Sandra Gotlaufa-Orozco (CA Bar No. 298327)
DYADlaw, P.C.
380 S. Melrose Dr., Suite 414
Vista, California 92081
Tel: (858) 480-1077
sandra.gotlaufa@dyadlaw.com

Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Gerardo REYES BENITEZ, Petitioner, v. Christopher J. LAROSE, in his official capacity as Warden of Otay Mesa Detention Center; et. al., Respondents	Case No.: 26-cv-2389-JLS-MMP Agency File No.: [redacted] **PETITIONER'S TRAVERSE**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. Introduction

Petitioner respectfully submits this Traverse in response to Respondent's Response. Respondents contend that Petitioner is subject to mandatory detention under 8 U.S.C. § 1226(c) based on a conviction under California Penal Code § 243(d). That contention fails as a matter of law. Section 243(d) is not categorically an aggravated felony or other qualifying offense under the Immigration and Nationality Act, and Respondents cannot meet their burden to establish that mandatory detention applies.

The factual record further underscores the inappropriateness of mandatory detention in this case. Petitioner is steadily employed as a landscaper and shares custody of his three minor U.S. citizen children with his estranged wife. The children all have learning disabilities and are heavily dependent on Petitioner for economic support and stability due to their mother's longstanding struggles with substance abuse and homelessness. The incident that led to the ill-advised CA PC § 243(d) felony plea bargain was a stand-alone mistake whereby Petitioner slapped his child on the cheek. When a Child Protective Services doctor examined the child the next day, he concluded that the mark was "superficial and skin to a scratch" and that the child had not been injured (*See* Exhibit B at p. 5). Petitioner was sentenced to 180 days in jail, and he actually served 96 days. (*See* Exhibit A.)

These circumstances highlight both the overbreadth of the statute at issue and the constitutional concerns raised by Petitioner's continued detention.

II. Respondents Bear The Burden To Justify Mandatory Detention

Mandatory detention under § 1226(c) is a narrow exception to the general rule requiring individualized custody determinations. The government bears the burden of establishing that a noncitizen falls squarely within its scope. Where the applicability of § 1226(c) turns on the nature of a criminal conviction, courts apply the categorical approach. *See Descamps v. United States* (holding that courts must compare statutory elements, not underlying facts; 570 U.S. 254 (2013)); *Taylor v. United States* (establishing the categorical framework; 579 U.S. 301 (2016)).

In the Ninth Circuit, any ambiguity in whether a conviction qualifies must be resolved in favor of the noncitizen, and the government's failure to establish a qualifying predicate offense precludes mandatory detention. *Ruiz-Vidal v. Gonzales* 473 F.3d 1072 (9th Cir. 2007); *Young v. Holder* 697 F.3d 976 (9th Cir. 2012).

III. California PC § 243(d) Is Overbroad Relative to 18 U.S.C. § 16(a)

Under 18 U.S.C. § 16(a) and as clarified by controlling case law, a crime of violence requires the intentional use of violent physical force. The Supreme Court clarified in *Borden v. United States* that offenses committed with a mens rea of

recklessness or less do not satisfy this definition. *See Borden v. United States* 593 U.S. 420 (2021). Similarly, the Ninth Circuit requires "violent force—that is, force capable of causing physical pain or injury to another person." *See United States v. Dominguez-Maroyoqui* (748 F.3d 918 (9th Cir. 2014)).

California Penal Code § 243(d) does not meet this standard. The statute requires only a willful touching that results in serious bodily injury, but it does not require intent to cause that injury. As the Ninth Circuit has recognized, California battery statutes encompass even minimal or offensive touching. *See Ortega-Mendez v. Gonzales* (holding that simple battery under California law is not a crime of violence because it includes offensive touching; 450 F.3d 1010 (9th Cir. 2006)). Because § 243(d) permits conviction where injury results from minimal or indirect force and without intent to cause harm, it is overbroad relative to 18 U.S.C. § 16(a).

