

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals Office of the Clerk

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Conry, Brian Patrick, Esquire 534 S.W. Third, Suite 711 Portland, OR 97204-0000 DHS/ICE Office of Chief Counsel - POO 1220 SW Third Avenue, Suite 300 Portland, OR 97204

Name:

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Date of this notice: 9/12/2014

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 Wendtland, Linda S.

TranC

Userteam: Docket

Falls Church, Virginia 20530

File: Portland, OR

Date:

SEP 1 22014

In re:

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian Patrick Conry, Esquire

ON BEHALF OF DHS:

Gina C. Emanuel

Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] -

Convicted of crime of domestic violence, stalking, or child abuse, child

neglect, or child abandonment

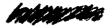
APPLICATION: Cancellation of removal; adjustment of status; waiver of inadmissibility

The respondent appeals from an Immigration Judge's September 19, 2012, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained.

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, was convicted in November 1996 of attempted sexual abuse in the first degree in violation of sections 161.405 and 163.427(1)(a)(A) of the Oregon Revised Statutes. It is conceded that this conviction renders him removable under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (Tr. at 8-9), and thus the issue on appeal is whether he qualifies for relief from removal.

The respondent is the beneficiary of an approved immediate-relative petition filed by his United States citizen wife, and thus the main form of relief he seeks is adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The Immigration Judge found the respondent eligible to apply for adjustment, but ultimately concluded that he does not merit such relief in discretion. Whether the respondent deserves a favorable exercise of discretion is a question of judgment that we decide for ourselves, see 8 C.F.R. § 1003.1(d)(3)(ii), but any such judgment must be based on the Immigration Judge's factual findings rather than our own, see 8 C.F.R. § 1003.1(d)(3)(iv). The Immigration Judge's findings of fact are controlling on appeal unless they are clearly erroneous, see 8 C.F.R. § 1003.1(d)(3)(i).

Absent adverse factors, adjustment of status should ordinarily be granted in discretion. *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Where adverse factors are present, however, the applicant must offset these by coming forward with proof of countervailing equities. *Id.*



Depending upon the seriousness of the applicant's adverse factors, moreover, these equities may need to be unusual or even outstanding. *Id*.

The respondent's 1996 aggravated felony conviction is unquestionably a very serious adverse discretionary factor. The conviction resulted from the respondent's guilty plea to a charge that he subjected his 11-year-old step-daughter to sexual contact involving digital penetration of her vagina. Under the circumstances, we conclude that the respondent's application for adjustment of status cannot be granted absent proof of genuine rehabilitation and unusual or outstanding countervailing equities. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996) (holding that alien convicted of sexually penetrating a victim under 16 years of age must show compelling equities in order to be granted discretionary relief).

As the Immigration Judge acknowledged, the respondent's equities are very substantial. The respondent is 50 years old, has been a lawful permanent resident of the United States since 1990, and has been gainfully employed as a vineyard worker for 20 years, so removal to Mexico at this stage of his life would cause him serious hardship.

The respondent is also the father or stepfather of a number of United States citizens, most of whom submitted letters of support on his behalf noting that he has provided them with reliable economic support and has been present for many of the important events in their lives (Exh. 4, at 12-13, 15-16). The respondent's ex-wife (and the mother of the child he molested) also filed a letter of support on his behalf, stating that the respondent has been a good provider for his children and that his removal would cause economic hardship to her and to the children by interrupting the flow of child support payments (Exh. 4, at 19). We have no doubt that the respondent's removal to Mexico would cause emotional hardship for all concerned and the loss of his economic support would undoubtedly present real challenges for the family members he leaves behind.

The respondent has also come forward with strong evidence that he has been rehabilitated since his 1996 conviction. The respondent has had no further arrests or convictions since the 1996 incident, and the Immigration Judge found that he takes responsibility for his actions, is sincerely remorseful, and has successfully participated in all aspects of his court-mandated sex offender treatment. The respondent's claim to rehabilitation is also supported by an August 2011 clinical report, prepared by Dr. Richard King (who also testified as an expert witness below), indicating that the respondent presents a very low risk of recidivism (Exh. 6, tab A, pp. 32-48).

Although the respondent's 1996 conviction is a very substantial negative discretionary factor, when viewed cumulatively we conclude that the respondent's lengthy residence in this country, his strong employment history, his family ties to United States citizens, and his genuine rehabilitation are "unusual" and "outstanding" equities. Given the respondent's rehabilitation and the fact that approximately 18 years have elapsed since his last transgression, moreover, we are convinced that his equities outweigh his negative factors and that he deserves this final opportunity to remain with his family. Accordingly, we will vacate the Immigration Judge's decision denying the respondent's application for adjustment of status and remand the record for the completion of background checks and the entry of an appropriate order.



In conclusion, although the respondent is removable under section 237(a)(2)(E)(i) of the Act, he is eligible for, and deserving of, adjustment of status under section 245(a) of the Act. Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the Immigration Judge's decision is vacated to the extent it denied the respondent's application for adjustment of status.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

U.S. Department of Justice Executive Office for Immigration Review

Falls Church, Virginia 20530

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Date:

SEP 1 22014

In re: And Company of the Company

DISSENTING OPINION: Patricia A. Cole, Board Member

Board Member Patricia A. Cole respectfully dissents. I would affirm the Immigration Judge's decision because of the seriousness of the respondent's offense.

The respondent's 1996 conviction resulted from his guilty plea to a charge that he subjected his 11-year-old step-daughter to sexual contact involving digital penetration of her vagina. Like the Immigration Judge, I find few crimes more reflective of an individual's undesirability as a permanent resident than the sexual abuse of a child. Consequently, the respondent's application for adjustment of status should not be granted absent proof of genuine rehabilitation and unusual or outstanding countervailing equities. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996) (holding that alien convicted of sexually penetrating a victim under 16 years of age must show compelling equities in order to be granted discretionary relief).

The respondent's equities are very substantial, but the evidence does not indicate that the adverse effect of removal upon the respondent and his family will exceed that typically suffered by a family in this situation. See Matter of Burbano, 20 I&N Dec. 872, 876 (BIA 1994); Matter of Roberts, 20 I&N Dec. 294, 301-02 (BIA 1991). The respondent has also provided sufficient evidence of rehabilitation. However, because of his conviction for a very serious crime involving the sexual abuse of a child who was entitled to his care and protection, the respondent has spent most of his residence in the United States as a registered sex offender. I would not consider the rehabilitation of a child sex offender to be an "unusual or outstanding" equity. Instead, I would deem proof of rehabilitation to be a minimal threshold requirement, without which an exercise of discretion could not even have been considered.

Consequently, I find the respondent's 1996 conviction for committing a sex crime against his step-daughter to be a compelling negative discretionary factor that is not outweighed by his considerable equities. I agree with the Immigration Judge that a favorable exercise of the Attorney General's discretion would not be appropriate and therefore find that the respondent's application for adjustment of status was properly denied.

Patricia A. Cole

Board Member