No. [redacted]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted]

Petitioner,

v.

William P. BARR,
Attorney General of the United States,

Respondent.

PETITION FOR REVIEW
FROM THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
AGENCY CASE NUMBER: [redacted]

PETITIONER'S ADDENDUM

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1 FEDERAL DRIVE, SUITE 1850
FORT SNELLING, MN 55111

Martin Law
Miller, Maria Teresa
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In the matter of [redacted] File A [redacted] DATE: Mar 18, 2020

256124

__ Unable to forward - No address provided.

_X_ Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to: Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

__ Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
1 FEDERAL DRIVE, SUITE 1850
FORT SNELLING, MN 55111

__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

__ Other: _____

MG
COURT CLERK
IMMIGRATION COURT FF

cc: OFFICE OF THE PRINCIPAL LEGAL ADVISOR
1 FEDERAL DR., SUITE 1800
FORT SNELLING, MN, 55111

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File Number: [redacted]

Date: MAR 18 2020

In the Matter of:	)	**IN REMOVAL**
	)	**PROCEEDINGS**
[redacted]	)	
	)	**-DETAINED-**
Respondent.	)	
	)	

Charges:

INA § 237(a)(2)(A)(ii) – convicted any time after admission of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

INA § 237(a)(2)(A)(iii) – Convicted of an aggravated felony crime of violence, as defined at 18 U.S.C. 16, under INA § 101(a)(43)(F), for which the term of imprisonment is at least one year.

INA § 237(a)(2)(E)(i) – convicted any time after admission of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

INA § 237(a)(2)(E)(ii) – at any time after admission was enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of that order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

Application:

Adjustment of Status under INA § 209(a); Waiver of Inadmissibility under INA § 209(c); Asylum under INA § 208, Withholding of Removal under INA § 241(b)(3); and Protection under the Convention Against Torture.

ON BEHALF OF RESPONDENT:
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ON BEHALF OF THE DHS:
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WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Background

On January 23, 2019, the U.S. Department of Homeland Security (DHS) commenced removal proceedings against Respondent, [redacted] (born July 5, 1989), by filing the Notice to Appear (NTA), charging Respondent as removable pursuant to the above-captioned charges of the Immigration and Nationality Act ("the Act" or "INA"). Id. Respondent admitted the 15 factual allegations, and conceded the 4 charges of removability. Respondent declined to designate a country of removal, and the Court designated South Sudan, should such action become necessary.

Respondent has filed the above-listed applications for relief. Exs. 5, 6, 7. For the reasons below, the Court now denies Respondent's application for adjustment of status under INA § 209(a) and his application for a waiver of inadmissibility under INA § 209(c). The Court also denies Respondent's application for asylum under INA § 208 and denies Respondent's application for withholding of removal under INA § 241(b)(3). The Court will grant Respondent's application for deferral of removal under Article 3 of the Convention Against Torture.

II. Evidence Presented

A. Testimony

1. Respondent

Respondent testified about his family, his criminal history, and his fears of returning to South Sudan.

2. Respondent's Father

Respondent's father, [redacted] testified about his former role in the Sudanese national parliament, the threats he received, and his reasons for fleeing Sudan. He also testified about his fears that Respondent would be harmed if Respondent returned to South Sudan. Respondent's father is a Lawful Permanent Resident (LPR).

B. Documentary Evidence

Ex. 1: Form I-862, Notice to Appear, dated December 4, 2018, and filed January 23, 2019.

Ex. 2: Form I-213, Record of Deportable/Inadmissible Alien, dated December 4, 2018, and filed January 23, 2019.
Ex. 3: Respondent's criminal records (94 pages), filed May 1, 2019.
Ex. 4: Form I-213, Record of Deportable/Inadmissible Alien, dated December 2, 2019, and filed December 26, 2019.
Ex. 5: Form I-589, Application for Asylum, Withholding of Removal, and protection under the Convention Against Torture, signed in Court on February 21, 2020.
Ex. 6: Form I-601, Application by Refugee for Waiver of Grounds of Excludability, filed January 9, 2020.
Ex. 7: Form I-485, Application to Register Permanent Residence or Adjust Status, filed January 9, 2020.
Ex. 8: Fee Waiver Request, filed January 9, 2020.
Ex. 9: Order of the Immigration Judge granting fee waiver request, dated January 9, 2020.
Ex. 10: Respondent's Evidence in Support of Applications (76 pages), filed January 29, 2020.
Ex. 11: Respondent's Country Condition Reports (84 pages), filed January 29, 2020.
Ex. 12: Respondent's Additional Evidence in Support of Application (18 pages), filed February 12, 2020.
Ex. 13: Respondent's Criminal History Chart, including criminal records (128 pages), filed February 12, 2020.
Ex. 14: Respondent's submission of evidence (5 pages), filed February 21, 2020.
Ex. 15: Respondent's list of proposed particular social groups, filed February 21, 2020.
Ex. 16: DHS submission: Rap sheet (42 pages), filed February 21, 2020.
Ex. 17: United States Department of State 2019 Human Rights Report for South Sudan.[1]

III. Credibility

It is the applicant's burden to satisfy the Immigration Judge (IJ) that his or her testimony is credible. See Fesehaye v. Holder, 607 F.3d 523, 526 (8th Cir. 2010). As Respondent's application was filed after May 11, 2005, the credibility provisions of the REAL ID Act govern. INA § 208(b)(1)(B); INA § 241(b)(3)(C). Consistent with the REAL ID Act, the following factors may be considered in assessing an applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not such inaccuracy or falsehood goes to the heart of the applicant's claim. INA § 208(b)(1)(B)(iii); see also Matter of J-Y-C-, 24 I&N Dec. 260, 262–63 (BIA 2007). The testimony of the applicant, if credible, is sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.13(a). To be credible, an applicant's testimony must

[1] Through this Order, the Court takes administrative notice of the U.S. Department of State 2019 South Sudan Human Rights Report. See 8 C.F.R. § 1003.1(d)(3)(iv) (stating the Court may take administrative notice of "commonly known facts such as current events or the contents of official documents").

be believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear. 8 C.F.R. § 1208.13(a). In determining whether the applicant has met his or her burden, the IJ may weigh credible testimony along with other evidence of record. Where the IJ determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii).

Respondent's testimony was largely consistent with his prior written statements and applications. Respondent gave an account that was internally consistent and inherently plausible. Respondent was also responsive and candid. Therefore, the Court finds Respondent credible.

The Court also finds the testimony of Respondent's father to be credible. His testimony was candid, responsive, and consistent with the other evidence in the record.

