No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH EMANUEL HECHAVARRIA, AKA DAVID RILEY,

*Petitioner*,

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,

*Respondent*.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# PETITION FOR A WRIT OF *CERTIORARI*

Timothy W. Hoover
*Counsel of Record*
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street
Buffalo, New York 14202
thoover@hodgsonruss.com
(716) 848-1271

## QUESTION PRESENTED

Petitioner Joseph Hechavarria, an immigrant, has been ordered removed from the United States for having committed a crime of violence as defined by 18 U.S.C. § 16(a). That subsection applies to offenses that have "as an element the use, attempted use, or threatened use of physical force." The offense in question, second-degree assault in violation of New York Penal Law § 120.05(2), can be committed by omission. Under the categorical approach, does an offense that can be committed by omission rather than affirmative act necessarily entail the "use" of force within the meaning of § 16(a)?

## DIRECTLY RELATED PROCEEDINGS

1. *Hechavarria v. Barr*, No. 15-3331 (2d Cir. Oct. 28, 2019), ECF No. 196 (denying petition for review).
2. *Hechavarria v. Barr*, No. 15-3331 (2d Cir. Dec. 30, 2019), ECF No. 202 (denying petition for rehearing *en banc*).
3. *Hechavarria v. Sessions*, No. 16-1380 (2d Cir. May 16, 2018), ECF No. 112 (reversing denial of habeas relief and remanding for further proceedings).
4. *Hechavarria v. Sessions*, No. 15-CV-1058 (W.D.N.Y. Nov. 2, 2018), ECF No. 38 (conditionally granting habeas relief).
5. *Hechavarria v. Whitaker*, No. 15-CV-1058 (W.D.N.Y. Jan. 16, 2019), ECF. No. 55 (enforcing conditional writ of habeas corpus and ordering release from custody).

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IN THE
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JOSEPH EMANUEL HECHAVARRIA, AKA DAVID RILEY,

*Petitioner*,

v.

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*Respondent.*

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ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Petitioner Joseph Hechavarria respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The Second Circuit's opinion is reported at 782 F. App'x 56 (2d Cir. Oct. 28, 2019) and is attached to Petitioner's Appendix ("Pet. App.") at 1a. The Second Circuit's order denying Mr. Hechavarria's petition for rehearing is attached at Pet. App. 20a.

## JURISDICTION

The Second Circuit issued its Summary Order and Judgment denying Mr. Hechavarria's petition for review on October 28, 2019. (Pet. App. 1a.) A timely petition for rehearing *en banc* was filed on December 12, 2019, and denied on

December 30, 2019. (Pet. App. 20a.) The original *certiorari* deadline was March 29, 2020. *See* Supreme Court Rule 13.3. On March 19, 2020, for all petitions for *certiorari* due on or after that date, the Court issued an order extending the filing period to 150 days. This petition was timely filed on May 28, 2020, *see* Supreme Court Rule 29.2, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(A)(iii) (Pet. App. 21a) provides that an:

> alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1101(a)(43)(F) (Pet. App. 22a) defines aggravated felony as:

> a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [of] at least one year.

18 U.S.C. § 16 (Pet. App. 23a) provides:

> The term "crime of violence" means any crime punishable by imprisonment for a term exceeding one year . . . that— (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.

New York Penal Law § 120.05(2) (Pet. App. 24a) states that a person commits assault in the second degree when:

> With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument.

New York Penal Law § 15.10 (Pet. App. 25a) addresses culpability in relevant part as follows:

> The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability." If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

New York Penal Law § 15.00(3) (Pet. App. 26a) defines omission as:

> [A] failure to perform an act as to which a duty of performance is imposed by law.

## STATEMENT

Mr. Hechavarria lawfully immigrated to the United States in 1984. Following a July 2011 conviction for assault with a dangerous instrument, in violation of New York Penal Law § 120.05(2), Mr. Hechavarria was charged with removability. (Administrative Record, *Hechavarria v. Barr*, No. 15-3331 (2d Cir.), ECF No. 24 at ("AR") 70, 84, 88, 97-98, 787-90.) On June 24, 2015, an Immigration Judge ordered Mr. Hechavarria removed and denied relief from removal, concluding that Mr. Hechavarria's assault conviction was a crime of violence under 18 U.S.C. § 16. (Pet. App. 4a-15a.) The IJ did not specify whether he was relying on § 16(a) or

§ 16(b). Two days later, this Court invalidated the Armed Career Criminal Act ("ACCA")'s analogue to § 16(b). *See (Samuel) Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

Mr. Hechavarria timely appealed to the Board of Immigration Appeals and argued that his assault conviction did not qualify as a "crime of violence" under 18 U.S.C. § 16. (AR 2, 11-12.) The BIA deemed this argument barred by the "law of the case," though without addressing the intervening decision in *(Samuel) Johnson*, and affirmed Mr. Hechavarria's order of removal. (Pet. App. 16a-19a.)

On October 16, 2015, Mr. Hechavarria timely petitioned the Second Circuit for review. *Hechavarria*, No. 15-3331, ECF No. 1. The court of appeals had jurisdiction under 8 U.S.C. § 1252(a). Mr. Hechavarria's case was stayed pending the outcome of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *Hechavarria*, No. 15-3331, ECF No. 52. The stay was lifted in September 2018, after *Dimaya* held that 18 U.S.C. § 16(b) is unconstitutionally vague. *Id.*, ECF No. 90. The Second Circuit appointed *pro bono* counsel and directed briefing on (1) whether Mr. Hechavarria's offense qualified as a crime of violence under 18 U.S.C. § 16(a); (2) whether the BIA erred in relying on the law-of-the-case doctrine; and (3) whether the intervening decisions in *(Samuel) Johnson* and *Dimaya* excused Mr. Hechavarria's initial failure to challenge the crime-of-violence determination. *Id.*, ECF No. 79.

Section 16(a) defines "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). In his briefs on the merits, Mr.

Hechavarria argued that assault under New York Penal Law § 120.05(2) is not categorically a crime of violence because it can be committed by omission, and therefore does not require the "use" of physical force. *Id.*, ECF No. 109 at 35-36; *id.*, ECF No. 156 at 17-19.

