

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY**

<u>File No.:</u> A	:	
	:	
In the Matter of	:	In Removal Proceedings
	:	
	:	
	:	
Respondent.	:	
	:	

CHARGE: INA § 237(a)(2)(A)(iii) - Aggravated Felony (relating to the murder, rape, or sexual abuse of a minor)

APPLICATION: Motion to Terminate Removal Proceedings

ON BEHALF OF RESPONDENT

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ON BEHALF OF DHS

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INTERLOCUTORY DECISION AND ORDER OF THE IMMIGRATION JUDGE

The Court has considered the entire record carefully, even if not specifically addressed. Based on the following, the Court finds that the government has sustained the charge of removability lodged against Respondent by clear and convincing evidence, pursuant to the Immigration and Nationality Act (“INA”) § 240(c)(3)(A).

I. Facts and Procedural History

is a citizen and native of Colombia who was admitted to the United States (“U.S.”) at or near Newark, New Jersey, on or about December 18, 1994 with an F-22 immigrant classification. On June 10, 2009, Respondent was convicted in the Superior Court of New Jersey at Passaic County for the offense of endangering the welfare of a child in the second degree, in violation of N.J. Stat. Ann. § 2C: 24-4a.

On August 17, 2010, the Department of Homeland Security (“DHS”) issued Respondent a Notice to Appear (“NTA”)(Exh. 1) charging him with removability under the INA § 237(a)(2)(A)(iii), an aggravated felony as defined by INA § 101(a)(43)(A)(relating to the murder, rape or sexual abuse of a minor). On September 15, 2010, the NTA was personally served on Respondent. On October 6, 2010, Respondent submitted a Judgment of Conviction (“JOC”) dated June 11, 2009 related to Indictment Number 07-08-1009-I. (Exh. 2).

On October 28, 2010, Respondent, with counsel, admitted the factual allegations and denied the charge of removability contained in the NTA. On the same day, Respondent submitted a transcript of a plea hearing conducted on January 14, 2009 (Exh. 3) and several documents, including a copy of indictment dated August 7, 2007 (Exh. 4 Tab B) and a transcript of a plea hearing held on January 14, 2009 (Exh. 4 Tab G), related to Indictment Number 07. Accompanying the documents was a motion to terminate the removal proceedings.

II. Legal Analysis

A. "Murder, Rape or Sexual Abuse of a Minor"

An alien is removable under INA § 237(a)(2)(A)(iii) if he has been convicted of an aggravated felony, as defined in INA § 101(a)(43)(A). That section provides that "[t]he term 'aggravated felony' means – (A) murder, rape or sexual abuse of a minor."

In determining whether an offense is an aggravated felony, the Third Circuit Court of Appeals presumptively applies the categorical approach to look at the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain the conviction. Taylor v. U.S., 495 U.S. 575, 599-600 (1990); Jean-Louis v. Att'y Gen., 582 F.3d 462, 471 (3d Cir. 2009); Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005); see also Tran v. Gonzales, 414 F.3d 464, 481 (3d Cir. 2005). When the predicate offense for removability under the INA is supplied by state law, this Court must consider what the convicting court must necessarily have found to support the conviction. See Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002).

(i) Respondent's Conviction for Endangering the Welfare of a Child

N.J. Stat. Ann. § 2C: 24-4a reads:

- a. Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3 and P.L.1974, c. 119, s.1 (C.9:6-8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.

Id.

As the plain language of the statute in question makes clear, an individual could be convicted of second degree endangering of a child's welfare for sexual conduct impairing or debauching a child's morals, or for non-sexual conduct causing a child harm such that the child would be deemed abused or neglected. See Stubbs v. Att'y Gen., 452

F.3d 251, 254-55 (3d Cir. 2006)(holding that the Board of Immigration Appeal's ["Board'] inquiry beyond the statute of conviction of the facts alleged in the charging instrument "was justified" because N.J. Stat. Ann. § 2C:24-4(a) includes "conduct which both may and may not involve sexual abuse of a minor."). Since it is unclear from the face of the statute exactly which variation of the statute Respondent was convicted of violating, further inquiry is required. See Singh, F.3d 144, 163 (3d Cir. 2004); Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002).

The Third Circuit has determined that a court may depart from the formal categorical approach where the statute of conviction is "phrased in the disjunctive or structured in outline form." Singh v. Ashcroft, 383 F.3d 144, 163 (3d Cir. 2004). When a statute is divisible, i.e., it encompasses crimes that constitute both removable and non-removable offenses, courts apply a modified categorical approach and look to the alien's record of conviction to determine the specific conduct for which the alien was convicted. Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999). The U.S. Supreme Court has held that the record of conviction includes the charging document, the plea agreement or transcript of the plea colloquy in which a defendant confirmed the factual basis for the plea, or a comparable judicial record. Shepard v. U.S., 544 U.S. 13, 26 (2005); Partyka v. Att'y Gen., 417 F.3d 408, 415-16 (3d Cir. 2005); Matter of Babaisakov, 24 I&N Dec. 306, 311 (BIA 2007).