IV. Findings of Fact

Respondent is 30 years old. He was born in Cairo, Egypt. Respondent claims he is a citizen of South Sudan because both his parents were born there. He lived in the area that is now South Sudan for three or four years as a child. Respondent left Sudan when he was six or seven years old. Respondent entered the United States in June 1999 as a derivative asylee. His father had previously been granted asylum status. Respondent has never left the United States since his arrival, and he has not returned to South Sudan. Respondent knows of no family members who live in South Sudan today, and none of his immediate family members have ever returned there.

Respondent has family ties in the United States, including his LPR parents, one LPR sister, one U.S. citizen sister, one U.S. citizen brother, and one U.S. citizen niece. Respondent and his ex-wife, Acacia Ward, have one U.S., born son, who is 3 years old. The child lives with his mother, Ms. Ward, who has custody of him. She and the child live in Rochester, Minnesota. Respondent had a child support order in place, but he has not yet been ordered to pay anything because he has been incarcerated.

Respondent has a significant criminal history in the United States. He estimates he has been arrested about 20 times. He did not recall the details of each criminal offense, but he testified about the incidents he could remember.

Respondent testified that he was first arrested around 2010, at 20 years old, for theft.[2] He was also convicted of other offenses in 2010, such as disorderly conduct and theft. See Ex.

[2] Respondent did not recall an arrest in 2007 for theft, when questioned by the DHS about the incident. See Ex. 16 at 4.

3 at 28–29; Ex. 13 at 1–2. In 2011, Respondent was convicted of fifth-degree assault. Ex. 13 at 9–10. Respondent testified he was at a bar when he got in an argument with staff and punches were thrown. He was convicted of theft again in 2016. See Ex. 3 at 33–35; Ex. 13 at 104.

Respondent has also been convicted for giving a false name to police several times. See Ex. 13 at 3, 5, 11, 50, 61–62, 72. He testified that he gave police false names to avoid arrest. He was also convicted of fleeing police by means other than a motor vehicle. See id. at 72.

Respondent has been convicted five times for driving under the influence of alcohol (DUI). The first two DUIs occurred in 2011. On both occasions, Respondent testified he gave a false name to the police officer because he thought he would get away with it. For the second offense, treatment was recommended, but Respondent did not attend treatment. The third and fourth DUIs occurred in 2014. Respondent's fifth DUI occurred in 2015. At the time the officer pulled him over for this last offense, Respondent was driving 100 miles per hour, Respondent tried to switch seats with his ex-wife, and he refused a breathalyzer test. For the fifth DUI, Respondent was also sentenced to 48 months of imprisonment, and the court ordered him to attend treatment.

Respondent admitted he is an alcoholic. He used to drink every day, to avoid his problems, and needed alcohol to function. Respondent also stated he previously used controlled substances.

Respondent has attended court-ordered treatment twice for his alcohol problem, which were ordered after his third and fifth DUIs. The first treatment center was called Common Ground, and he attended outpatient treatment there about twice per week in 2013 or 2014. For his second treatment, from approximately March 2016 to May 2017 (about 13 months), Respondent attended inpatient treatment through Adult & Teen Challenge-Rochester. Ex. 14 at 1. There, Respondent learned that he had addictive personality, and he attended therapy sessions about once per week, which felt like a relief to Respondent. Respondent was diagnosed with post-traumatic stress disorder (PTSD), depression, anxiety, ADHD, and chemical dependency. See id. He also completed a 90-day anger management course and developed coping skills for his mental health struggles. Respondent provided treatment records. See Ex. 10 at 10–72. These records show significant progress by Respondent. The records also show he was diagnosed with severe alcohol use disorder and moderate stimulant related disorder (cocaine). See id. at 13–14.

He has also attended Alcoholics Anonymous (AA) meetings and tried to make amends with those he has hurt. His family has forgiven him, but his ex-wife has not. He speaks with his ex-wife sometimes because they have a child in common.

Respondent has a history of domestic violence offenses against his ex-wife. In 2014, Respondent was arrested for domestic assault. See Ex. 3 at 84–94. The victim was his ex-

wife, who was his girlfriend at the time. She had just had a miscarriage, so they were stressed. They argued a lot, and he pushed her, causing injuries, and he punched her in the head.

In 2014, a Domestic Abuse No Contact Order (DANCO) was issued to prevent Respondent from contacting the victim, but Respondent subsequently violated this order and was convicted several times for violating it, with his first conviction for violating the order occurring in 2015. See id. at 57–60; Ex. 13 at 28.

In March 2017, Respondent completed inpatient treatment and returned home. However, around June 2017, Respondent relapsed and started drinking alcohol again. On August 2, 2017, he got in an argument with his ex-wife. Respondent broke her phone and punched her in the face, leaving her with a bloody nose. Their son, four months old at the time, was in the room. Respondent was then incarcerated.

In 2018, Respondent was again convicted for a DANCO violation by calling his ex-wife from prison. See Ex. 13 at 115. He violated the DANCO at least seven times, but he was only convicted of one count. See id. at 115, 122–28; see also Ex. 3 at 44–48. Respondent used other inmates' pin numbers to make those calls because he knew his calls would be tracked. On those phone calls, he told his ex-wife to drop the charges against him, so he could avoid criminal punishment. According to Respondent, the DANCO is no longer in effect.

Respondent has been incarcerated since August 4, 2017. In detention, he has taken some GED classes ,including a program called, "Thinking for Change" to improve himself. See Ex. 14. Respondent claimed he had access to alcohol and drugs in prison, but he abstained from using them.

If released, Respondent plans to stay at a halfway house, then with his mother or brother in Rochester. They know about Respondent's trouble with alcohol, and they do not drink. Respondent would seek a sponsor from AA, and he would seek further alcohol treatment then finish school to get an automotive degree. Respondent wants to become an auto mechanic. He used to work as a mechanic before detention in St. Paul. He last worked in 2009 or 2010 at a printing company. Respondent believes he filed his income tax returns for the years he worked. The record of proceedings contains some partial tax records. See Ex. 12 at 11–18 (showing jointly filed federal income tax returns for 2016 and 2017).

Respondent fears returning to South Sudan because of his father's political involvement in the past. Respondent, "[redacted] bears essentially the same name as his father, "[redacted] Respondent fears the government of South Sudan will kill him if he returns.

[redacted]

Respondent's father testified he was a member of parliament (the National Congress) representing the southern region of Sudan for about one and a half years in the mid-1990s. He explained that people in the northern and southern regions believed he was sharing information with the other side. See also Ex. 12 at 1 (notarized affidavit). The people in the northern part of Sudan were suspicious of him because they believed he was sending information and sharing secrets with the people in the south. The people in the southern part of Sudan believed he was collaborating with the people in the northern part of Sudan because the parliament was controlled by one political party.