After the close of briefing in Mr. Hechavarria's case, but before oral argument, a separate panel of the Second Circuit rejected an omission argument similar to the one Mr. Hechavarria presented, held that § 120.05(2) cannot plausibly be committed without an affirmative act, and concluded that § 120.05(2) is categorically a crime of violence. *See Singh v. Barr*, 939 F.3d 457, 463-64 (2d Cir. 2019) (per curiam). After hearing oral argument in Mr. Hechavarria's case, the Second Circuit issued a Summary Order denying his petition as foreclosed by *Singh*. *See Hechavarria*, 782 F. App'x 56, 57 (2d Cir. 2019).

Mr. Hechavarria petitioned the Second Circuit for rehearing *en banc*, urging the full court to consider whether an offense that can be committed by omission necessarily entails the *use* of physical force. *Id.*, ECF No. 198 at 6-10. The court denied rehearing. *Id.*, ECF No. 202. This petition followed.

## REASONS FOR GRANTING THE PETITION

### POINT I. THE PETITION SHOULD BE GRANTED BECAUSE THE QUESTION PRESENTED IS IMPORTANT, IT CONCERNS THE MEANING OF THIS COURT'S PRECEDENT, AND IT HAS DIVIDED THE CIRCUIT COURTS.

The statute authorizing Mr. Hechavarria's removal states that an "alien who is convicted of an aggravated felony at any time after admission is

deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). A separate statute defines the term aggravated felony as "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16, in turn, defines crime of violence as:

> (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.

8 U.S.C. § 16. Section 16(a), the "elements clause," contains the language relevant to this petition.

To determine whether an offense entails the use of physical force under § 16(a), courts apply the "categorical approach." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013); *Dimaya*, 138 S. Ct. at 1211. Under this approach, the actual facts of the conviction are irrelevant. *See Dimaya*, 138 S. Ct. at 1211; *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Instead, the Court presumes that the offense consisted of the least culpable conduct for which there is a realistic probability of conviction under the statute. *See Moncrieffe*, 569 U.S. at 191. The Court then compares that conduct to the federally defined generic offense—here, "crime of violence" under § 16(a). *See Leocal*, 543 U.S. at 8-9.

### A. A failure to act should not qualify as a "use" of force under 18 U.S.C. § 16(a).

Physical force means "force exerted by and through concrete bodies," as opposed to "intellectual force or emotional force." *(Curtis) Johnson v. United States*, 559 U.S. 133, 138 (2010). And when read as a definition of "crime of violence," physical force "suggests a category of violent, active crimes." *Id.* at 140 (quoting *Leocal*, 543 U.S. at 11). For an offense to entail the *use* of physical force, moreover, it must categorically require the "active employment" of physical force. *Leocal*, 543 U.S. at 9 (quotation marks omitted).

"Active employment" does not mean direct action. Indirect applications of physical force still qualify as a "use"; the chain of causation simply has an extra link or two. *See United States v. Castleman*, 572 U.S. 157, 171 (2014). But—and this is the crucial point—total inaction in breach of a duty to act is fundamentally different from indirectly wielding physical force. *Cf. Vacco v. Quill*, 521 U.S. 793, 807 (1997) (upholding "the distinction between letting a patient die and making that patient die"). A failure to act cannot qualify as the use or active employment of physical force. So if an offense can be committed by omission, it is not a crime of violence under § 16(a).

### B. Second-degree assault under New York Penal Law § 120.05(2) can be committed by omission.

In New York, as in most jurisdictions, "criminal liability may be predicated on an 'omission.'" *People v. Wong*, 81 N.Y.2d 600, 607 (N.Y. 1993). New York Penal Law § 15.10 states that the minimal requirement for criminal liability is

"conduct which includes a voluntary act or the omission to perform an act which [the defendant] is physically capable of performing." Omission, in turn, is defined as "a failure to perform an act as to which a duty of performance is imposed by law." N.Y. Penal Law § 15.00(3).

Omission liability applies even to assault and similar crimes that one ordinarily thinks of as being affirmative. For example, in *Wong*, the state charged two caretakers in the shaking death of an infant. *Id.* at 378-79. The state's theory was that one of the caretakers had shaken the infant while the other had failed to intervene. *Id.* at 379. Both defendants were charged with the same offenses: first- and second-degree manslaughter and endangering the welfare of a child. *Id.* at 380. The Court of Appeals held that the state's "theory against the 'passive' defendant [wa]s legally sound," because criminal liability can arise without any affirmative conduct if the passive defendant has a duty to act. *Id.* at 381; *see also People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992) (holding that first-degree manslaughter can be committed by omission); *People v. Miranda*, 612 N.Y.S.2d 65, 66 (N.Y. App. Div. 1994) (holding that a parent's failure to seek medical care for a child could constitute assault); *People v. Gladden*, 118 Misc. 2d 831, 832-33 (N.Y. Sup. Ct. 1983) (explaining that a prosecutor sufficiently proved assault by establishing the existence of a duty to act, ability to act, and failure to act resulting in injury).

Although none of these cases specifically involved New York Penal Law § 120.05(2), they suffice to show a realistic probability that § 120.05(2) could be prosecuted under an omission theory through the addition of a deadly weapon or

dangerous instrument.[1] To see why, return to the facts of *Wong* but assume that, instead of shaking the child, the "active" defendant had hit him with plastic knuckles—a deadly weapon under New York Penal Law § 10.00(12)—or had struck him with the wire handle of a fly swatter—a dangerous instrument under New York Penal Law § 10.00(13), *see People v. Wade*, 648 N.Y.S.2d 563, 564 (N.Y. App. Div. 1996). These scenarios are not at all far-fetched. Regrettably, parents often strike their children. Nor can there be any question that the facts described above would violate § 120.05(2). *See, e.g.*, *Wade*, 648 N.Y.S.2d 564 (affirming conviction under § 120.05(2) where the defendant struck his five-year-old daughter on her back, over her clothing, with the handle of a fly swatter).[2] And as *Wong* makes clear, in every case in which the "active" parent's conduct violates § 120.05(2), the "passive" parent is equally culpable on an omission theory if she stood by and failed to intervene.

### C. The circuit courts disagree about whether failure to act is a "use" of force.

The circuit courts are divided on the question presented. The Third and Sixth Circuits take Mr. Hechavarria's side. In *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), the Third Circuit held that "the use of physical force required by

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1 Section 120.05 is divisible into separate subsections that effectively create separate crimes, so the categorical approach is applied only to § 120.05(2). *See Descamps v. United States*, 570 U.S. 254, 263-64 (2013).

