IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60546

FIDEL CINTORA AGUILAR

Petitioner

v.

PETER D KEISLER,
ACTING US ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Oct. 2, 2007)

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's motion for summary affirmance is GRANTED.

MOT-21A

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: JUL 11 2007

File: A90 791 836 – San Antonio, TX

In re: FIDEL *CINTORA* AGUILAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lance E. Curtright, Esquire

ON BEHALF OF DHS: Christina Playton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act
[8 U.S.C. § 1182(a)(2)(A)(i)(I)] –
Crime involving moral turpitude

APPLICATION: Termination; former section 212(c) waiver of inadmissibility

ORDER:

PER CURIAM. The appeal is dismissed.[1] We affirm the Immigration Judge's April 13, 2007, decision finding the respondent removable as charged and ineligible for relief for removal. Specifically, we

[1] The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7) (2007).

find no legal error in the Immigration Judge's determination that the respondent's 1994 withheld judgment, which the respondent accepted after a jury's finding of guilt in the respondent's felony trial for lewd and lascivious conduct with a child under the age of 16 in violation of Idaho law, constitutes a conviction for immigration purposes. *See Madriz-Alvarado v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004); *see also Matter of Punu*, 22 I&N Dec. 224 (BIA 1998). In addition, as the Immigration Judge correctly noted, the respondent's argument that application of the definition of conviction added to the Immigration and Nationality Act by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is impermissibly retroactive is foreclosed by the Fifth Circuit's holdings to the contrary in *Madriz-Alvarado v. Ashcroft, supra*, and *Moosa v. INS*, 171 F.3d 994, 1009-10 (5th Cir. 1999). Moreover, the Board is not empowered to rule on the constitutionality of the statutes and regulations that we administer. *See Matter of Valdovinos*, 18 I&N Dec. 343, 345 (BIA 1982). To the extent the respondent asserts that the Department of Homeland Security ("DHS") unfairly initiated removal proceedings against him, the respondent's argument is without merit. Despite any assurances that the DHS may or may not have advanced, the DHS maintains prosecutorial discretion. Furthermore, we will not review the decision of the DHS to institute proceedings. *See Matter of Bahta*, 22 I&N Dec. 1381, 1391-92 (BIA 2000).

Finally, we agree with the Immigration Judge that the respondent is ineligible for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). As the Immigration Judge noted, that the respondent decided to waive his right to appeal to avoid the consequences of having a conviction for immigration purposes does not demonstrate the requisite reliance on the continued availability of section 212(c) relief. Nor does it demonstrate that the respondent actively engaged in conduct that reflected an intention to preserve his eligibility for such relief. *See Carranza-DeSalinas*, 477 F.3d 200 (5th Cir. 2007). As such, the respondent is ineligible for relief under former section 212(c) of the Act.

On the whole, the record supports the Immigration Judge's resolution. Accordingly, the appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

IN THE MATTER OF	)	
FIDEL CINTORA AGUILAR	)	Case Number:
RESPONDENT	)	A90-791-836
IN REMOVAL PROCEEDINGS	)	

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended: alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of, a crime involving moral turpitude.

APPLICATIONS: Motion to Reconsider and Terminate Proceedings.

Section 212(c) of the Immigration and Nationality Act (now repealed): waiver of inadmissibility.

ON BEHALF OF RESPONDENT
Lance E. Curtright, Esq.
De Mott, McChesney, Curtright & Associates, LLP
800 Dolorosa, Suite 100
San Antonio, TX 78207

ON BEHALF OF THE GOVERNMENT
Assistant Chief Counsel
P.O. Box 1939
San Antonio, TX 78297

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a native and citizen of Mexico who was admitted to the United States as a resident alien on December 1, 1990. Exhibit 1. On January 15, 2007 the respondent arrived at the Del Rio, Texas port of entry from Mexico and applied for admission as a resident alien. He was paroled into the country on January 16, 2007 pending removal proceedings. On January 19, 2007, the Department of Homeland Security (DHS) personally served the respondent with a Notice to Appear (NTA) charging him with being removable from the United States as an alien who has been convicted of a crime involving moral turpitude. At a master hearing on March 1, 2007, the respondent denied that he had been convicted of the offense of "lewd and lascivious conduct with a child under sixteen years of age" in violation of Idaho law. Idaho Code Ann. § 18-1508. He also denied the charge of removability. To prove the allegation and sustain its burden of proving the charge of removability by clear and convincing evidence, the government introduced

the respondent's record of conviction. Group Exhibit 2. Based on the evidence submitted, the Court found that the respondent is removable as charged. The respondent has filed a motion asking the Court to reconsider its finding that the respondent has been convicted of a crime involving moral turpitude, and requesting termination of proceedings. In the alternative, the respondent seeks a waiver of his ground of removal pursuant to former section 212(c) of the Act. DHS is opposed to the respondent's motion to terminate proceedings and to the application for section 212(c) relief. Both parties have filed briefs in support of their positions.