Respondent's father was arrested many times in southern Sudan before he was elected to parliament in his district. He testified that he had avoided being killed by going to Khartoum, Sudan, to work in the parliament. After he moved to Khartoum, with his family, war broke out in the south, which heightened tensions between the two sides and raised suspicion and the risk of harm to him.

Respondent's father was under constant surveillance and in danger of being killed because of his alleged allegiance to both sides involved in the conflict. Respondent's father was never physically harmed, but he was afraid all the time the people from the north would harm him. These people often threatened Respondent's father, beginning in early 1996 until summer 1996, when he fled the country, leaving his wife and children temporarily in Khartoum.

After he left the country, Respondent's father learned from his wife in Khartoum that many times, during the day and at night, national Sudanese government agents came to their home looking for him and asking her for information about him. She would tell those agents that she did not know about politics. On one occasion, she did not give the answer the Sudanese authorities wanted, so they punched her. The government agents also trashed the family home, stating that they were members of the national security force and that they were looking for documents. See id. They also told Respondent's mother that they knew his father had applied for asylum in the United States. See id. In November 1997, his wife and children fled Khartoum and went to Cairo. Respondent's father is still afraid to return to South Sudan because of his political activities in parliament.

Respondent's father also believes Respondent will be in grave danger in South Sudan. Respondent's father believes Respondent will be immediately identified and killed by the government because the government is still looking for Respondent's father, and he and his son share the same name. He stated the people do not speak English there; rather, they speak local languages.

South Sudan became an independent nation in 2011. See Ex. 11 at 1, 37. Respondent's father testified that the government of South Sudan is not the same government as when Respondent's father was in parliament. Respondent's father stated the same parties are still around though, and he stated the "war" has been going on for 24 years.

Respondent's father stated he will support Respondent if he is released. Respondent's father, age 58, used to have problems with alcohol. He now is diabetic, has high blood pressure, and he has seizures. He has been hospitalized occasionally. Respondent's father testified that he depends on Respondent.

Respondent also fears return to South Sudan because of his mental health problems. He states the government imprisons the mentally ill in South Sudan, and the country has inadequate mental health services. He stated people can tell that something is "off" with him because of his behavior. Respondent is unsure if he could safely live in any part of South Sudan.

V. Relief

A. Adjustment of Status under INA § 209(a) and Waiver of Inadmissibility under INA § 209(c)

1. Legal Standard

In general, an applicant bears the burden to prove he or she merits meets the eligibility requirements for any form of relief or protection from removal and, if required for that form of relief, that the applicant merits a favorable exercise of discretion. See INA § 240(c)(4).

Respondent has applied for adjustment of status under INA § 209(a). That Section provides that after one year of physical presence, any alien who has been admitted to the United States as a refugee, whose admission as a refugee has not been terminated, who has not acquired lawful permanent resident (LPR) status, and who is found to be admissible shall be regarded as lawfully admitted to the United States for permanent residence. INA § 209(a). An applicant for adjustment of status under INA § 209(a) must also show he or she is admissible to the United States (i.e. not subject to any grounds of inadmissibility under INA § 212). See Matter of L-T-P-, 26 I&N Dec. 862, 864 (BIA 2016).

If an applicant is inadmissible, an applicant may seek to a waiver under INA § 209(c) for certain grounds of inadmissibility under INA § 212. The Court will grant such a waiver if the applicant shows it should be granted "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." INA § 209(c). In assessing a waiver application, the Court balances positive equities and claims of hardship against the gravity of any criminal offenses. See Matter of Jean, 23 I&N Dec. 373, 383 (2002).

The Court applies a heightened standard for applicants who are "violent or dangerous individuals." See id. at 383. For these applicants, the court will not grant a waiver under

INA § 209(c) "except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship." Id. In addition, "depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient." Id. Even if an applicant establishes exceptional and extremely unusual hardship, a waiver under INA § 209(c) and adjustment of status may still be denied in the exercise of discretion if the adverse factors—particularly those involving criminal conduct—outweigh the favorable factors. Matter of C-A-S-D-, 27 I&N Dec. 692 (BIA 2019).

2. Analysis

Respondent seeks a waiver under INA § 209(c) based on his inadmissibility under INA § 212(a)(2)(A)(i)(I) (for having been convicted of a crime involving moral turpitude).[3] See Ex. 6 at 1. Respondent claims he merits a waiver "to assure family unity." Id.

Based on Respondent's criminal history, the Court finds Respondent is a violent and dangerous individual such that the heighted standard under Matter of Jean applies. Most significantly, Respondent has been convicted of a violent and dangerous crime. On January 29, 2018, Respondent was convicted of domestic assault under Minn. Stat. § 609.2242, subd. 2(4). Ex. 3 at 1. Respondent testified about the underlying conduct of this offense. In approximately July 2017, he got in an argument with his ex-wife, broke her phone, and punched her in the face, leaving her with a bloody nose. Their son, four months old at the time, was in the room. The police reports and the statement of probable cause corroborate this account of events. See Ex. 3 at 3; Ex. 13 at 112–14. This is a violent and dangerous crime. See *Violent*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. Of, relating to, or characterized by strong physical force <violent blows to the legs>. 2. Resulting from extreme or intense force <violent death>."); *Dangerous*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. (Of a condition, situation, etc.) perilous; hazardous; unsafe <a dangerous intersection>. 2. (Of a person, an object, etc.) likely to cause serious bodily harm <a dangerous weapon> <a dangerous criminal>."). Moreover, the Court notes that any offense under Minn. Stat. § 609.2242, subd. 4 is categorically an aggravated felony "crime of violence" under 18 U.S.C. 16(a), defined 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." See United States v. Romero-Orbe, 853 F.3d 1333, 1334 (8th Cir. 2017) (citing United States v. Schaffer, 818 F.3d 796 (8th Cir. 2016)). Thus, the heightened Matter of Jean standard applies to Respondent's waiver application.

[3] Respondent conceded the charge under INA § 237(a)(2)(A)(ii) for having been convicted of two or more crimes involving moral turpitude. Therefore, he is inadmissible under INA § 212(a)(2)(A)(i)(I). Further, the Court notes that Respondent might also potentially be inadmissible under INA § 212(a)(2)(B) (convicted of two or more offenses for which the aggregate sentences to confinement were five years or more), but the Court need not address this issue because the Court is denying the waiver under INA § 209(c).

The Court finds Respondent would suffer "exceptional and extremely unusual hardship" in this case, based on the finding that Respondent will more likely than not be tortured or killed if he returns to South Sudan. See Section V.D.2 of this Decision. However, the Court does not find Respondent has established "exceptional and extremely unusual hardship" to his U.S. citizen son because his son lives with his mother (Respondent's ex-wife), and the mother has custody of the child. Respondent has been incarcerated for a majority of his son's lifetime. The record is insufficient to show that the hardship his son would suffer would be "exceptional and extremely unusual." Cf. Matter of C-A-S-D-, 27 I&N Dec. at 698 (concluding the IJ clearly erred in finding the respondent's son relied on him for financial and emotional support because the record showed the respondent had been incarcerated for most of his son's life, did not previously provide significant financial support, and did not demonstrate a strong relationship with his son).