The facts of this case illustrate that overbreadth. Petitioner's conviction arose from an isolated incident during a period of extreme family instability, in which he slapped one of his children on the cheek. A medical examination conducted the following day determined that the child sustained only a superficial mark, akin to a scratch, and had not suffered actual injury. Petitioner accepted an ill-advised plea bargain for felony CA PC § 243(d), was sentenced to 180 days,

served 96 days in custody, and completed parenting classes. These circumstances confirm that CA PC § 243(d) reaches conduct that does not involve the intentional use of violent force required under federal law.

IV. CA PC § 243(d) Is Indivisible

Under *Descamps v. United States*, courts may not examine the record of conviction unless the statute is divisible. *See Descamps v. United States* 570 U.S. 254 (2013). California PC § 243(d) contains a single, indivisible set of elements and does not list alternative crimes. Because it criminalizes conduct broader than the federal definition of a crime of violence, it cannot categorically qualify as an aggravated felony. *See also Rendon v. Holder* (explaining that a statute is indivisible where it does not set out alternative elements; 764 F.3d 1077 (9th Cir. 2014)).

V. CA PC § 243(d) Is Not A Crime Involving Moral Turpitude

A crime involving moral turpitude requires both reprehensible conduct and a sufficiently culpable mental state. The Ninth Circuit has repeatedly held that simple battery is not a crime involving moral turpitude (CIMT) because it lacks the requisite level of intent. *See People v. Mansfield* 200 Cal. App. 3d 82, 245 Cal. Rptr. 800 (1988); *Fernandez-Ruiz v. Gonzales* (holding that offenses involving

1 negligent or reckless conduct are not CIMTs; 468 F.3d 1159 (9th Cir. 2006)). *See*
2 *also Uppal v. Holder* (605 F.3d 712 (9th Cir. 2010)); *People v. Colantuono* 7
3 Cal.4th 206 (1994)).
4
5 CA PC § 243(d) does not require intent to injure and permits conviction
6 based on minimal force resulting in unintended harm. Accordingly, it is overbroad
7 relative to the definition of a CIMT.
8
9
10 The facts here further demonstrate the absence of moral turpitude. Petitioner
11 is a working parent who has assumed primary responsibility for supporting and
12 raising his three minor U.S. citizen children, all of whom have faced
13 developmental challenges. Their mother has struggled with substance abuse and
14 homelessness, leaving Petitioner as their primary source of care and guidance.
15 Petitioner is currently seeking full custody to protect them from a dangerous
16 environment. That he was granted shared custody following the underlying
17 incident underscores that the conduct at issue does not reflect the type of inherently
18 base or depraved behavior required for a CIMT.
19
20
21
22 **VI. Respondents Cannot Meet Their Burden Under § 1226(c)**
23
24 Because California Penal Code § 243(d) is not categorically a crime of
25 violence, nor a crime involving moral turpitude, Respondents cannot establish that
26 Petitioner falls within the scope of § 1226(c). At a minimum, the statute presents
27
28

categorical ambiguity, which defeats mandatory detention. *See Moncrieffe v. Holder* (requiring that ambiguities in the categorical analysis be resolved in favor of the noncitizen; 569 U.S. 184 (2013)).

Petitioner is therefore detained under § 1226(a) and is entitled to an individualized bond hearing as explained in Petitioner's habeas corpus petition.

VII. Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court hold that Petitioner is not subject to mandatory detention under 8 U.S.C. § 1226(c), grant the petition for writ of habeas corpus, and order Respondents to release Petitioner immediately, or to provide a constitutionally adequate bond hearing.

Dated: April 29, 2026

Signature: /s/ Sandra Gotlaufa Orozco
By: Sandra Gotlaufa-Orozco
Attorney for Petitioner

1
2
3
4
5
6

EXHIBIT A

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ERIN J. LEE, Esq. (SBN 266654)
LAW OFFICES OF ERIN J. LEE, PC
500 LA TERRAZA BOULEVARD, SUITE 150
ESCONDIDO, CALIFORNIA 92025-3876
TELEPHONE: (619) 361-1015
FACSIMILE: (760) 692-4870
EMAIL: erin@erinjlee.com

Attorney for Respondent

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

REYES BENITEZ, GERARDO,

Respondent.