2 The blow need not be especially forceful to satisfy the "physical injury" requirement. Under New York Penal Law § 10.00(9), a squeeze on the arm producing bruising is a "physical injury." *People v. Kraatz*, 47 N.Y.S.3d 817, 818 (N.Y. App. Div. 2017).

the ACCA cannot be satisfied by a failure to act." *Id.* at 230. "[B]ecause Pennsylvania aggravated assault under § 2702(a)(1) criminalizes certain acts of omission," the Court reasoned, "it sweeps more broadly than the ACCA's definition of 'physical force.'" *Id.* Likewise, in *United States v. Burris*, 912 F.3d 386 (6th Cir.) (en banc), *cert. denied*, 140 S. Ct. 90 (2019), the Sixth Circuit held that Ohio's felony-assault statute, which extends to failures to act in violation of a legal duty to do so, did not necessarily require the use of physical force. *Id.* at 398-99, 402.

The First, Eighth, and Tenth Circuits have come to the opposite conclusion. In *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020), the First Circuit held that any offense which entails causing bodily injury, even if committed by omission, necessarily requires the use of force. *Id.* at 130-32. In *United States v. Peeples*, 879 F.3d 282 (8th Cir.), *cert. denied*, 138 S. Ct. 2640 (2018), the Eighth Circuit held that Iowa's attempted-murder statute, which encompasses omissions, is a crime of violence under the elements clause of U.S.S.G. § 4B1.2(a). *Id.* at 286-87. And in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir.), *cert. denied*, 138 S. Ct. 2005 (2018), the Tenth Circuit held that although Colorado's second-degree assault statute could be violated by an "omission to act," it nevertheless required the use of physical force. *Id.* at 538.

The Second Circuit is of two minds. As noted above, the court rejected the omission argument as regards New York Penal Law § 120.05(2), holding that, notwithstanding cases like *Wong*, second-degree assault necessarily requires a "use" of force. *Singh*, 939 F.3d at 463-64; *Hechavarria*, 782 F. App'x at 56.

Earlier this year, however, the court held that first-degree manslaughter is *not* a crime of violence because it could be committed without any affirmative act. *See United States v. Scott*, 954 F.3d 74, 87 (2d Cir. 2020). Relying heavily on the same *Wong* decision that Mr. Hechavarria cited in his papers, the court explained that "New York first-degree manslaughter may be committed by a defendant's failure to act." *Id.* at 81. Because "use of force" requires at least some action to initiate a harmful sequence, the court "conclude[d] that a crime that may be committed by complete inaction does not have 'as an element the use . . . of physical force against the person of another.'" *Id.* at 86-87 (quoting 18 U.S.C. § 924(e)(B)(i)) (ellipses in original). In the Second Circuit, then, assault with a deadly weapon or dangerous instrument is a crime of violence unless the victim dies, in which case it is not.

The core disagreement in this inter-circuit debate is the reach of *Castleman* and the nature of omission liability. The courts endorsing Mr. Hechavarria's position generally hold that although indirect action may constitute a use of force under *Castleman*, the same cannot be said for an omission, which entails no action at all. *See Scott*, 954 F.3d at 85-86; *Mayo*, 901 F.3d at 229-30. The other side of the debate sees omissions as simply another species of indirect action, and equates causing physical harm with using physical force. *See Baez-Martinez*, 950 F.3d at 130-32; *Peeples*, 879 F.3d at 286-87; *Ontiveros*, 875 F.3d at 538. Only this Court can supply a definitive answer about the reach of *Castleman* and the nature of an omission.

### D. The question presented is apt to recur frequently and the stakes are high, making the circuit courts' disagreement especially impactful.

When the circuit courts divide over an issue that arises infrequently, the need to resolve their disagreement is less pressing than when, as is the case here, the debated issue arises often. New York alone allows an omission theory for a variety of offenses including manslaughter, first-degree assault, second-degree assault, and third-degree assault. *See Wong*, 619 N.E.2d at 381; *Miranda*, 612 N.Y.S.2d at 66; *Gladden*, 462 N.Y.S.2d at 118. These are common offenses and New York is a populous state. Further, as illustrated by the other circuit court opinions cited above, many other states also countenance omission liability.

Convictions under these statutes will be offered as a basis for removal or sentencing enhancement in courts across the country, meaning that the very same predicate offense will receive different treatment depending on the fortuity of location. Worse, the magnitude of the difference is enormous given the serious consequences that accompany the "crime of violence" designation, *see (Samuel) Johnson*, 135 S. Ct. at 2555 (mandatory minimum 15-year term of imprisonment); *Dimaya*, 138 S. Ct. at 1210-11 (removal from the United States). Granting this petition would clarify the law as to all offenses that can be violated by omission, helping to ensure that these severe consequences fall only on those who have actually committed aggravated felonies.

## POINT II. IN THE ALTERNATIVE, IF THE COURT GRANTS *CERTIORARI* ON A SIMILAR ISSUE IT SHOULD HOLD THIS CASE FOR FURTHER CONSIDERATION.

If the Court grants any petitions for *certiorari* addressing whether a violation of New York Penal Law § 120.05(2) is a crime of violence, or whether a failure to act is a use of force, it should hold this case for consideration and, if appropriate, vacate and remand this matter. *See* 28 U.S.C. § 2106; *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (noting that a GVR order may alleviate "'[p]otential for unequal treatment' that is inherent in [the Court's] inability to grant plenary review of all pending cases raising similar issues" (citations omitted)).

## CONCLUSION

For the reasons set forth above, this petition for a writ of *certiorari* should be granted.

Dated: May 28, 2020
Buffalo, New York

Respectfully submitted,

**HODGSON RUSS LLP**
*Attorneys for Petitioner Joseph Hechavarria*

By: _____
Timothy W. Hoover
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
(716) 848-1271
*thoover@hodgsonruss.com*

# Appendix A

15-3331
*Hechavarria v. Barr*

BIA
Reid, IJ
A028 333 385

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

## SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of October, two thousand nineteen.**

PRESENT:

ROBERT A. KATZMANN,
*Chief Judge*,
JON O. NEWMAN,
MICHAEL H. PARK,
*Circuit Judges*.

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JOSEPH EMANUEL HECHAVARRIA, AKA DAVID RILEY,

*Petitioner*,

v. No. 15-3331

WILLIAM BARR, UNITED STATES ATTORNEY GENERAL,

*Respondent*.

---

FOR PETITIONER: SPENCER L. DURLAND, Timothy W. Hoover, Hodgson Russ LLP, Buffalo, NY.