Respondent's offense is also an aggravated felony "crime of violence," which suggests the INA § 209(c) waiver should be denied in the exercise of discretion. Cf. Matter of K-A-, 23 I&N Dec. 661, 666 (BIA 2004) ("Indeed, even nonviolent aggravated felonies will generally constitute significant negative factors militating strongly against a favorable exercise of discretion.").

Moreover, Respondent has a long history of other criminal offenses that weigh heavily as negative factors. See Exs. 3, 13, 16. Notably, he has been convicted of five DUI offenses from 2011 to 2015. These offenses create a great risk of bodily harm to others. Begay v. United States, 553 U.S. 137, 141 (2008) ("Drunk driving is an extremely dangerous crime.").

The Court credits Respondent for his rehabilitation efforts, including a 13-month inpatient treatment from 2016 to 2017. Respondent testified that, during this treatment, he learned what his triggers are. Although Respondent has not had another DUI offense after this most recent treatment, he relapsed in July 2017, a few months after completing the treatment, and he has been incarcerated since August 2017, which has foreclosed the possibility of committing further similar offenses.

Respondent expressed a desire to remain sober and explained his plan to seek residence at a halfway house, seek more treatment, and rely on his family members for support, including his parents and brother. He has made attempts to repair the damage he caused with family members. The Court also commends Respondent for his rehabilitation efforts while in detention, including taking GED classes and completing behavioral improvement programs. However, Respondent has been incarcerated since August 2017, so his rehabilitation and the likelihood that he would reoffend—despite his affirmations that he would remain sober and seek treatment—are difficult to assess. See Matter of C-A-S-D-, 27 I&N Dec. at 700 (citing Matter of Mendez, 21 I&N Dec. 296, 304 (BIA 1996) (finding that "good conduct in following prison rules in a controlled setting [is not] persuasive evidence of rehabilitation")).

Additionally, Respondent has several other criminal offenses on his record, including two thefts, disorderly conduct, fifth-degree assault, and multiple offenses of giving a false name to police officers.

The Court also considers Respondent's positive equities. He has lived in the United States for over 20 years, and he has family ties with lawful status here, including his parents, three siblings, and a niece. He also has a young U.S. citizen son, but the record does not show he has a particularly strong relationship with him, mostly because he has been incarcerated for a majority of his son's life.

Respondent has filed some partial tax records. See Ex. 12 at 11–18 (showing federal income tax returns for 2016 and 2017). He has also submitted letters of support from friends, family, and community members. See Ex. 10 at 73–76; Ex. 12 at 1–10.

Respondent and his family also suffered hardship when he was young. He entered the United States as an asylee, but the Court gives less weight to this factor. Cf. Matter of C-A-S-D-, 27 I&N Dec. at 698 ("Regarding the respondent's hardship, we acknowledge that he came to the United States as a refugee, but that factor carries less weight here than in other contexts, because every respondent seeking a section 209(c) waiver entered as a refugee.").

Given Respondent's pattern of serious criminal behavior from about 2010 through 2017, including his multiple domestic assaults, five DUI convictions, and several other offenses, the Court concludes Respondent's criminal history is a substantial adverse factor that outweighs the positive equities in his case. Respondent has not demonstrated truly compelling countervailing equities that would outweigh the serious negative factors. Therefore, the Court will deny Respondent's application for a waiver under INA § 209(c) and will, in turn, deny Respondent's request for adjustment of status under INA § 209(a).

B. Asylum under INA § 208

Asylum is unavailable for applicants who have committed certain crimes or represent a danger to the security of the United States. See INA § 208(b)(2)(A)(i)–(v). Respondent conceded the charge under INA § 237(a)(2)(A)(iii), relating to INA § 101(a)(43)(F), and the Court sustained this charge. Thus, Respondent is statutorily ineligible for asylum because he has been convicted of an aggravated felony. See INA § 208(b)(2)(A)(ii), (B)(i) (barring asylum to aliens convicted of a particularly serious crime, which includes any aggravated felony). Accordingly, the Court denies Respondent's application for asylum under INA § 208.

The Court finds that termination of Respondent's prior asylee status is warranted because Respondent has conceded he has been convicted of an aggravated felony under INA

§ 101(a)(43). See Matter of K-A-, 23 I&N Dec. 661, 664–65 (BIA 2004); see also Matter of V-X-, 26 I&N Dec. 147, 149 (BIA 2013); Matter of A-S-J-, 25 I&N Dec. 893, 897 (BIA 2012).

C. Withholding of Removal under INA § 241(b)(3)

A conviction for a "particularly serious crime" will render an applicant statutorily ineligible for withholding of removal. INA § 241(b)(3)(B)(ii). Aggravated felony convictions are considered particularly serious crimes if the term of imprisonment equals or exceeds five years, either separately or in the aggregate. INA § 241(b)(3)(B). However, even in cases where aggravated felony sentences do not equal or exceed five years, the Court is authorized to determine whether a conviction constitutes a particularly serious crime. INA § 241(b)(3)(B).

Respondent has been convicted of an aggravated felony under INA § 101(a)(43)(F). Respondent's sentence for this crime was 24 months of incarceration. See Ex. 3 at 1. This is less than five years, so Respondent's offense is not automatically a particularly serious crime that bars withholding of removal. See INA § 241(b)(3)(B). The Court proceeds, therefore, to analyze whether Respondent's offense is a particularly serious crime based on the factors outlined in case law.

When determining if a crime is "particularly serious," the Court looks "'to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, [and] the type of sentence imposed.'" Tian v. Holder, 576 F.3d 890, 897 (8th Cir. 2009) (quoting Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982)). If "the elements of the offense . . . potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction." Matter of N-A-M-, 24 I&N Dec. 336, 342 (BIA 2007); see also Marambo v. Barr, 932 F.3d 650, 655–56 (8th Cir. 2019) (holding the IJ properly relied on facts and circumstances in the criminal complaint in conducting a particularly serious crime analysis). The Board of Immigration Appeals (BIA) has also stated that it would not engage in a separate determination of whether the alien is a danger to the community but instead would focus on the nature of the crime as opposed to the likelihood of future serious misconduct. Matter of N-A-M-, 24 I&N Dec. at 342. The BIA has noted that "[c]rimes against persons are more likely to be categorized as 'particularly serious crimes,'" although some crimes against property might also be particularly serious. Matter of Frentescu, 18 I&N Dec. at 247.