In Removal Proceedings

File No. [redacted]

RESPONDENT'S BRIEF ON APPEAL

ERIN J. LEE, Esq. (SBN 266654)
LAW OFFICES OF ERIN J. LEE, PC
500 LA TERRAZA BOULEVARD, SUITE 150
ESCONDIDO, CALIFORNIA 92025-3876
TELEPHONE: (619) 361-1015
FACSIMILE: (760) 692-4870
EMAIL: erin@erinjlee.com

Attorney for Respondent

NOT DETAINED

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

REYES BENITEZ, GERARDO,

Respondent.

In Removal Proceedings

File No. [redacted]

RERSPONDENT'S BRIEF ON APPEAL

STATEMENT OF FACTS

Respondent, Gerardo Reyes Benitez (A209-864-973) is a 31-year old male, a native and citizen of Mexico who entered the United States without inspection. (Notice to Appear; IJ Dec. at 1)

Respondent was accorded a removal hearing in San Diego, California Immigration Court before Immigration Judge Ana Partida on June 6, 2017. At that hearing, Respondent submitted a record of master calendar hearing in which he admitted the factual allegations and conceded removability for the charge stated in his Notice To Appear. Respondent designated Mexico as the country of removal should that become necessary, and applied for cancellation of removal for non-permanent resident under Section 240A(b)(1) of the Act; in the alternative post-conclusionary voluntary departure under Section 240B(b) of the Act. (Tr. at 3-4)

On March 25, 2019, Respondent had a hearing on the merits of his cancellation of removal application before Immigration Judge Jeffrey L. Romig. (Tr. at 19) At that hearing counsel for Respondent amended his cancellation of removal application to include a second basis for relief, namely cancellation of removal application for a spouse subjected to extreme cruelty by a U.S. spouse under INA §240A(b)(2). (Tr. at 22)

Respondent testified that he has three children with his wife, Maria Ursula Prince. They are [redacted] [redacted] (Tr. at 31-32) Respondent was dating Ms.

Prince, his then girlfriend, in 2009. When he found out that she was pregnant, he moved in with her and supported her and their daughter. Respondent stated that he had been brought up to believe that if a man got a woman pregnant, he was responsible to support her and their children. (Tr. at 35)

Respondent stated that his wife had two daughters from prior relationships, [redacted] Respondent lived with and supported his wife, her two daughters and their children. Both daughters became involved with drugs and alcohol and spent time in jail after Respondent and their mother split up. (Tr. at 35-36)

Respondent stated that his wife was taking drugs during their relationship. They argued about her drug use but she would not stop so Respondent left the house in 2014. (Tr. at 39-40) Respondent stated that he continued to support his wife and the children and to "fulfill [his] duties as a father." Respondent would see his children every fifteen days and would talk with them on the telephone about every two days. (Tr. at 42)

Respondent stated that his wife came to his home in January 2016 and dropped off their three children saying she could no longer take care of them but that

she still wanted Respondent to give her money. Respondent had been contacted by his children's social worker about his wife's neglect of the children two weeks prior. After the children were dropped off, he contacted the social worker who asked Respondent if he was in a position to take care of his children and if he wanted to do so. Respondent said he was and the social worker gave him forms to fill out to legally get custody of the children. (Tr. at 44-43)

Respondent stated that when they came to him, the children were malnourished, dirty and had bad dental problems. They only had the clothes they were wearing. Respondent bought them clothes and looked into enrolling them in school. He found out then that they had never been to school because they had never been vaccinated except when they had been born. He was able after much effort to get his children enrolled in school. (Tr. at 47)

Respondent's daughter, [redacted] adjusted quickly to school but the older brother, [redacted] had a lot of problems with his behavior. [redacted] was reported to not pay attention and was disruptive in class. He would call the teachers stupid and one time tried to run away from school. (Tr. at 49)

After the incident when tried to escape from school, Respondent was called at his job and had to go get him. After they arrived home with the other child, Respondent told that they needed to have a talk. He set down on the bed and told him that what he was doing in school was wrong because he was not wanted there. was ignoring Respondent and not paying attention. Respondent went to spank him on his bottom, but jumped off the bed. As a result, Respondent ended hitting on his face and leaving a "three finger marks" there, or a mark that spanned three fingers. (Tr. at 50-51, 63)

