggravated felony conviction under sections 101(a)(43)(R) and 237(a)(2)(A)(iii) of the Act had no statutory counterpart under section 212 of the Act (I.J. at 13-14).² We affirmed this determination and dismissed the respondent's appeal. The respondent petitioned for review of our decision with the Ninth Circuit.³

In the interim, the Supreme Court invalidated the Board's precedents applying the statutory counterpart rule. *Judulang*, *supra*, at 490. On remand from the Ninth Circuit, the respondent argues that she is eligible for a waiver of inadmissibility under section 212(c) in light of *Judulang*.⁴ After the briefing schedule expired in this matter, we articulated the post-*Judulang* eligibility criteria for section 212(c) relief in *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). Pursuant to *Matter of Abdelghany*, *supra*, the respondent is statutorily eligible for section 212(c) relief.

In *Matter of Abdelghany*, *supra*, at 272, we held that an otherwise eligible LPR who is removable by virtue of a plea or conviction entered before April 24, 1996, is eligible to apply for section 212(c) relief in removal proceedings *unless* the applicant is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act, 8 U.S.C. § 1182(a)(3)(A), (B), (C), or (E), (10)(C); or the applicant has served an aggregate term of

¹ The respondent's conviction for Shoplifting was vacated pursuant to Ariz. Rev. Stat. § 13-907. However, a conviction set aside under section 13-907 has not been eliminated for immigration purposes. *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1142 (9th Cir. 2010); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

² The Immigration Judge also pretermitted the respondent's applications for cancellation of removal and voluntary departure on account of her convictions of aggravated felonies. *See* sections 240A(a)(3) and 240B(b)(1)(C) of the Act, 8 U.S.C. §§ 1229b(a)(3), 1229c(b)(1)(C) (*id.*).

³ While the respondent's petition for review was pending, the respondent was removed to the United Kingdom. We nevertheless retain jurisdiction to consider the respondent's appeal. *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (citing *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009)).

⁴ The respondent also asserts that her Shoplifting offense is not a crime involving moral turpitude. She does not argue that her other convictions do not qualify as removable offenses under sections 101(a)(43)(B), (R), 237(a)(2)(A)(ii), (iii), and (B)(i) of the Act.

imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996. We noted, moreover, that the latter prohibition is inapplicable by regulation to any aggravated felony conviction resulting from a plea agreement made before November 29, 1990. *See id.* at 260 n.10 (citing 8 C.F.R. § 1212.3(f)(4)(ii); *Toia v. Fasano*, 334 F.3d 917, 919-21 (9th Cir. 2003)).

There is no indication that the respondent is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act. Furthermore, the respondent's aggravated felony convictions do not bar her from applying for section 212(c) relief. The respondent's conviction of two counts of Forgery of a Check were entered on April 11, 1996, prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996.⁵ In addition, she was sentenced to less than 5 years' incarceration for this offense. The respondent's 1989 conviction of Possession for Sale of a Controlled Substance also does not bar relief, as it was entered prior to the effective date of the Immigration Act of 1990.⁶ Further, her 2 years' incarceration stemming from this offense cannot be aggregated with her term of imprisonment for her forgery offense. *See Matter of Abdelghany, supra*, at 260 n.10. Accordingly, the respondent is statutorily eligible for section 212(c) relief because she has served an aggregate term of imprisonment of less than 5 years as a result of an aggravated felony conviction entered between November 29, 1990, and April 24, 1996. *Id.* at 272. We therefore find it appropriate to remand the record for the Immigration Judge to conduct a full evidentiary hearing and to make a ruling as to whether the respondent merits section 212(c) relief in the exercise of discretion.

On remand, the parties should have the opportunity to update the record, and to provide any additional testimony, documentary evidence, and arguments regarding the respondent's removability, her application for section 212(c) relief, or any other form of relief for which the respondent may be eligible. The Immigration Judge should also reexamine whether the respondent's 2005 Shoplifting conviction, under Ariz. Rev. Stat. § 13-1508(A)(1), qualifies as a crime involving moral turpitude in light of intervening precedent. *See Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013) (addressing the appropriate application of an elements-based examination of a statute of conviction) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that a conviction based on a guilty plea can qualify as a predicate offense only if the defendant "necessarily admitted [the] elements of the generic offense.") (emphases added)); *Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 279-80 (BIA 2014) (clarifying what constitutes an "element" of an offense for immigration purposes); *see also Olivas-Motta v. Holder*, 716 F.3d 1199, 1203 (9th Cir. 2013) (requiring Immigration Judges to evaluate whether an offense qualifies as a crime involving moral turpitude under the categorical and modified categorical approaches outlined in *Shepard, supra*, and *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

⁵ Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (effective Apr. 24, 1996) (AEDPA).