On January 29, 2018, Respondent was convicted of domestic assault under Minn. Stat. § 609.2242, subd. 2(4). Ex. 3 at 1. This statute states that a person is guilty of a felony domestic assault if he "violates the provisions of [section 609.2242] or section 609.224, subdivision 1, within ten years of the first of any combination of two or more

previous qualified domestic violence-related offense convictions or adjudications of delinquency." Minn. Stat. § 609.2242, subd. 2(4). An act constitutes misdemeanor domestic assault in Minnesota where a defendant does either of the following against a family or household member: "(1) commits an act with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another." Minn. Stat. § 609.2242, subd. 1. A conviction under Minn. Stat. § 609.2242, subd. 4 is categorically an aggravated felony "crime of violence" under 18 U.S.C. 16(a). See United States v. Romero-Orbe, 853 F.3d 1333, 1334 (8th Cir. 2017) (citing United States v. Schaffer, 818 F.3d 796 (8th Cir. 2016)). The Court finds the elements of this offense potentially bring it "within the ambit" of a particularly serious crime.

Additionally, the Court finds the nature of the crime—domestic assault—is particularly serious. The crime is an offense against a person, which makes the nature of the crime likely to be a particularly serious crime. See Matter of Frentescu, 18 I&N Dec. at 247.

Next, the Court considers Respondent's sentence. The Court recognizes that "the sentence imposed is not the most accurate or salient factor to consider in determining the seriousness of an offense." See Matter of N-A-M-, 24 I&N Dec. at 343. However, Respondent's sentence was 24 months of incarceration. See Ex. 3 at 1. The Court finds Respondent's sentence is significant and weighs towards a finding that this offense is particularly serious.

Lastly, the Court considers the circumstances and underlying facts. Respondent testified that he got into an argument with his wife, broke her phone, and punched her in the face, causing her to have a bloody nose. Their son four-month-old son was present during the incident. The Court finds the facts and circumstances of Respondent's offense make his crime particularly serious.

In light of the above, the Court concludes Respondent's conviction for domestic assault in violation of Minn. Stat. § 609.2242, subd. 2(4), is a particularly serious crime that makes Respondent ineligible for withholding of removal. See INA § 241(b)(3)(B)(ii). Thus, the Court denies Respondent's application for withholding of removal under INA § 241(b)(3).

Because Respondent is ineligible to seek withholding of removal under INA § 241(b)(3) based on his criminal offense, Respondent is also ineligible for withholding of removal under the Convention Against Torture. See 8 C.F.R. § 1208.16(d)(2). Respondent is only eligible to seek deferral of removal under the Convention Against Torture. See id.

D. Protection under the Convention Against Torture

1. Legal Standard

For asylum applications filed on or after April 1, 1997, an applicant for asylum shall also be considered for eligibility for withholding of removal or deferral of removal under the Convention Against Torture (CAT). See 8 C.F.R. § 1208.13(c)(1). Eligibility for this form of relief is set forth at 8 C.F.R. § 1208.16(c) and 8 C.F.R. § 1208.18. The burden of proof is on the applicant to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2). The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.16(c)(2).

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a). "Acquiescence" requires that the public official have prior awareness of the activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7). It is not sufficient to show that the government is aware of the torture and is simply powerless to stop it. See Ramirez-Peyro v. Gonzalez, 477 F.3d 637, 639 (8th Cir. 2007). However, a government's willful blindness toward the torture of citizens by third parties amounts to unlawful acquiescence. Gallimore v. Holder, 715 F.3d 687, 689 (8th Cir. 2013). A public official or person acting "under color of law" while inflicting or acquiescing to torture satisfies the requirement that torture be committed by someone acting "in an official capacity." See Ramirez-Peyro v. Holder, 574 F.3d 893, 899–901 (8th Cir. 2009). Country conditions evidence of torturous conduct that is routine and sufficiently connected to the criminal justice system may support a finding that high-level government officials are acquiescing to such conduct. See Matter of O-F-A-S-, 27 I&N Dec. 709, 718 (BIA 2019).

In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered. Such evidence includes, but not is limited to: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable. 8 C.F.R. § 1208.16(c)(3). Other relevant information regarding conditions in the country of removal may also be considered. Id.

A pattern of human-rights violations alone is not sufficient to show that a particular person would be in danger of being subjected to torture upon his return to that country; rather,

"[s]pecific grounds must exist that indicate the individual would be *personally* at risk." Matter of S-V-, 22 I&N Dec. 1306, 1313 (BIA 2000) (emphasis added) (citation omitted). Eligibility for relief cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. Matter of J-F-F-, 23 I&N Dec. 912, 917–918 (A.G. 2006).

2. *Analysis*

The Court finds Respondent would more likely than not be tortured if he is removed to South Sudan. Respondent fears that if he returns to South Sudan, government actors will kill him based on his relationship to his father and because of his imputed political views. The Court finds this fear is well supported by the evidence in the record. The Court also finds government actors would torture or kill Respondent, and Respondent cannot relocate to a part of South Sudan where he would not likely be tortured.

To begin, the Court finds Respondent suffered no past harm amounting to torture. The testimony and evidence of record did not reveal any physical injury Respondent suffered in his home country. Respondent's parents, however, did suffer threats and an assault that caused them to flee Sudan. This harm did not rise to the level of past torture, but it strengthens Respondent's claim that he is likely to be tortured in the future.

Based on Respondent's personal characteristics and his father's past political involvement, the Court finds the government of South Sudan would more likely than not target Respondent for torture. Respondent's father was a member of parliament in the Sudanese National Congress for about a year and a half from approximately 1995 to summer 1996. Respondent's father testified about the threats he received, which forced him to flee the country. After he fled, members of the national security force came to his house looking for him and for documents. When his wife did not give them the information they wanted, these government officials ransacked the house and punched his wife. Because of his political activities, government officials in northern and southern Sudan viewed Respondent's father as a traitor and spy.

Since departing Sudan, Respondent's father has been vocal about his political beliefs. For example, he has written and spoken out many times about tribal conflicts in South Sudan. See Ex. 12 at 10. He is likely to be seen as a traitor by the president and the people of the Dinka tribe. See id. None of Respondent's family members have returned to South Sudan, primarily out of fear of retribution related to the political activities of Respondent's father.

Respondent's father believes the government of South Sudan still considers him a traitor. See id. at 1. He also believes the government of South Sudan will target his son for harm because they will view him as a political opponent, based on Respondent's relationship to his father. Respondent's father believes Respondent will be immediately identified and

killed by the government because the government is still looking for Respondent's father. Respondent essentially bears the same name as his father, which will make him easily identifiable by the government. The Court finds Respondent will more likely than not be identified by the government of South Sudan upon arrival and will be targeted for detention, torture, and death because of his relationship to his father. The government will also likely impute his father's status as a political traitor on him and target him for that reason. The Court also finds the government would torture or kill Respondent for the specific purpose of punishing him for his father's political activities, or alternatively, for the purpose of punishing or intimidating his father. This constitutes a prohibited purpose under 8 C.F.R. § 1208.18(a).