Respondent sent back to school the following day. Child Protective Services was called and was examined by a doctor who stated that he had been struck but that the mark was superficial and akin to a scratch and that had not been injured. (Tr. at 51) A few months later, Respondent was arrested by the police because of the same incident. He agreed to a plea agreement and was jailed for about 90 days before being referred to immigration custody. During that time, he continued to work with the social worker, who brought his children to see him about three times. (Tr. 52-53)

Upon being released from immigration custody, Respondent had to take 52

weeks of parenting classes and, after 38 of them, was allowed to have supervised visits with his children and weekend, overnight visits. Respondent completed his required parenting classes but voluntarily continued with them because they helped him care for his children. His wife also had to take parenting courses, was given therapy for her drug issues, and placed on probation. (Tr. at 54-55)

Respondent stated that his children are still living with his cousin because the family court wants to be sure he will be allowed to remain in the United States before they given him full custody. Respondent stated that he has been changed by these events and the parenting courses and no longer uses physical punishment on the children. Respondent relates that the children have become more disciplined and much calmer. They help him with things and look after themselves more. They are even doing better in school, as he is being told by the teachers during their meetings. (Tr. at 56-57)

It is submitted that Respondent was able to take his children from their drug addicted, neglectful mother and began caring for them. With the help of his current girlfriend and family members, the children now have clean clothes, healthy food, a roof over their heads, their vaccinations, are enrolled in school,

had their teeth attended by a dentist, and are enrolled in an afterschool program to help them catch up from the years of neglect.

The mark on [redacted] face when Respondent attempted to spank him was determined by an examining doctor at the request of Child Protective Service to be superficial with no subdermal hematoma (bruising) and more akin to a scratch and that he had not been injured.

CREDIBILITY

In the instant matter, the Immigration Judge made no findings regarding Respondent's credibility. Where the Immigration Judge does not make an adverse credibility finding, an applicant's factual contentions must be considered true. *She v. Holder*, 629 F.3d 958, 964 (9th Cir. 2010) (explaining a petitioner's testimony is presumed credible absent an explicit adverse credibility finding); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) (testimony must be accepted as true in the absence of an explicit adverse credibility finding).

//

//

INTRODUCTION

As stated above, Respondent applied for cancellation of removal for non-permanent residents under INA §240A(b)(1) which requires *inter alia* a showing of exceptional and extremely unusual hardship to a qualifying relative and cancellation of removal for a spouse subjected to extreme cruelty by a U.S. spouse under INA §240A(b)(2) which requires *inter alia* a showing of only extreme hardship to the respondent and/or the respondent's children as relief from removal before Immigration Judge Jeffrey L. Romig.

In his decision, IJ Romig decided not to make a determination on hardship but rather, as he put it, to "leap over" that issue "because the respondent has not established good moral character under sections 240A(b)(1)(B) and 240A(b)(2)(A)(iii) of the Act." (IJ Dec.at 1)

I RESPONDENT ESTABLISHED *PRIMA FACIE* ELIGIBILITY FOR A GRANT OF CANCELLATION OF REMOVAL UNDER INA §240A(b)(1) AND/OR INA §240A(b)(2) AND THE IMMIGRATION JUDGE DENIED HIM DUE PROCESS OF LAW IN FAILING TO MAKE A COMPLETE DETERMINATION ON SAID APPLICATIONS

A RESPONDENT HAS THE REQUISITE CONTINUOUS PHYSICAL PRESENCE IN THE UNITED STATES FOR EACH APPLICATION FOR CANCELLATION OF REMOVAL

The facts regarding Respondent's continuous physical presence in the United States are not at issue. Respondent credibly testified that he entered the United States on December 1, 2007 and has not departed.