FOR RESPONDENT: JESI J. CARLSON, Office of Immigration Litigation (Joseph H. Hunt, Assistant

Attorney General; John W. Blakeley, Office of Immigration Litigation, *on the brief*), United States Department of Justice, Washington, D.C.

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition for review of the Board of Immigration Appeals ("BIA") decision is **DENIED**.

Petitioner Joseph Hechavarria seeks review of a Board of Immigration Appeals ("BIA") decision dismissing his appeal of an Immigration Judge's ("IJ") ruling that he is removable as an aggravated felon due to his New York conviction of second-degree assault with a deadly weapon or dangerous instrument. We assume the parties' familiarity with the underlying facts and procedural history of the case.

Hechavarria was born in Jamaica and lawfully entered the United States as a nonimmigrant visitor in 1984. After marrying a United States citizen, he became a lawful permanent resident on a conditional basis, but his conditional status was terminated pursuant to 8 U.S.C. § 1186a(c)(2). In 2011, Hechavarria was convicted in New York state court of second-degree assault in violation of New York Penal Law ("NYPL") § 120.05(2). "A person is guilty of assault in the second degree" under § 120.05(2) when, "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument." NYPL § 120.05(2).

Based on this conviction, Hechavarria was charged with removability under 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony." The definition of "aggravated felony," 8 U.S.C. § 1101(a)(43)(F), includes any "crime of violence" as defined by 18 U.S.C. § 16, which in turn contains the now-invalidated "residual clause," *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018), and the still-applicable "force clause." In 2013, an IJ

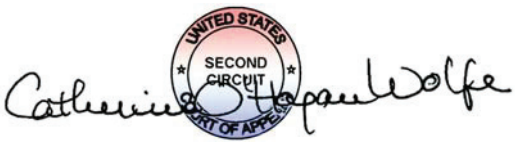
found that Hechavarria was removable both because his conditional residency terminated and because he was convicted of an aggravated felony. Hechavarria failed to timely appeal. Neither the charge of removability nor the IJ clarified whether New York second-degree assault qualified as a crime of violence under § 16's force or residual clause.

Hechavarria later applied for, among other things, asylum. The IJ rejected that application, holding that Hechavarria was statutorily ineligible because he had been convicted of an aggravated felony. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i). Hechavarria appealed to the BIA, which held that the IJ's original determination in 2013 was the law of the case, so Hechavarria was precluded from relitigating whether his second-degree assault conviction was for an aggravated felony. The BIA then affirmed the IJ and dismissed the appeal.

Hechavarria timely filed a petition for review, arguing that the BIA erroneously applied the law-of-the-case doctrine in the face of controlling, intervening case law and asking us to remand to the agency for consideration in the first instance of whether his conviction is an aggravated felony. However, after briefing in this case was finished, we held that New York second-degree assault under NYPL § 120.05(2) is a crime of violence under § 16's force clause and thus an aggravated felony. *See Singh v. Barr*, 939 F.3d 457, 463–64 (2d Cir. 2019). Even if the BIA erred in its application of the law-of-the-case-doctrine, the outcome would not change and remand would be futile. *See Banegas Gomez v. Barr*, 922 F.3d 101, 107 (2d Cir. 2019).

The petition for review is therefore **DENIED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



# Appendix B

IMMIGRATION COURT
4250 FEDERAL DRIVE, ROOM F108
BATAVIA, NY 14020

In the Matter of

Case No.: A028-333-385

HECHAVARRIA, JOSEPH EMANUEL
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 6/24/15. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to ~~or in the alternative to~~. JAMAICA

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[X] Asylum was ( )granted (X)denied( )withdrawn.

[X] Withholding of removal was ( )granted (X)denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Adjustment of Status under Section 245 was ( )granted (X)denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal (X) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: 212(h) waiver denied.

Date: 6/24/15

JOHN B. REID
Immigration Judge

Appeal: ~~Waived~~/Reserved Appeal Due By: 7/24/15

ALIEN NUMBER: 028-333-385 NAME: HECHAVARRIA, JOSEPH EMANUEL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [P] DHS

DATE: 6/24/15 BY: COURT STAFF

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q6

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BUFFALO, NEW YORK

File: A028-333-385 June 24, 2015

In the Matter of

| | | |
|---|---|---|
| JOSEPH EMANUEL HECHAVARRIA | ) | IN REMOVAL PROCEEDINGS |
| RESPONDENT | ) | |

CHARGES:

APPLICATIONS: Adjustment of status pursuant to Section 245 of the Immigration and Nationality Act (the Act) coupled with a Section 212(h) waiver;
Asylum pursuant to Section 208 of the Act;
Withholding of removal pursuant to Section 241(b)(3)(A) of the Act;
Relief under the "Torture Convention."

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: MICHAEL G. DREHER, Esquire

## ORAL DECISION OF THE IMMIGRATION JUDGE

This removal proceeding has a substantial history. The respondent previously appeared before a different Immigration Judge, and that Judge found removability on both grounds charged by the Government. Those grounds were Section 237(a)(2)(A)(iii) of the Act relating to an aggravated felony crime of violence and Section 237(a)(1)(D)(i) of the Act relating to an alien whose permanent residence was terminated for failure to comply with the requirements of the Act to remove the

conditions of his permanent residence.

On September 12, 2013, this Court entered a decision pretermitting the respondent's application for adjustment of status because he appeared to be statutorily ineligible for a Section 212(h) waiver. The Court ordered that the respondent be removed from the United States to Jamaica.

Several months after the decision the respondent appealed my decision to the Board of Immigration Appeals, and, on July 16, 2014 the Board ruled that the respondent's appeal was untimely and that this Court's decision was final.

The respondent subsequently made a motion to reopen these proceedings to this Court claiming that circumstances had changed in Jamaica and that he now feared that he would be tortured upon return to Jamaica because the Jamaican government would not provide him with medical services and prescriptions as required. While the Court was contemplating whether or not to reopen the proceedings on claimed new circumstances the Second Circuit entered a decision on January 8, 2015 in the Matter of Hasic v. Holder wherein the Circuit held that a person who was lawfully admitted to the United States under a status other than that of a lawful permanent resident, who adjusted his status to that of a lawful permanent resident, is not statutorily barred from pursuing a waiver under Section 212(h) of the Act. Since the respondent was initially admitted to the United States as a visitor and then had his status adjusted, the Court did reopen these proceedings on February 11 of this year.

In the reopened proceedings, the respondent is seeking an adjustment of status with an approved waiver and also relief based upon his fear of return to Jamaica.