II. Motion to Terminate Proceedings

The record of conviction reflects that the conduct for which the respondent was convicted was sexual intercourse with a fourteen year old minor and that it was committed "willfully and lewdly" with intent to appeal to or gratify the sexual desire of the defendant. "Moral turpitude" generally refers to conduct that shocks the conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. It has been said that it is the nature of the act and not the statutory prohibition of it that renders a crime one of moral turpitude. *Matter of Fualaau* 21 I&N Dec. 475 (BIA 1996). I find that the offense in this case involving sexual contact with a minor is a crime involving moral turpitude. See

generally *Matter of Dingena* 11 I&N Dec. 723 (BIA 1966) and cases cited therein.

The respondent also argues that removal proceedings should be terminated because the retroactive application of the definition of "conviction", added to the Act by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), to the respondent's 1994 "withheld judgment" under Idaho law, is manifestly unjust and violative of due process. *See* IIRIRA Division C of Pub. L. No. 104-208, § 322, 110 Stat. 3009, 628-29. According to the respondent, he waived his constitutional right to appeal a jury's finding of guilt in his 1994 trial for "lewd and lascivious conduct with a child under sixteen years of age" because of advice from counsel that acceptance of a "withheld judgment" would insulate him from deportation, as the "withheld judgment" would not be considered a "conviction" for immigration purposes. *See Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); Idaho Code Ann. § 19-2603. The respondent asks the Court to terminate proceedings because the retroactive application of the "conviction" definition to the respondent is "manifestly unjust", violative of due process, and therefore unconstitutional.

As the respondent himself acknowledged, Congress clearly stated that the definition of "conviction" was to be applied retroactively. *See* IIRIRA, Pub. L. No. 104-208, § 322(c), 110 Stat. 3009, 628-29; *Moosa v. INS*, 171 F.3d 994, 1006-07 (5th Cir. 1999). Because Congress has made its intent clear, the Court need not look further, and the second prong of the

Landgraf retroactivity analysis is not needed. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). To the extent that the respondent claims that Congress has acted unconstitutionally, this Court has no power to so hold. *See Matter of U-M-*, 20 I&N Dec. 327, 334 (BIA 1991). Moreover, the respondent's constitutional argument has already been rejected by the Fifth Circuit Court of Appeals. *See Moosa*, 171 F.3d at 1009-10. See also *Madriz-Alvarado v Ashcroft* 783 F. 3d 321 (5th Cir. 2004). Accordingly, the respondent's motion to reconsider and terminate proceedings will be denied.

III. Waiver of Inadmissibility under former INA § 212(c)

In the alternative, the respondent argues that he is eligible for relief under former section 212(c) of the Act. Relying on a recent decision by the Fifth Circuit, he contends that he detrimentally relied on the availability of section 212(c) relief when he waived appeal following a jury verdict of guilty in his trial for the crime of "lewd and lascivious conduct with a child under sixteen years of age". Because the respondent cannot demonstrate detrimental reliance, his application for section 212(c) relief will be denied.

A. Applicable Law

Former section 212(c) of the Act provides that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not

under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United Stats in the discretion of the Attorney General despite the applicability of certain grounds of exclusion specified in section 212(a). This waiver was expanded to also be available to lawful permanent residents who did not proceed abroad, but risked losing their legal permanent resident status due to charges of deportability or removability. *See Matter of Silva*, 16 I&N Dec. 26 (BIA 1976). However, section 212(c) relief applies only to charges of removability for which there are comparable grounds of inadmissibility. 8 C.F.R. § 1212.3(f)(5); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; A.G. 1991); *see, e.g., Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). Section 212(c) was subsequently repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009, 597 (IIRIRA).