In his decision, the Immigration Judge states:

> The respondent also has not established the requisite period of "continuous physical presence" for cancellation of removal under 240A(b)(1)(A) and 240A(d)(1) [sic] of the Act. In Pereira v. Sessions, 585 U.S. ___, 138 S.Ct. 2105 (2018), the Supreme Court held that the "stop-time rule" does not apply where the NTA does not specify the date and time for an initial master calendar hearing. Accordingly, in the present case, the NTA did not serve to "stop time" under the statutes. The regulations instruct that when the NTA does not include the time, date and place of the initial removal hearing, the Immigration Court shall provide this information by means of the hearing notice. See 8 C.F.R.§1003.18(b). Accordingly, the Court considers the stop-time rule in this case to be imposed as of the date of the issuance of the hearing notice for initial master calendar hearing; that date was May 8, 2017. The respondent initially came to the United

> States on December 1, 2007. He is therefore not able to demonstrate 10 years of "continuous physical presence" under sections 240A(b)(1)(A) and 240A(d)(1) of the Act. (IJ Dec. at 3)

The above-quoted passage from the Immigration Judge's decision is highly confusing. To begin with, Respondent was applying for cancellation of removal for a spouse subjected to extreme cruelty by a U.S. spouse under INA §240A(b)(2) not under 240A(d)(1) which is not a cancellation of removal section. In addition, INA §240A(b)(2) requires only three (3) years continuous physical presence, which the Immigration Judge does not address. He only referenced the requisite ten (10) years continuous physical presence required by INA §240A(b)(1).

Furthermore, Respondent disagrees that the filing on a hearing notice after a defective NTA cures the defect and triggers the stop-time rule. Certainly, 8 C.F.R. §1003.18(d) has no impact on the holding in *Pereira v. Holder, supra.*

The Board's recent decision of *Matter Mendoza-Hernandez et al.,* 27 I&N Dec. 551 (BIA 2019) was overturned by *Lorenzo v. Barr, supra,* which reaffirmed the U.S. Supreme Court's holding in *Pereira v. Sessions, supra* that a notice to appear that does not specify that date and place of the hearing

is defective and does not trigger the "stop time" rule for cancellation of removal purposes. Furthermore, the *Lorenzo* court held that such a defective notice to appear is not "cured" by the subsequent service of a hearing notice which does specify the date and place of the hearing for cancellation of removal purposes.

Respondent therefore submits that he has the requisite continuous physical presence in the United States for both for cancellation of removal for non-permanent residents under INA §240A(b)(1) and cancellation of removal for a spouse subjected to extreme cruelty by a U.S. spouse under INA §240A(b)(2).

B RESPONDENT HAS NOT BEEN CONVICTED OF A CRIME INVOLVING MORAL TURPITUDE WHICH WOULD BAR HIM FROM CANCELLATION OF REMOVAL UNDER INA §240A(b)(1) AND/OR INA §240A(b)(2)

Respondent was convicted on May 3, 2017 of violation of California Penal Code Section 243(d) in the Superior Court of San Diego, California. This offense is not a crime involving moral turpitude in the Ninth Circuit.

In *Uppal v. Holder*, 605 F.3d 712 718-719 (9th Cir. 2010), the Ninth Circuit Court of Appeals cited *Matter of Muceros*, A42-998-610 (BIA May 11, 2000), an index decision, in finding that a Canadian statute could not be a CIMT for the same reasons the BIA held that a conviction under CA PC § 243(d) for battery was not categorically a CIMT.

The Ninth Circuit reasoned:

> "the level of intent involved only extends to touching the victim. No evil intent is required. The victims are not a specially protected class of persons or those who have a special relationship to the perpetrator. . . . We recognize the argument that the element of "serious bodily injury" presents an aggravating factor which elevates the respondent's crime to one involving moral turpitude. [But][w]e adopt the reasoning of the California Courts in this regard, which have held that "[s]ince section 243 does not require an intention to do any act which would be judged to be evil by generally accepted community standards of morality, battery is not a crime of moral turpitude [for impeachment purposes] even though it may unintentionally result in serious bodily injury." *Uppal v. Holder*, at 718-719.