Respondent's father testified that although the new government of South Sudan is not the same as when he was in parliament, the same parties are basically still around. He asserted that the "war" has been going on for 24 years. The country conditions show the current conflict, which started in 2013, reflects tensions that date back to the civil war in the 1990s. See id. at 37.

The country conditions evidence in the record strongly supports Respondent's claims. The evidence shows that government forces routinely target people for detention, torture, and unlawful killing in South Sudan, based on their perceived political affiliation. Since 2013, there have been "regular reports that security forces conducted arbitrary arrests, including of journalists, civil society actors, and supposed political opponents." Ex. 11 at 5. Security forces have routinely arrested and detained citizens, rarely reporting such arrests to police or other proper civilian authorities. See id. "Security forces arbitrarily arrested opposition leaders, civil society activists, businesspersons, journalists, and other civilians due to ethnicity or possible affiliation with opposition forces. The [Sudan People's Liberation Army (SPLA)] and [National Security Service (NSS)] often abused political opponents and others whom they detained without charge." Id. at 8. There were also reports of dozens of political prisoners and detainees held by authorities without charge, with the purpose of intimidating them or stifling opposition. See id. at 11. "Prominent political prisoners were often held for extended periods of time and were sometimes sentenced to death." Id. "[G]overnment soldiers reportedly engaged in acts of collective punishment and revenge killings against civilians assumed to be opposition supporters, and often based on their ethnicity." Id. at 12. Surveillance by the government has created a climate of fear and paranoia in civil society. See id. at 61.

Further, the U.S. Department of State 2019 Human Rights Report for South Sudan discusses secret detention centers where government officials reportedly have tortured civilians:

> According to the [UN Security Council (UNSC)] panel of experts and several independent human rights advocates, the NSS Operations Division maintained a facility known as "Riverside" where it detained, interrogated,

> and sometimes tortured civilians. The panel of experts also allege the existence of secret, unofficial detention centers operated by the NSS. The panel of expert reported allegations of torture, including electrical shocks, and beatings.

Ex. 17 at 3. The same report also suggests the government of South Sudan has sought out and abducted political opponents from abroad:

> There were credible reports that, for politically motivated purposes, South Sudan attempted to exert bilateral pressure on other countries aimed at having them take adverse actions against specific individuals. For example, there were credible reports that during the year the NSS pressured the Government of Uganda to monitor, intimate, and forcibly return South Sudanese human rights defenders residing in Uganda.
>
> A UN panel of experts report released during the year concluded that opposition figures Samuel Dong Luak and Aggrey Idris Ezbon were forcibly abducted from Kenya and illegally extradited to South Sudan in 2017 and that it was "highly probable" they were executed shortly thereafter.

Id. at 10–11.

Government officials have targeted political dissidents based on their perceived political or ethnic affiliation for detention, where they are often tortured. See Ex. 11 at 43. "Government forces arrested and detained civilians, mainly men, on accusations of being rebels or rebel supporters or force them to provide information about the rebels." Id. at 78. "Many" detainees have disappeared or have been extrajudicially executed. See id. at 44. "Detainees are held in squalid conditions and largely denied access to family, lawyers, and medical care." Id. at 65. The Human Rights Council has found reasonable grounds to believe that government and opposition forces have committed acts of torture and serious violations of human rights and international humanitarian law, including deliberate targeting of civilians "on the basis of their perceived political or ethnic affiliation, and by means of killings, abductions, rape and sexual violence, and the looting and destruction of villages." See id. at 52.

The country conditions evidence also supports this Court's finding that the torture Respondent fears will be inflicted by government actors. The ruling party in South Sudan is Sudan People's Liberation Movement (SPLM), under president Salva Kiir. Ex. 11 at 1. The SPLM has been engaged in armed conflict with opposition forces, led by Riek Machar Teny, since 2013. See id. This war has resulted in nearly 400,000 deaths and over four million people displaced. See id. at 37. The parties have signed several ceasefire agreements in the past. See id. Despite these agreements, armed conflict and human rights abuses against civilians have continued. See id. at 11–12. The viability of the most recent

ceasefire signed in September 2018 is dubious. See id. at 38, 64–65, 74–77, 83. Amnesty International has noted the "disturbing lack of prospects for accountability for crimes committed in relation to the conflict that broke out in December 2013." Id. at 83.

Security forces, other government agents, and opposition forces have all committed numerous unlawful killings and abducted an unknown number of persons. See id. at 2. "Civilian authorities routinely failed to maintain effective control over the security forces." See id. at 1. In addition, the "government has no effective mechanisms to investigate and punish abuse." Id. at 6. "Authorities rarely investigated complaints of arbitrary detention, harassment, excessive force, and torture." Id. at 7.

The national police force lacks training and resources, suffers from corruption, and is widely distrusted.[4] See id. at 6. Police often go months without pay, solicit bribes, or seek compensation for services to civilians. See id. The police have limited presence and are generally ineffective, so security forces regularly exercise police functions, though they lack legal authority to do so. See id. at 7. Corruption is endemic in all branches of government. Id. at 24.

The above evidence shows government officials directly inflict violence and human rights abuses on civilians, often because of their perceived political status. This evidence also illustrates the weak state of the government security apparatus in South Sudan, which is plagued by corruption, ineffectiveness, and a tendency toward impunity for abuses. Therefore, the Court finds government actors would more likely

Moreover, the Court considers the evidence of gross, flagrant, and mass violations of human rights in South Sudan. The country reports show South Sudan is in extreme crisis, including substantial armed conflict, dire humanitarian issues, and severe human rights abuses. The U.S. Department of State 2018 Human Rights Report for South Sudan states:

> Human rights issues included government-perpetrated extrajudicial killings, including ethnically based targeted killings of civilians; forced disappearances and the mass forced displacement of approximately 4.4 million civilians; torture; arbitrary detention; harsh and life-threatening prison conditions; political prisoners; violence against, intimidation, and detention of journalists, closure of media houses, censorship, and site blocking; substantial interference with freedom of association; significant restrictions on freedom of movement; restrictions on political participation; corruption; unlawful recruitment and use of approximately 19,000 child soldiers; widespread rape of civilians targeted as a weapon of war; trafficking

[4] However, one recent nationwide poll showed that 78 percent of citizens would go to the police if they were a victim or witnessed a crime. See Ex. 11 at 6.

> in persons; criminalization of [lesbian, gay, bisexual, transgender, and intersex (LGBTI)] conduct, and violence against the LGBTI community.