The documentary evidence which has been submitted in connection with these forms of relief is as follows:

Exhibit 4 is the frivolous warnings relating to filing a frivolous asylum application;

Exhibit 5 is the respondent's application for asylum;

Exhibit 6 is the letter from the Consulate General of Jamaica to the respondent dated April 14, 2014. This is the letter that the respondent believes would lead to his torture;

Group Exhibit 7 is a very substantial group of medical records that the respondent had submitted in his motion to reopen;

Exhibit 8 is the U.S. Department of State Country Report for Jamaica for the year 2013;

Group Exhibit 9 is the materials relating to the respondent's application for adjustment of status with a Section 212(h) waiver. This Group Exhibit includes a copy of the approved I-130 petition that was filed by his son, a Form I-485 application for adjustment of status, a Form I-601 requesting a Section 212(h) waiver, a request for a fee waiver and an order granting same, a medical report dated May 8, 2015, an affidavit of support from the respondent's son, Germane, who filed the I-130, and a letter indicating that he is still sponsoring the respondent, an affidavit of support from the co-sponsor, the respondent's niece, Adjra Hechavarria, along with her tax returns and a letter from her.

The final Exhibit is Group Exhibit 10 which is the son's DD-214 relating to his honorable discharge from military service and additional materials submitted by the respondent including medical papers.

Both the respondent and his sister testified in support of his applications for relief on June 10 of this year.

**APPLICATION FOR ASYLUM AND RELATED RELIEF**

The respondent is seeking relief from return to Jamaica primarily because he argues that the government of Jamaica will effectively lead to the respondent's being

tortured since they will not furnish him with the documentation necessary to sustain his health. The respondent had previously had, I believe, two kidney transplants, and is under treatment for same.

The letter from the Consulate General of Jamaica, which triggered this fear of the respondent, is Exhibit 6 in these proceedings, a letter dated April 14, 2014. It states, in pertinent part, "the ministry of health has informed that there will be challenges in assessing the appropriate medical care, as the services available are minimal and very costly in Jamaica."

"However, should you be removed, you are required to obtain a comprehensive medical report including referrals, which can be taken to the health center for admission for treatment upon your arrival."

At the outset, the Court would determine that the respondent is statutorily ineligible for asylum and for withholding of relief under Section 241(b)(3)(A) of the Act, and also withholding of removal under the Torture Convention because the respondent has been convicted of a particularly serious crime which makes him statutorily ineligible for these forms of relief. The respondent was convicted of assault in the second degree on or about August 17, 2011. He was sentenced to a period of custody of three years determinant with two years of post-release supervision and an order of protection until December 22, 2021.

As has been found by the previous Judge, the respondent's assault conviction is an aggravated felony conviction. That would make him statutorily ineligible for asylum pursuant to Section 208 of the Act. For withholding of removal purposes, not all aggravated felonies are per se particularly serious, only those where the sentence of imprisonment is at least five years. Other convictions, whether they are aggravated felonies or not, can be determined by the Court to see whether they may be aggravated

felonies.

The respondent was charged with assaulting a person and cutting them with a knife. The respondent testified in connection with these proceedings and indicated that he was sure he did not commit the crime, although he pled guilty to it. The respondent indicated that he had been taking crack cocaine and had basically passed out.

This Court finds that the respondent's conviction for assault in the second degree, a crime of violence, with a sentence of imprisonment of three years, would be considered to be a particularly serious crime. It involved harm to an individual, not to property, and involves a dangerous or deadly weapon.

Because the respondent has been convicted of a particularly serious crime, he is ineligible for asylum and for withholding of removal under both the Immigration statute and the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).

The respondent would be eligible for temporary deferral of removal under the Torture Convention if he could show that it is more likely than not that he would be tortured by government officials in Jamaica or that government officials would acquiesce, turn a blind eye, to torture that they were aware of.

As stated earlier, the respondent relies very heavily on the letter from the Consulate General of Jamaica, Exhibit 6, to show his fear. This Court's reading of that letter, however, is very different from that of the respondent. The letter appears to be advising the respondent that he may see difficulties obtaining the relief or the medical treatment that he may require but it is alerting him to that fact, advising him to bring medical records with him, and suggesting that he check early for those benefits and register for them. It also advises him that he may wish to seek attorney assistance in Jamaica.

My reading of the statute certainly does not show that it is more likely than not that the respondent would be tortured upon return to Jamaica.

It may be that the medical situation in Jamaica may be less advanced than that of the United States. In order to qualify or establish torture by the government of Jamaica, however, the respondent would have to show that the medical attention is available to the respondent and that the government of Jamaica is intentionally refusing to make it available to the respondent with a specific intention to torture the respondent. Clearly the record in the proceeding does not show that. To the contrary, it shows a concern of the government of Jamaica to alert the respondent as to how he should go about seeking relief. This Court therefore finds that the respondent has totally failed to show that it is more likely than not that he would be tortured at the hands of government officials in Jamaica or that the government officials would acquiesce and turn a blind eye to the torture.

**ADJUSTMENT OF STATUS**

The respondent is seeking adjustment of status based upon an approved I-130 petition filed by his son. It would appear that the asylum application and the related documentation is all in order. Because of the respondent's aggravated felony conviction, however, in order to qualify for a Section 212(a) waiver, the respondent must show that his denial of admission "would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien;" see Section 212(h)(B) of the Act.

The respondent was asked by the Court as to what hardship his being removed from the United States and denied an adjustment of status would be to his son. He indicated that the hardship would be not being in Jamaica with me to give me support in my illness. He said there is no other hardship for them.

The Court would note that the respondent's son, who filed the I-130 petition on his behalf, resides in Buffalo, New York, which is only about 30 to 40 miles from where the respondent is detained in Batavia, and where these proceedings are being held. Although the Court urged that the respondent have his son available at the hearing, the son did not come to the hearing.

The respondent is apparently also married to a U.S. citizen who filed the original I-130 petition on his behalf, but they have been separated since approximately 1988 or 1989, shortly after the respondent's adjustment of status was initially granted.

The respondent also has another son who lives in New York, but he has not seen this son since 2010, and has not spoken to him for years.

On the record before this Court, the Court must find that the respondent has failed to meet his burden that his not being granted adjustment of status would be an extreme hardship on the specified family members. Therefore, the Court must deny the respondent's Section 212(h) application and the respondent therefore could not qualify for adjustment of status since he is inadmissible to the United States for having been convicted of a crime involving moral turpitude.