In 2001, the United Stats Supreme Court held that section 212(c) relief remains available to aliens, irrespective of when they were put into proceedings, if their "convictions were obtained through plea agreements [prior to April 1, 1997] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect," *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). Employing the retroactivity analysis formulated in *Landgraf*, the Supreme Court in *St. Cyr*

determined that section 304(b) of IIRIRA, when applied to aliens who had entered into plea agreements in reliance on the availability of such relief, had an impermissible retroactive effect. *Id.* Thus, section 304(b) of IIRIRA could not be applied retroactively in such cases. *Id.*; *see also* 8 C.F.R. §§ 1003.44, 1212.3, 1240.1. In *Carranza-DeSalinas v. Gonzales*, the Fifth Circuit held that section 212(c) relief may be available to individuals who proceeded to trial and that it is not limited to defendants that entered into plea agreements. *Carrantza-DeSalinas*, 477 F.3d 200 (5th Cir. 2007). To be eligible for relief pursuant to former section 212(c), the alien seeking relief must demonstrate that he "detrimentally changed his position in reliance on continued eligibility for § 212(c) relief." *Id.* at 205 (quoting *Hernandez-Castillo v. Moore*, 436 F.3d 516, 520 (5th Cir. 2006)).

B. Respondent's Argument

The respondent argues that he detrimentally relied on the availability of section 212(c) relief when he decided to forego his right to appeal the jury's guilty verdict and accept a "withheld judgment". However, by his own admission he was not deportable or inadmissible at the time of his plea and sentence because the Board's interpretation of "conviction" at that time did not include the respondent's "withheld judgment". The evidence submitted by the respondent makes clear that he waived his right to appeal in reliance on the Board's interpretation of "conviction". *See Matter of Ozkok*, 19 I&N Dec. 546. Although the

respondent may have "changed his position", he did not do so in reliance on continued eligibility for section 212(c) relief. *See Carranza-DeSalinas*, 477 F.3d at 205.

In essence, the respondent's arguement is restatement of his constitutional challenge to the retroactive application of the definition of "conviction", added by IIRIRA in 1996. As explained above, this argument is without merit. Congress has the power to make past activity a ground of removal. *See Moosa*, 171 F.3d at 1009 (citing *Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992) (citations omitted)). At the time of his conviction, he gave up the right to appeal, but he did so in reliance on the Board's jurisprudence on the meaning of "conviction", not the continued availability of section 212(c) relief. As such, he is not eligible for section 212(c) relief. *See Carranza-De Salinas*, 477 F.3d 200; *see also St. Cyr*, 533 U.S. 289.

Respondent has not requested any other form of relief nor does he appear to be eligible for any such relief. Accordingly, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reconsider and terminate proceedings is **DENIED**.

IT IS FURTHER ORDERED that the respondent's request for section 212(c) waiver of inadmissibility be pretermitted and **DENIED**.

IT IS FURTHER ORDERED that respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

Dated: April 13, 2007 /s/ Glenn McPhaul
Glenn P. McPhaul

STATE OF IDAHO)
)
COUNTY OF BLAINE)

BEFORE ME, THE UNDERSIGNED AUTHORITY, DID APPEAR KATHLEEN RIVERS, AND BEING UNDER SOUND MIND DID DEPOSE AND SWEAR AS FOLLOWS:

1. "I am an attorney practicing criminal law in the State of Idaho. I have practiced criminal law in Idaho since 1984. I was the Blaine County Public Defender from 1992 through 1996. In my capacity as Public Defender, I represented Fidel Aguilar-Cintora beginning sometime in 1993.

2. Fidel was charged with Statutory Rape and Lewd and Lascivious Acts in violation of Idaho State law. Fidel pled not guilty.

3. On February 2, 1994, a jury acquitted Fidel on the Statutory Rape charge, but found him guilty of the Lewd and Lascivious Acts count. I spoke with the members of the jury after the trial and they told me that they thought Lewd and Lascivious Conduct was a misdemeanor and that due to the circumstances and factors of the case, they would not have convicted Fidel had they know it was a felony.

4. I was aware that Fidel was a lawful permanent resident alien of the United States when I began my representation for him. I attempted to prevent this criminal offense from causing his deportation from the United

States by speaking with an Idaho attorney, who was also a friend of mine at the time, named Ray Pena. Mr. Pena is Mexican-American and was practicing law in Rupert, Idaho. He represented many Latino clients in criminal cases and I understood that he was very familiar with the consequences of criminal charges on legal residency and deportation.

5. I was told by Mr. Pena that Fidel could avoid deportation from the United States if the judge issued an 'Order Withholding Judgment.'

6. An 'Order Withholding Judgment" is a procedure under Idaho law where the defendant is found guilty, but the court withholds a formal finding of guilt. The court places the defendant on probation and, if the defendant successfully completes the probation, the charge is dismissed as if no charges were ever filed. A defendant does not have to report the charge as a conviction. If the probation is not successfully completed, further proceedings are held.