Id. at 1. The Human Rights Report continues, "Security force abuses occurred throughout the country. Despite one successful prosecution, impunity was widespread and remained a major problem. Opposition forces also perpetrated serious human rights abuses, which, according to the United Nations, included unlawful killings, abduction, rape, sexual slavery, and forced recruitment." Id. at 1–2. Although the transitional constitution prohibits torture, "security forces mutilated, tortured, beat, and harassed political opponents, journalists, and human rights workers . . . . Government and opposition forces, armed militia groups affiliated with both, and warring ethnic groups committed torture and abuses in conflict zones." Id. at 3. Interethnic conflict and violence, involving government and opposition forces, has resulted in human rights abuses, as well.[5] See id. at 24.

Moreover, South Sudan's humanitarian situation is dire: insecurity has disrupted agriculture and trade, and local markets have collapsed. See id. at 38. Displacement and lack of food have exacerbated security concerns. See id. at 59–60.

Finally, the Court finds Respondent could not internally relocate. Respondent fears torture by the government of South Sudan. The government significantly restricts freedom of movement in South Sudan, and it routinely blocks travel for political figures within and outside the country. See id. at 20. Security forces operate checkpoints, and in-country movement is impeded by ongoing armed conflict between government and opposition forces. See id. Respondent is unsure if he could safely live in any part of South Sudan. Respondent's father added that relocation would be difficult for Respondent because people do not speak English there; rather, they speak local languages. Respondent has no family in South Sudan, and he has not lived there since he was six or seven years old.

In addition, Respondent testified that his mental health problems could make him more likely to stand out to be detained. He stated people can tell that something is "off" with him because of his behavior. He claims the government imprisons the mentally ill in South Sudan, and the country has inadequate mental health services. Respondent's fears about the treatment of the mentally ill in South Sudan is supported by the documentary evidence. "Persons determined by a judge to be sufficiently dangerous (and "mentally ill") following referral by family or the community, are incarcerated, medicated, and remain in detention until a medical evaluation determines they are no longer a threat and can be released." Ex. 11 at 4. In 2016, the government reported holding 162 inmates with mental disabilities. See id. Medical care in prisons is "rudimentary." Id. at 3. This evidence suggests Respondent might be further unable to safely relocate because he would be noticed and imprisoned for behavior related to his mental health diagnoses. Altogether, the Court finds Respondent

[5] In his application, Respondent also expressed a fear of return to South Sudan because of his tribe membership, as a member of the Malual sub-tribe of the Dinka tribe. See Ex. 5 at 5. However, the evidence in the record does not establish Respondent would be harmed because he is a member of the Dinka tribe or the Malual sub-tribe.

cannot internally relocate anywhere in South Sudan where he could avoid the torture he fears.

In light of the above, the Court concludes Respondent has met his burden to show he merits protection under the CAT. Respondent has demonstrated that he would more likely than not face torture or death at the hands of government if he returns to South Sudan. He has also shown he cannot internally relocate in South Sudan. Thus, the Court will grant Respondent's application for deferral of removal under Article 3 of the CAT.

Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for adjustment of status under INA § 209(a), including request for a waiver under INA § 209(c), be **DENIED**.

IT IS FURTHER ORDERED that Respondent's application for asylum under INA § 208 be **DENIED**.

IT IS FURTHER ORDERED that Respondent's application for withholding of removal under INA § 241(b)(3) be **DENIED**.

IT IS FURTHER ORDERED that Respondent's application for withholding of removal under the Convention Against Torture be **DENIED**.

IT IS FURTHER ORDERED that Respondent be **REMOVED** from the United States.

IT IS FURTHER ORDERED that Respondent's application for deferral of removal under the Convention Against Torture be **GRANTED**.

M. Audrey Carr
United States Immigration Judge

If either party elects to appeal this decision, Notice of Appeal must be received by the Board of Immigration Appeals within thirty (30) days of this decision. 8 C.F.R. § 1003.38(a)–(b).

[redacted]

NOTICE TO ALIEN GRANTED DEFERRAL OF REMOVAL
(8 C.F.R. § 1208.17(b))

Your removal to **SOUTH SUDAN** shall be deferred until such time as the deferral is terminated. This grant of deferral of removal:

1. Does not confer upon you any lawful or permanent immigration status in the United States;

2. Will not necessarily result in you being released from the custody of the DHS if you are subject to such custody;

3. Is effective only until terminated;

4. Is subject to review and termination based on a DHS motion if the Immigration Judge determines that it is not likely that you would be tortured in the country to which removal has been deferred, or upon your request; and

5. Defers removal only to **SOUTH SUDAN** and does not preclude the DHS from removing you to another country where it is not likely you would be tortured.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] **A** [redacted]

Date of this notice: 11/13/2020

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Gemoets, Marcos
Malphrus, Garry D.
Hunsucker, Keith

MalikAr
Userteam: Docket

File: [redacted] – Fort Snelling, MN

Date: NOV 13 2020

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maria Teresa Miller, Esquire

ON BEHALF OF DHS: Courtney Campbell
Assistant Chief Counsel

APPLICATION: Adjustment of status, waiver of inadmissibility under section 209(c) of the Act, withholding of removal, Convention Against Torture

The respondent, a native of Egypt and citizen of South Sudan, appeals the Immigration Judge's March 18, 2020, decision denying his applications for adjustment of status with a waiver of inadmissibility and withholding of removal. *See* sections 209(a) and (c) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1159(a), (c), 1231(b)(3)(A). The Department of Homeland Security ("DHS") appeals the decision granting the respondent deferral of removal under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18.[1] The DHS's appeal will be sustained. The respondent's appeal will be dismissed. The Immigration Judge's decision will be vacated insofar as it grants the respondent's application for protection under the Convention Against Torture, and the respondent will be ordered removed from the United States to South Sudan.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

We uphold the Immigration Judge's denial of the respondent's application for adjustment of status and waiver of inadmissibility under sections 209(a) and (c) of the Act. After 1 year of physical presence, an alien who has been admitted to the United States as a refugee, whose admission as a refugee has not been terminated, who has not acquired lawful permanent resident status, and who is found admissible shall be regarded as lawfully admitted to the United States for permanent residence. Section 209(a) of the Act. An applicant under section 209(a) must show that he is not subject to any grounds of inadmissibility under section 212(a) of the Act. *Matter of L-T-P-*, 26 I&N Dec. 862, 864 (BIA 2016). The respondent conceded that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to having been convicted of two or

[1] The Immigration Judge also denied the respondent's application for asylum (IJ at 20). Because the respondent has not challenged that determination on appeal, we deem the issue waived. *See Matter of J-J-G-*, 27 I&N Dec. 808, 815 (BIA 2020).