The Court in this case consulted the JOC dated June 11, 2009 (Exh. 2), transcript of the plea hearing (Exh. 3) and a copy of the related indictment dated August 7, 2007 (Exh. 4 Tab B). See Matter of Sweetser, 22 I&N Dec. 709, 714 (BIA 1999). The indictment reflects that Respondent was convicted in the Superior Court of New Jersey at Passaic County for the offense of endangering the welfare of a child in the second degree, in violation of N.J. Stat. Ann. § 2C: 24-4a. (See Indictment, Exh 4 Tab B). In pertinent part, pages 20 through 22 of the transcript of plea hearing (Exh 4 Tab G) related to Respondent's conviction states as follows:

- Q. Mr. _____, on or about January 31st of 1995 through January 30th of 1997 did you come in contact with an individual who was under the age of 16 by the name of _____ ?
- A. Yes
- Q. And was that an inappropriate touching of _____ ?
- A. Yes.
- Q. And that touching was in an area, either her breast or vagina?
- A. Yes.
- Q. And at that time the touching was for sexual gratification?
- A. What do you mean sexual gratification?
- Q. That when you touched _____ a it wasn't an accident, it was a purposeful touching for sexual gratification?
- A. Yes. ...
- Q. Mr. _____ did there come a time that you came in contact in about January of 2001 up until about January of 2003 that you came in contact with an individual by the name of _____ ? Is that yes?

- A. Yes.
- Q. What's _____'s last name?
- A.
- Q. Okay, now _____ was also under the age of 16 at the time?
- A. Yes.
- Q. And this- you came into contact where you had an inappropriate touching, correct?
- A. Yes.
- Q. Or her—or her butt?
- A. No.
- Q. Where was the touching?
- A. I was just massaging her. I never touched her breasts.
- Q. Okay. Was the touching for sexual gratification?
- A. Yes.
- Q. Okay, and on these—you're pleading guilty to two separate and distinct occasions, correct?
- A. Yes.

(See Transcript of Plea Hearing, Jan. 14, 2009; Exh. 4 Tab G at p. 20-22). Those are the facts upon which Respondent knowingly and voluntarily pled to endangering the welfare of a child in the second degree.

Under the modified categorical approach, the record of conviction provides sufficient evidence for the Court to find that Respondent's conviction under N.J. Stat. Ann. § 2C: 24a involved the "sexual abuse of a minor" as defined by INA § 101(a)(43)(A). Critical to this Court's analysis are the precedent cases of Restrepo v. Att'y Gen., 617 F.3d 787(3d Cir. 2010)(concluding that a conviction for violating N.J. Stat. Ann. § 2C:14-3 (a) was a categorical match with the federal aggravated felony standard); Stubbs v. Att'y Gen., 452 F.3d 251, 255 (3d Cir. 2006)(holding that the petitioner's conviction failed to fit the Board's definition of "sexual abuse of a minor" because the language in the record of conviction merely tracked the statute of conviction); Matter of Small, 23 I&N Dec. 448, 449 (BIA 2002)(finding a misdemeanor offense under section 130.60(2) of the New York Penal Law for sexual abuse of a minor meets the definition of an aggravated felony under INA § 101(a)(43)(A)); and Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 994-96 (BIA 1999)(finding that a state conviction for "indecenty with a child by exposure" constituted "sexual abuse of a minor" even though sexual contact was not a necessary element of the crime).

While the INA does not expressly define the term "sexual abuse of a minor," the Court of Appeals for the Third Circuit and the Board have relied on definitions for "sexual abuse" of a "child" found in 18 U.S.C. § 3509(a). See Stubbs v. Att'y Gen., 452 F.3d 251, 256 (3d Cir. 2006); Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 996 (BIA 1999). Under 18 U.S.C. §§ 3509(a)(2) and (a)(8), a "child" means a person under eighteen years of age and the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, the molestation, prostitution, or other form of sexual exploitation of children, or incest children. See Stubbs, 452 F.3d at

255. Unlike the petitioner in Stubbs, the record of conviction in the instant matter provides adequate information to conclude that Respondent was convicted of an aggravated felony pursuant to INA § 101(a)(43)(A). By his own admission during the plea colloquy, Respondent stated that he touched a girl under the age of 16 on either her breast or vagina. (See Transcript of Plea Hearing on Jan. 14, 2009; Exh. 4 Tab G at p. 20-21). Respondent further admitted that he massaged another girl who was also under the age of 16. (Id. at 21-22). Respondent's conduct on both occasions clearly demonstrates that he used a child to engage or assist him in engaging in sexually explicit conduct or other sexual exploitation. *C.f.* N.J. Stat. Ann. § 2C: 24a.

Counsel's argument that the elements of Respondent's plea allocution reflect the absence of a relationship between the victim and defendant i.e. someone having a legal duty or someone who has assumed responsibility for the care of the child is irrelevant. (See Resp't Memo, Oct. 28, 2010). The definition for the term "aggravated felony" under INA § 101(a)(43)(A) does not include any reference to a legal or other relationship between a victim and defendant. It merely requires the "murder, rape or sexual abuse of a minor." Based on the applicable law and in part on the record of conviction, including the transcript of the plea hearing, this Court finds that Respondent's conviction was for "sexual abuse of a minor," which is an aggravated felony under the INA.

Given that Respondent's conviction for violating N.J. Stat. Ann. § 2C: 24a is an aggravated felony under INA § 101(a)(43)(A), DHS has met its burden to establish by clear and convincing evidence that Respondent is removable pursuant to INA § 237(a)(2)(A)(iii) and the charge is sustained.

ORDERS

IT IS ORDERED that the charge under INA § 237(a)(2)(A)(iii)(cross referencing INA § 101(a)(43)(A) is **SUSTAINED**; and

IT IS FURTHER ORDERED that Respondent's motion to terminate removal proceedings is **DENIED**.

11-23-2010
Date

Margaret Reichenberg
Margaret Reichenberg
Immigration Judge