The Court would note that the adjustment of status application is a discretionary form of relief. Even if the Court found that the respondent qualified for the granting of that relief, under the facts of this case, the Court would deny the adjustment of status in discretion. The respondent has been convicted of a very serious crime of violence with a deadly weapon. He was sentenced to three years of imprisonment as a result of that. Clearly, as the Court has found, this is a particularly serious conviction.

The Court would also note that Section 212(h) of the Act prohibits a waiver in that "no waiver shall be granted under this sub-section in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for

permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien had not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of the initiation of proceedings to remove the alien from the United States." Although the Second Circuit has held, as set forth above, that the respondent would not be precluded statutorily from this relief since he had not been admitted to the United States as a lawful permanent resident but rather had adjusted his status within the United States, the Court finds that given the seriousness of the particularly serious crime involved, the fact that it is a crime of violence, and the fact that a person who had been lawfully admitted into the United States as a permanent resident would be blocked from this relief even though the respondent would not be, that the Court would not exercise its discretion favorably to grant the respondent relief.

Based upon the foregoing, the following orders of the Court shall enter:

**ORDERED**

The respondent's application for asylum pursuant to Section 208 of the Act is hereby denied;

**FURTHER ORDERED**

The respondent's application for withholding of removal pursuant to Section 241(b)(3)(A) of the Act his hereby denied;

**FURTHER ORDERED**

It is further ordered that the respondent's application for withholding of removal under the "Torture Convention" is hereby denied;

**FURTHER ORDERED**

The respondent's application for temporary deferral of removal under the "Torture Convention" is hereby denied;

**FURTHER ORDERED**

The respondent's application for a Section 212(h) is hereby denied;

**FURTHER ORDERED**

The respondent's application for adjustment of status pursuant to Section 245 of the Act is hereby denied;

**FURTHER ORDERED**

The respondent is hereby ordered removed from the United States to Jamaica.

***Please see the next page for electronic signature***

JOHN B. REID
Immigration Judge

//s//

Immigration Judge JOHN B. REID

reidj on July 27, 2015 at 8:55 PM GMT

# Appendix C

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A028 333 385 – Batavia, New York Date:

SEP 30 2015

In re: JOSEPH EMANUEL HECHAVARRIA a.k.a. David Riley

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)] - Conditional resident status terminated

Lodged: 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)(F) of the Act

APPLICATION: Adjustment of status, waiver of inadmissibility, asylum, withholding of removal, Convention Against Torture

The respondent timely appeals from an Immigration Judge's June 24, 2015, decision, ordering his removal to Jamaica. The appeal will be dismissed. The respondent's request to proceed on appeal *in forma pauperis* is granted under 8 C.F.R. § 1003.8(a)(3). *See Matter of Chicas*, 19 I&N Dec. 114 (BIA 1984).

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, and the likelihood of future events, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

To the extent the respondent, on appeal, challenges his underlying conviction for an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), to wit, a "crime of violence" under 18 U.S.C. § 16 for which the term of imprisonment was at least one year, on account of his 2011 New York conviction for the offense of Assault in the Second Degree, we find the issue is not properly before us for consideration. As the respondent did not timely appeal the Immigration Judge's decision previously entered in his case on September 12, 2013, it became administratively final. Thus, the Immigration Judge's unchallenged determination that the respondent had been convicted of a "crime of violence" aggravated felony based on his 2011 New York Assault in the Second Degree conviction, became the "law of the case," and the respondent is precluded from relitigating the same issue. *See Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 591 (1st Cir. 2012) (Issue preclusion may be applied to bar relitigation of an issue decided in an earlier action only if the issues raised in the two actions are the same); *see also Matter of Barragan-Garibay*, 15 I&N Dec. 77, 78 (BIA 1974) (observing the public interest "in preventing relitigation of previously determined issues").

Consequently, the respondent's 2011 aggravated felony conviction bars him from asylum under sections 208(b)(2)(A)(i) and (B)(i) of the Act, 8 U.S.C. §§ 1158(b)(2)(A)(i) and (B)(i). Furthermore, even though the respondent's aggravated felony conviction is not considered to be, *per se,* a particularly serious crime, because the respondent was sentenced to a term of imprisonment of less than 5 years, we find the Immigration Judge (I.J. at 5) applied the correct standard in his determination, which included consideration of the nature of the offense and that it caused serious harm to a person by the use of a dangerous or deadly weapon, and properly concluded that the respondent's offense nevertheless constituted a particularly serious crime, statutorily precluding the respondent from establishing his eligibility for withholding of removal pursuant to section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(ii), as well as under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(d)(2) and (3). *See Matter of N-A-M-,* 24 I&N Dec. 336, 342) (BIA 2007) (citing *Matter of L-S-*, 22 I&N Dec 645, 654-56 (BIA 1999) (examining in detail the actual circumstances of the crime, well beyond what was disclosed by the elements of the crime, including information from other participants in the crime)); *see also Matter of Y-L-,* 23 I&N Dec. 270 (A.G. 2002); *see also Nethagani v. Mukasey,* 532 F.3d 150 (2d Cir. 2008).

Moreover, although the respondent is still eligible for deferral of removal under the Convention Against Torture, if removed to Jamaica, we find the Immigration Judge's conclusion that the respondent did not establish his eligibility thereunder to be correct. *See* 8 C.F.R. §§ 1208.16(c)(2) and 1208.17. As noted by the Immigration Judge (I.J. at 5), the respondent relies heavily on the letter from the Consulate General of Jamaica (Exh. 6), in support of his fear that he would denied appropriate and affordable medical care if returned to Jamaica to treat his serious medical conditions. However, as noted by the Immigration Judge (I.J. at 5), the letter only appears to be warning the respondent that he may encounter difficulties in obtaining the appropriate medical treatment he may require, "as the services available are minimal and very costly in Jamaica," and is preparing and alerting him to that fact. The letter does not purport to block or deny him access to any medical treatment he may otherwise require in Jamaica.

While there may not be enough health care facilities in Jamaica (as compared to those found in the United States), that can provide appropriate, competent, and adequate care, at a reasonable cost, to address the respondent's medical issues, including his kidney problems (he had a kidney transplant in 2008), and his possible need for dialysis should he suffer additional renal failure, this is insufficient to meet his burden of proof under the Convention Against Torture. Furthermore, the respondent did not establish that any possible substandard treatment he might receive at a hospital or other health care facility in Jamaica would be inflicted by an official or other person acting in an official capacity, or with their acquiescence, with the specific intent to cause him severe physical or mental pain or suffering, or that he will more likely than not be individually and intentionally singled out for torture by hospital officials. *See* 8 C.F.R. § 1208.18(a)(1); *Pierre v. Gonzales*, 502 F.3d 109, 121-22 (2d Cir. 2007) (holding that beyond evidence of inhumane conditions, a claimant can demonstrate a likelihood of torture only by providing some evidence that the authorities act with the specific intent to inflict severe physical or mental pain or suffering because of certain characteristics or medical conditions that claimant possesses).