In the recent case of *Altayar v. Barr,* 947 F.3d 544 (9th Cir. 2020), the court reaffirmed its holding in *Uppal v. Holder, supra* stating:

> The BIA determined that the aggravating circumstance of using a deadly weapon or dangerous instrument supported categorizing

> Altayar's offense as one involving moral turpitude. That determination finds ample support in the BIA's own longstanding decisions, *see, e.g., Wu,* 27 I. & N. Dec. at 11–12; *In re Sanudo*, 23 I. & N. Dec. 968, 971 (BIA 2006); *In re Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976), as well as our own. Indeed, in *Uppal*, we specifically noted that an "'aggravating dimension []'" that has been "recognized as sufficiently increasing the culpability of an assault to turn an assault into a CIMT *ha[s] been the use of a deadly weapon*." 605 F.3d at 717 (emphasis added) (citing *Medina*, 15 I. & N. Dec. at 614). In *Ceron*, our en banc Court similarly explained that "[t]he presence of an aggravating factor, such as . . . the use of a deadly weapon, can be important in determining whether a particular assault amounts to a crime involving moral turpitude." 747 F.3d at 783 (quotations omitted).

The decision in *Altayar v. Barr, supra* makes clear that the holdings in *Uppal v. Holder, supra* still apply in this case.

The Immigration Judge relies on *Matter of Wu,* 27 I&N Dec. 8 (BIA 2017) and a California state case in finding that California Penal Code Section 243(d) is a crime involving moral turpitude. However, said cases are actually compatible with the Court's holding in *Altayar v. Barr, supra* and *Uppal v. Holder, supra*, that the use of an aggravated factor like use of a deadly weapon is necessary to determine whether a crime involves moral turpitude.

California Penal Code Section 243(d) does not require any aggravated factors nor an intent, as duly noted by the Ninth Circuit's decision in *Uppal v. Holder*, *supra*. Therefore, a conviction in violation of California Penal Code Section 243 is categorically not a crime involving moral turpitude, and Respondent is not ineligible for Cancellation of Removal under INA 240A(b)(1) or INA 240A(b)(2).

C THE IMMIGRATION JUDGE ERRED AND ABUSED HIS DISCRETION IN FAILING TO PROPERLY CONSIDER ALL RELEVANT EVIDENCE CONCERNING RESPONDENT'S MORAL CHARACTER IN MAKING HIS DECISION

In his decision, the Immigration Judge discounted the majority of Respondent's credible evidence concerning his relationship with his wife and children in determining that Respondent lacked good moral character under the "catch-all" provision of INA §101(f), 8 U.S.C. §1101 (f). The IJ's stated reason for so doing was that "the Immigration Judge cannot look behind record of conviction in order to re-litigate the issue of an alien's guilt or innocence." (IJ Dec. at 5) However, this is contrary to law and contrary to his reasoning in finding that Respondent did not have good moral character.

First, while an Immigration Judge cannot look behind the record of conviction for *per se* crimes involving moral turpitude, a determination of moral character under the "catch-all" provision of INA §101(f) is by its nature is a much broader inquiry requiring the IJ to look behind the record of conviction and not be limited by it. Thus, the Immigration Judge must consider all relevant evidence of a respondent's moral character.

In *Torres-Guzman v. INS,* 804 F.2d 531 (9th Cir. 1986), the court stated:

> We reject the suggestion that conduct not in fact falling within the seven per se categories of section 1101(f) may support, without any consideration of other relevant counterbalancing factors, a conclusion of lack of good moral character. Although the Board in performing its duties may be called upon to interpret the scope of section 1101(f)'s per se categories, it is not free to enlarge them by analogy. Cf. *Hernadez-Robledo*, 777 F.2d 536, 542 (9th Cir.1985) (declining to equate the destruction of property per se with lack of good moral character). Where, as here, petitioners have not committed acts bringing them within section 1101(f)'s enumerated categories, the Board ***must consider all of petitioners' evidence on factors relevant to the determination of good moral character***. (Emphasis added)

During his testimony, Respondent credibly testified credibly to the facts stated

above. In summary, Respondent has lived and worked in the U.S. since December 2007. He testified that he monetarily supported his family until the children showed up on his doorstep one day, disheveled, malnourished, and overall neglected. Since that time, he changed their lives around - clothing, feeding, housing them; newly enrolling them in school, and working with their school to get them the help they need. He sought the help of friends and neighbors to navigate through the system with his limited knowledge of it. He has worked with Child Protective Services to ensure the best for the children, and complied with every request made by it and the courts. Respondent did all these things in a short period of time.