7. I was specifically told that an 'Order Withholding Judgment' would prevent Fidel's deportation. To the best of my recollection this was confirmed by immigration authorities. I do not specifically recall with whom I spoke but the whole focus of my representation was to posture the case so that Fidel would avoid deportation and so that he could continue to work for his employer in Blaine County.

Fidel was in jail at the time on an immigration hold due to the charges so I was able to have contact with such authorities. It was my practice to not simply accept the representations of one person on such an important issue and to instead, confirm the information with immigration.

8. Based upon the above understanding and information, I advised Fidel that 'Order Withholding Judgment' would prevent his deportation. Since deportation was the single most important issue (he received credit for time served so did not have to serve further jail time after trial), I advised him that he should give up his right to appeal, his right under Idaho Criminal Rule 35 for reconsideration of his sentence, and post-conviction relief. He had a significant appealable issue in the case as, among other things, I had filed a preliminary motion to dismiss for selective prosecution on the basis of race and ethnic discrimination (another recent statutory rape case involving a Caucasian couple was not pursued by the prosecution), which motion was denied.

9. The judge subsequently entered an 'Order Withholding Judgment.' He placed Fidel on probation for five years. Upon completion of his probation, the charges against Fidel were to be dismissed.

10. Based on the Withheld Judgment, the immigration authorities lifted the "hold" and did not deport Fidel. He was released from jail

and went back to work. In contrast, another defendant by the name of Serafino Lopez was charged at the same time as Fidel with an identical crime and under the same circumstances was deported. Mr. Lopez received the same sentence as Fidel but Mr. Lopez was never released from jail because he was in the country illegally. Immigration did not lift the hold on Mr. Lopez and after trial, instead of being released, the immigration authorities immediately deported him.

11. If I had known that the 'Order Withholding Judgment' would not prevent Fidel's deportation, I would have advised him to appeal, filed a Rule 35 motion, sought post-conviction relief, and pursued other remedies that may have been available as I believe the selective prosecution issue was a strong one.

3/6/07
Date

/s/ Kathleen C Rivers
Kathleen Rivers

SUBSCRIBED AND SWORN TO ME, THE UNDERSIGNED AUTHORITY, ON THIS THE 6th DAY OF MARCH 2007.

[SEAL]

/s/ Christine A. Rolf
Notary Public
Residing @ Hailey, Idaho
Commission Expires 6-15-2011

[Drivers License Omitted In Printing]

[State Bar ID Omitted In Printing]

STATE OF TEXAS)
)
COUNTY OF BEXAR)

BEFORE ME, THE UNDERSIGNED AUTHORITY, DID APPEAR FIDEL AGUILAR-CINTORA, AND BEING UNDER SOUND MIND DID DEPOSE AND SWEAR, THROUGH AN INTERPRETER, AS FOLLOWS:

1. "I first came to the United States sometime in the early 1980s. I received my lawful permanent residence in 1990.

2. Sometimes in 1993, I was charged with rape and lewd and lascivious acts with a minor. I pled not guilty to each charge. I was acquitted of the rape charge, but the jury found me guilty of committing lewd and lascivious acts with a minor.

3. My criminal attorney told me that I could prevent my deportation if I received an 'Order Withholding Judgment.' She told me that to obtain this, I could not appeal my case. Because I did not want to be deported, I agreed to request this order. If I would have known that I would still be deported with the "Order Withholding Judgment," I would have appealed my case.

4. I received an "Order Withholding Judgment" and immigration did not attempt to deport me. Further, I was allowed to re-enter the country repeatedly from 1994 until this last time.

5. I believed that I could reside here permanently, so I applied for my wife and children to come to the United States in 1996. They now live with me in Idaho."

3/12/07 /s/ Fidel Cintora A.
Date Fidel Aguilar-Cintora

SUBSCRIBED AND SWORN TO ME, THE UNDERSIGNED AUTHORITY, ON THIS THE 12 DAY OF MARCH 2007.

/s/ Laura E. Lozano
Notary Public

[SEAL] LAURA ELIZA LOZANO
NOTARY PUBLIC STATE OF TEXAS
COMMISSION EXPIRES:
JANUARY 5, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60546

FIDEL AGUILAR CINTORA

Petitioner

v.

PETER D KEISLER,
ACTING U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Nov. 28, 2007)

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Barksdale
United States Circuit Judge

REHG-6a