The respondent has not established-either by testimony or by means of country conditions evidence in the record-that it is more likely than not that he would be subjected to torture inflicted by or at the instigation of or with the consent or acquiescence (including willful blindness) of an official or other person acting in an official capacity, to qualify for the Convention Against

Torture. *See* 8 C.F.R. § 1208.18(a)(1); *see also De La Rosa v. Holder*, 598 F.3d 103, 106 (2d Cir. 2010) (finding that to establish entitlement for CAT protection, an alien bears the burden of proving that it is more likely than not that removal will cause him to be subject to torture, which is defined as the infliction of severe pain or suffering by, at the instigation of, or with the consent or acquiescence of a public official). "Acquiescence" at least requires prior awareness of the torturous activity by a public official and a breach of a legal responsibility to intervene to prevent it. *See* 8 C.F.R. § 1208.18(a)(7); *see also Kone v. Holder*, 596 F.3d 141, 147 (2d Cir. 2010).

In addition, as the respondent is the beneficiary of an approved immediate relative immigrant visa petition (Form I-130) filed on his behalf by his United States citizen son, he is eligible to pursue an application for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. Moreover, even though convicted of an aggravated felony on account of his 2011 New York Assault in the Second Degree conviction, said conviction does not preclude the respondent from pursuing an application for adjustment of status in conjunction with a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).[1] *See Matter of J-H-J-*, 26 I&N Dec. 563, 564 (BIA 2015) (noting that the plain language of section 212(h) of the Act precludes aliens from establishing eligibility for relief only if they lawfully entered the United States as permanent residents and thereafter committed an aggravated felony).

However, even though eligible for adjustment of status, we concur with the Immigration Judge's conclusion, based on his factual findings which are not clearly erroneous, that the respondent has not shown that he merits such relief in the exercise of discretion. *See Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). As we stated in *Matter of Marques*, 16 I&N Dec. 314 (BIA 1977), "an applicant who meets the objective prerequisites is merely eligible for adjustment of status; he is in no way entitled to such relief." *Id.* at 315-16; *see also Matter of Tijam*, 22 I&N Dec. 408, 412-13 (BIA 1998) (stating "[t]he question whether to exercise discretion favorably necessitates a balancing of an alien's undesirability as a permanent resident with the social and humane considerations present to determine whether a grant of relief is in the best interests of this country.").

Whether the respondent deserves a favorable exercise of discretion is a question of judgment that we review de novo, *see* 8 C.F.R. § 1003.1(d)(3)(ii), but any such judgment must be based on

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[1] As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involved some aggravating dimension that significantly increases the culpability of the offense, such as the perpetrator's use of a deadly weapon. *See Matter of Abdelghany*, 26 I&N Dec. 254, 262 (BIA 2014) (citing *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (holding that assault with a deadly weapon is a crime involving moral turpitude), aff'd, 547 F.2d 1171 (7th Cir. 1977)). In this case, the respondent's statute of conviction states in relevant part that "[w]ith intent to cause physical injury to another person, he causes such injury to such person . . . *by means of a deadly weapon or a dangerous instrument*" (emphasis added). *See* N.Y. PENAL LAW § 120.05(2). Consequently, the Immigration Judge properly found these aggravating factors contribute to making the respondent's 2011 New York Assault in the Second Degree offense a conviction for a crime involving moral turpitude, necessitating a waiver of inadmissibility be filed along with his adjustment of status application.

the Immigration Judge's factual findings rather than our own, *see* 8 C.F.R. § 1003.1(d)(3)(iv). However, as the Immigration Judge's findings of fact, which we have found not to be clearly erroneous, *see* 8 C.F.R. § 1003.1(d)(3)(i), are controlling on appeal, we are not persuaded to disturb the Immigration Judge's denial of the respondent's application for adjustment of status filed in conjunction with a waiver of inadmissibility under section 212(h) of the Act, in discretion.

Finally, contrary to the respondent's denial of due process arguments, we find the respondent had a full and fair hearing. The record reflects that the Immigration Judge conducted the respondent's hearing in a fair manner and the Immigration Judge's decision indicates that he objectively considered the respondent's testimony and the documentary evidence in the record in reaching his final decision. As we find the respondent was afforded a full and fair hearing, we find no violation of due process.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

# Appendix D

# UNITED STATES COURT OF APPEALS
## FOR THE
# SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of December, two thousand nineteen.

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Joseph Emanuel Hechavarria, AKA David Riley,

Petitioner,

v.

William P. Barr, United States Attorney General,

Respondent.

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**ORDER**

Docket No: 15-3331

Petitioner, Joseph Emanuel Hechavarria, has filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

# Appendix E

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

**(H) Waiver authorized for certain misrepresentations**

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

**(2) Criminal offenses**

**(A) General crimes**

**(i) Crimes of moral turpitude**

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

**(ii) Multiple criminal convictions**

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

**(iii) Aggravated felony**

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

**(iv) High speed flight**

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

**(v) Failure to register as a sex offender**

Any alien who is convicted under section 2250 of title 18 is deportable.

**(vi) Waiver authorized**

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the 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.

**(B) Controlled substances**

**(i) Conviction**

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

**(ii) Drug abusers and addicts**

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

**(C) Certain firearm offenses**

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

**(D) Miscellaneous crimes**

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

**(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and**

**(i) Domestic violence, stalking, and child abuse**

Any alien who at any time after admission is convicted of a crime of domestic

# Appendix F

(32) The term ''profession'' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term ''residence'' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term ''Service'' means the Immigration and Naturalization Service of the Department of Justice.

(35) The term ''spouse'', ''wife'', or ''husband'' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term ''State'' includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(37) The term ''totalitarian party'' means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms ''totalitarian dictatorship'' and ''totalitarianism'' mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(38) The term ''United States'', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(39) The term ''unmarried'', when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term ''world communism'' means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41) The term ''graduates of a medical school'' means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term ''refugee'' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ''refugee'' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term ''aggravated felony'' means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

[5] So in original. Probably should be preceded by ''is''.