Instead of considering the aforementioned set of facts, the Immigration Judge only relies on the one conviction Respondent had in his entire life. The entire weight of his conclusion is based on the conviction, which Respondent credibly testified about. Respondent admitted that he spanked [redacted] on his buttocks on several different occasions. He stated that this particular time, [redacted] jumped off the bed when he was trying to spank his buttocks. His girlfriend testified that he sounded sad after what happened and frustrated because he did not know how to handle him. (TR. at 89) The fact that he has complied with probation, completed required classes and then some, testified

that his children's behavior have improved, and his children are now safe was completely ignored.

Given the totality of the circumstances, it is submitted that Respondent's conduct far from being conduct evincing a lack of good moral character, was rather showed an individual deeply committed to the well-being of his children. He remains involved with the children and the children will only revert to their previous lives without him. Therefore, it is submitted that Respondent has met the test of good moral character as required by INA §§240A(b)(1) and §240A(b)(2).

Even if the Immigration Judge, as he states, "cannot look behind a record of conviction in order to re-litigate the issue of an alien's guilt or innocence," that is exactly what he does in coming to the conclusion that Respondent does not have good moral character. The Immigration Judge goes beyond the California statute, and determines that the Respondent was guilty of child abuse under section 240A(b)(2)(A)(iv) of the Act, based on legislative intent. If that were the case, Respondent would have been convicted under the proper California penal code for child abuse. However, he was not.

Then, the Judge goes on to analyze California jury instructions in coming to the conclusion that he had a defense to his conviction, and as such Respondent's testimony was unpersuasive. The Immigration Judge should have considered the totality of circumstances in making a good moral character decision, not the availability of certain defenses in his criminal proceedings. Therefore, if the Immigration Judge really did not look beyond the record of conviction to re-litigate Respondent's guilt or innocence, he could not have come to the conclusion that Respondent was guilty of child abuse, and thus lacked good moral character. As such, the Judge's reasoning in finding Respondent lacked good moral character under INA 101(f) was flawed.

II RESPONDENT, IN THE ALTERNATIVE, ARGUES THAT HE ESTABLISHED *PRIMA FACIE* ELIGIBILITY FOR A GRANT OF POST-CONCLUSION VOLUNTARY DEPARTURE

For the reasons stated above, Respondent believes that the Court erred in finding Respondent did not possess good moral character to establish eligibility for post-conclusion voluntary departure.

CONCLUSION

Based on the foregoing, it is submitted that Respondent has the required continuous physical presence in the United States and the required good moral character. Furthermore, it is submitted that if Respondent is deported, it is more likely than not that his children will fall back into their dire conditions before Respondent began caring for them whether it be in foster care of the custody of their mother. This would result in exceptional and extremely unusual hardship for them especially given the extreme hardship they have already experienced in their young lives.

Wherefore, Respondent respectfully requests the Board of Immigration Appeals to exercise its *de novo* review powers and grant his applications for cancellation of removal or in the alternative to remand his case for a full, fair and unbiased hearing.

Dated: 11/21/2020

Respectfully submitted,

Erin J. Lee
Attorney for Respondent

REYES BENITEZ, GERARDO

PROOF OF SERVICE

I, the undersigned declare and say that I am a resident of the County of San Diego, State of California over the age of eighteen years of age, and my business address is 500 La Terraza Boulevard, Suite 150, Escondido, California 92025-3876

On November 21, 2020, I e-served, **RESPONDENT'S BRIEF ON APPEAL** in the above-entitled action per instructions, at https://eservice.ice.gov.

I declare under penalty of perjury that the foregoing in true and correct.

Dated: 11/21/2020 BY: ____________________
Erin J. Lee