⁶ Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (effective Nov. 29, 1990) (IMMACT 90), *as amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751 (effective as if included in IMMACT 90).

Irrespective of whether this conviction is a crime involving moral turpitude, it does not render the respondent statutorily ineligible for section 212(c) relief. On remand, the DHS contends that while the respondent may use section 212(c) relief to cure her removability on account of her 1989 and 1996 convictions, she cannot use 212(c) to cure her removability on account of her 2005 Shoplifting conviction, which was entered after the effective date of that Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁷ (Br. at 21-23) (citing *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991)). In other words, even if 212(c) relief were granted, the respondent would remain removable as the waiver cannot cure her 2005 crime involving moral turpitude, which serves as a predicate for the charge under section 237(a)(2)(A)(ii) of the Act.

However, this argument relates to the *efficacy* of section 212(c) relief, not the respondent's *eligibility* for such relief. We additionally note that, on remand, the Immigration Judge may find that the respondent's Shoplifting offense is not a crime involving moral turpitude, which would eliminate the issue. The Immigration Judge may also determine that the respondent does not deserve section 212(c) relief in the exercise of discretion, despite her eligibility for the same. See *Matter of Abdelghany*, *supra*, at 272 (outlining eligibility criteria). We express no opinion regarding the outcome on remand.

In any event, the respondent's removability under section 237(a)(2)(A)(ii) of the Act is amenable to waiver under former section 212(c) because it depends in part on at least *one* conviction that resulted from a plea agreement made before section 212(c) was repealed. *Accord INS v. St. Cyr*, 533 U.S. 289 (2001). A grant of 212(c) relief for the 1989 and 1996 convictions would effectively undermine the respondent's charge of removability for having been convicted of *two* crimes involving moral turpitude. For once it is hypothesized that the respondent is eligible for 212(c) relief with respect to one of the two pillars supporting the charge of deportability, the two-CIMT charge must necessarily fall, because the remaining 2005 conviction or pillar standing alone would not support the charge.

We find *Matter of Balderas*, *supra*, to be inapposite because that decision stands for the proposition that a grant of section 212(c) relief does not immunize an alien from being subjected to new deportation proceedings if he subsequently reoffends. In arriving at that holding, we had no occasion to address the very different question presented here, i.e., whether a two-CIMT charge is waived if section 212(c) relief is granted with respect to only one of the underlying convictions. In short, *Matter of Balderas* was not a case about *eligibility* for section 212(c) relief; rather, it was about clarifying an important limitation on the *prospective effect* of section 212(c) relief for repeat offenders, i.e., those who continue to commit deportable offenses after having been granted such relief.

⁷ Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (effective Apr. 1, 1997) (IIRIRA). Section 212(c) relief is unavailable to any individual in post-IIRIRA removal proceedings who is removable by virtue of pleas or convictions entered on or after April 1, 1997. See *Matter of Abdelghany*, *supra*, at 261.

We additionally find it significant that a central feature of the *Judulang*'s Court's reasoning was its repudiation of the notion that section 212(c) waives "grounds of exclusion." 132 S. Ct. at 487-88. Indeed, the Court emphasized that "the thing the Attorney General waives [under section 212(c)] is not a particular exclusion ground, but the simple denial of entry." *Id.* at 487; *cf. Matter of Balderas, supra*, at 391 (finding that "a grant of section 212(c) relief 'waives' the finding of excludability or deportability"). In other words, section 212(c) waives neither crimes, nor grounds, nor convictions; rather, it simply authorizes the Attorney General to waive enforcement or execution of removability determinations.

In accordance with the Supreme Court's holding, we conclude that the Attorney General has authority under former section 212(c) to waive the execution of any removability determination made pursuant to section 237(a)(2)(A)(ii) of the Act that depends, in whole or in part, on a conviction that resulted from a plea agreement made before April 1, 1997. The respondent was found removable under section 237(a)(2)(A)(ii) of the Act based in part on her pre-IIRIRA conviction(s), and thus the Attorney General retains authority to waive execution of that removability determination under former section 212(c) of the Act.

In light of the foregoing, we will remand the record to the Immigration Judge to determine, in the first instance, whether the respondent warrants section 212(c) relief in the exercise of discretion and to reexamine whether the respondent's Shoplifting conviction is a crime involving moral turpitude.

Accordingly, the following order will be entered:

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Request to Appear as *Amicus Curiae* and Brief of *Amicus Curiae* via first class United States mail, postage-prepaid, to:

Office of the Chief Counsel
Immigration and Customs Enforcement
U.S. Department of Homeland Security
1809 Ted Turner Drive SW, Suite 332
Atlanta, Georgia 30303

Mary Lynn Anna Tedesco
The Fogle Law Firm, LLC
5801 Executive Center Drive
Suite 114
Charlotte, NC 28212

Date: April 19, 2018



Ryan Muenich