# Appendix G

sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district'' after ''section 7 of this title,''.

Subsec. (b)(2)(A). Pub. L. 104–294 substituted ''under this title'' for ''of not more than $1,000''.

Subsec. (c). Pub. L. 104–132, § 901(b)(2), added subsec. (c).

1994—Subsec. (b). Pub. L. 103–322 designated existing provisions as par. (1), substituted ''Subject to paragraph (2) and for purposes'' for ''For purposes'', and added par. (2).

1988—Pub. L. 100–690 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1996 AMENDMENT

Section 604(d) of Pub. L. 104–294 provided that: ''The amendments made by this section [amending this section, sections 36, 112, 113, 241, 242, 245, 351, 511, 542, 544, 545, 668, 704, 709, 794, 1014, 1030, 1112, 1169, 1512, 1515, 1516, 1751, 1956, 1961, 2114, 2311, 2339A, 2423, 2511, 2512, 2721, 3059A, 3561, 3582, 3592, and 5037 of this title, section 802 of Title 21, Food and Drugs, sections 540A and 991 of Title 28, Judiciary and Judicial Procedure, and sections 3631, 5633, 10604, and 14011 of Title 42, The Public Health and Welfare, and amending provisions set out as notes under sections 1001, 1169, and 2325 of this title and section 994 of Title 28] shall take effect on the date of enactment of Public Law 103–322 [Sept. 13, 1994].''

TERRITORIAL SEA OF UNITED STATES

For extension of territorial sea of United States, see Proc. No. 5928, set out as a note under section 1331 of Title 43, Public Lands.

**[§ 14. Repealed. Pub. L. 107–273, div. B, title IV, § 4004(a), Nov. 2, 2002, 116 Stat. 1812]**

Section, act June 25, 1948, ch. 645, 62 Stat. 686; Aug. 5, 1953, ch. 325, 67 Stat. 366; Pub. L. 87–845, § 3(a), Oct. 18, 1962, 76A Stat. 698; Pub. L. 90–357, § 59, June 22, 1968, 82 Stat. 248; Pub. L. 101–647, title XXXV, § 3519(c), Nov. 29, 1990, 104 Stat. 4923; Pub. L. 103–322, title XXXIII, § 330010(9), Sept. 13, 1994, 108 Stat. 2143, listed Title 18 sections applicable to and within Canal Zone.

**§ 15. Obligation or other security of foreign government defined**

The term ''obligation or other security of any foreign government'' includes, but is not limited to, uncanceled stamps, whether or not demonetized.

(Added Pub. L. 85–921, § 3, Sept. 2, 1958, 72 Stat. 1771.)

**§ 16. Crime of violence defined**

The term ''crime of violence'' means—

(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.

(Added Pub. L. 98–473, title II, § 1001(a), Oct. 12, 1984, 98 Stat. 2136.)

**§ 17. Insanity defense**

(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) BURDEN OF PROOF.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(Added Pub. L. 98–473, title II, § 402(a), Oct. 12, 1984, 98 Stat. 2057, § 20; renumbered § 17, Pub. L. 99–646, § 34(a), Nov. 10, 1986, 100 Stat. 3599.)

**§ 18. Organization defined**

As used in this title, the term ''organization'' means a person other than an individual.

(Added Pub. L. 99–646, § 38(a), Nov. 10, 1986, 100 Stat. 3599; amended Pub. L. 100–185, § 4(c), Dec. 11, 1987, 101 Stat. 1279; Pub. L. 100–690, title VII, § 7012, Nov. 18, 1988, 102 Stat. 4395.)

AMENDMENTS

1988—Pub. L. 100–690 made technical correction of directory language of Pub. L. 99–646, § 38(a), similar to that made by Pub. L. 100–185.

1987—Pub. L. 100–185 made technical correction in directory language of Pub. L. 99–646, § 38(a).

**§ 19. Petty offense defined**

As used in this title, the term ''petty offense'' means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization.

(Added Pub. L. 100–185, § 4(a), Dec. 11, 1987, 101 Stat. 1279; amended Pub. L. 100–690, title VII, § 7089(a), Nov. 18, 1988, 102 Stat. 4409.)

AMENDMENTS

1988—Pub. L. 100–690 inserted '', for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization'' after ''infraction''.

**§ 20. Financial institution defined**

As used in this title, the term ''financial institution'' means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

# Appendix H

# N.Y. Penal Law § 120.05

Section 120.05 - Assault in the second degree

A person is guilty of assault in the second degree when:

**1.** With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or

**2.** With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

**3.** With intent to prevent a peace officer, a police officer, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, a firefighter, including a firefighter acting as a paramedic or emergency medical technician administering first aid in the course of performance of duty as such firefighter, an emergency medical service paramedic or emergency medical service technician, or medical or related personnel in a hospital emergency department, a city marshal, a school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law, a traffic enforcement officer , traffic enforcement agent or employee of any entity governed by the public service law in the course of performing an essential service, from performing a lawful duty, by means including releasing or failing to control an animal under circumstances evincing the actor's intent that the animal obstruct the lawful activity of such peace officer, police officer, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, firefighter, paramedic, technician, city marshal, school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law, traffic enforcement officer , traffic enforcement agent or employee of an entity governed by the public service law, he or she causes physical injury to such peace officer, police officer, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, firefighter, paramedic, technician or medical or related personnel in a hospital emergency department, city marshal, school crossing guard, traffic enforcement officer , traffic enforcement agent or employee of an entity governed by the public service law; or

**3-a.** With intent to prevent an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, a vulnerable elderly person or an incompetent or physically disabled person, from performing such investigation or response, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee including by means of releasing or failing to

# Appendix I

# N.Y. Penal Law § 15.10

Section 15.10 - Requirements for criminal liability in general and for offenses of strict liability and mental culpability

The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability." If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

*N.Y. Penal Law § 15.10*

# Appendix J

# N.Y. Penal Law § 15.00

Section 15.00 - Culpability; definitions of terms

The following definitions are applicable to this chapter:

**1.** "Act" means a bodily movement.
**2.** "Voluntary act" means a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.
**3.** "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.
**4.** "Conduct" means an act or omission and its accompanying mental state.
**5.** "To act" means either to perform an act or to omit to perform an act.
**6.** "Culpable mental state" means "intentionally" or "knowingly" or "recklessly" or with "criminal negligence," as these terms are defined in section 15.05.

*N.Y. Penal Law § 15.00*