[redacted]

more crimes involving moral turpitude (IJ at 9, n. 3; Tr. at 19; Exh. 6). As a result of his inadmissibility, the respondent sought a waiver under section 209(c) of the Act. In assessing whether to grant a waiver application as a matter of discretion, we balance the positive equities and claims of hardship against the gravity of the alien's criminal offenses. *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002). If an alien is a violent or dangerous individual, he must demonstrate that exceptional circumstances warrant the grant of a waiver. *Id.* And even where the alien seeking a waiver demonstrates exceptional circumstances, he must still show that his positive equities outweigh his adverse factors in order to merit a favorable exercise of discretion. *Matter of C-A-S-D-*, 27 I&N Dec. 692, 699 (BIA 2019).

The Immigration Judge found that the respondent is subject to the heightened discretionary standard set forth in *Matter of Jean* because he is a violent and dangerous individual (IJ at 9). The respondent was convicted of felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (IJ at 9). The respondent argues that he should not be held to the heightened standard because, he alleges, his crime of domestic assault is less violent than other crimes for which the heightened standard has applied (Respondent's Br. at 5). However, the respondent does not dispute the Immigration Judge's factual findings related to his offense, which have ample support in the record and are not clearly erroneous (IJ at 9; Tr. at 62-63; Exhs. 3, 13; Respondent's Br. at 5-7). We discern no error in the Immigration Judge's consideration of the gravity of the domestic assault at issue, during which the respondent broke his ex-wife's phone and punched her in the face in the presence of the couple's 4-month-old son, giving her a bloody nose (IJ at 9; Tr. at 62-63; Exh. 13). This was a violent and dangerous crime, and just one of a series of convictions related to domestic assault and violations of protective orders (IJ at 5-6). We affirm the Immigration Judge's application of the heightened discretionary standard as appropriate based on her finding that the respondent is a violent and dangerous individual. The Immigration Judge found that the respondent demonstrated that his removal would result in exceptional and extremely unusual hardship to himself, but that a favorable exercise of discretion was unwarranted based on consideration of his positive equities and adverse factors (IJ at 10-11). *Matter of C-A-S-D-*, 27 I&N Dec. at 699.

We agree that the respondent has not shown that he merits adjustment of status as a matter of discretion (IJ at 10-11). *Matter of C-A-S-D-*, 27 I&N Dec. at 700 (finding that discretion should not be exercised favorably with respect to aliens seeking adjustment of status who have been convicted of dangerous or violent crimes, other than in the most exceptional circumstances) (citing *Matter of Jean*, 23 I&N Dec. at 383-84). Where the alien is subject to the heightened discretionary standard set forth in *Matter of Jean*, and "serious negative factors" are present, the alien must present "truly compelling countervailing equities" to merit a favorable exercise of discretion. *Matter of C-A-S-D-*, 27 I&N Dec. at 701. In this case, the respondent's multiple criminal offenses constitute a significant adverse factor that heavily weighs against a favorable exercise of discretion.

We are not persuaded by the respondent's argument that his positive equities, including his over 20 years of residence in the United States with family members who are United States citizens and lawful permanent residents, the support from his community, and his alleged rehabilitation related to his substance abuse, outweigh the negative equities such that he warrants a favorable exercise of discretion (Respondent's Br. at 8-9, 11). The Immigration Judge acknowledged, as do

[redacted]

we, that the length of his stay in the United States, his family ties, and support from friends and family weigh in his favor (IJ at 11). The Immigration Judge also credited the respondent's efforts towards rehabilitation, including his participation in substance abuse treatment (IJ at 10). Given that he later reoffended and has been incarcerated since 2017, the respondent has not, however, presented persuasive evidence of genuine rehabilitation. *Matter of Roberts*, 20 I&N Dec. 294, 303 (BIA 1991) (noting that an alien's assurances alone are insufficient to show genuine rehabilitation). The respondent has presented a great risk of bodily harm to others due to multiple domestic assaults, violations of protective orders, and five DUI convictions and general disregard of public safety laws (IJ at 6, 10, 11; Exhs. 3, 13). His other criminal offenses include two thefts, a disorderly conduct offense, a fifth degree assault, and multiple offenses of providing a false name to police officers (IJ at 11; Exhs. 3, 16). Considering all of the evidence before us, we agree with the Immigration Judge that the equities presented in this case are not compelling enough to outweigh the negative discretionary factors. Accordingly, we affirm the Immigration Judge's determination that the respondent has not demonstrated that he merits adjustment of status and a waiver of inadmissibility under sections 209(a) and (c) of the Act in the exercise of discretion.

We also uphold the Immigration Judge's determination that the respondent is ineligible for withholding of removal due to his felony conviction under Minn. Stat. § 609.2242, subd. 4, which is an offense that qualifies as a particularly serious crime (IJ at 12-13). Section 241(b)(3)(B)(ii) of the Act. The elements of the offense include acts committed with intent to cause fear in another of immediate bodily harm or death, or the intentional infliction or attempt to inflict bodily harm on another (IJ at 13). Also, the crime constitutes a felony when committed within 10 years of the first of any two or more prior domestic violence related convictions or adjudications of delinquency (IJ at 12-13). The Immigration Judge determined that these elements of the offense potentially bring it within the ambit of a particularly serious crime (IJ at 13). *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) (noting that the elements of a given offense must be considered to determine whether the offense is on its face a particularly serious crime, or if the elements potentially bring the offense within the ambit of a particularly serious crime).

The respondent argues that because the elements of his domestic assault offense encompass minor assaults, the offense is not a particularly serious crime (Respondent's Br. at 13). However, the Immigration Judge did not rely solely on the elements of the offense to determine that it is a particularly serious crime. Having determined that the elements of the domestic assault offense bring it within the ambit of a particularly serious crime, the Immigration Judge next considered the other relevant factors, including the nature and circumstances of the respondent's conviction and the sentence imposed. *Tian v. Holder*, 576 F.3d 890, 897 (8th Cir. 2009); *Matter of N-A-M-*, 24 I&N Dec. at 342 (finding that once the elements of an "offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all relevant information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information as well as other information outside the confines of a record of conviction"). The Immigration Judge considered that this offense is a crime against a person, that the respondent received a 24-month sentence upon his conviction, and that the circumstances of the offense indicate that it is a particularly serious crime (IJ at 13). As set forth above, the respondent's 4-month-old son was present during the assault, in which the respondent broke his ex-wife's phone and punched her in the face, causing her nose to bleed (IJ at 13). The respondent does not dispute the Immigration Judge's factual findings about

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these circumstances, and the length of his sentence (Respondent's Br. at 11-13). He also does not dispute the Immigration Judge's determination that a conviction under this statute is categorically an aggravated felony "crime of violence." (IJ at 13; Respondent's Br. at 11-13). *United States v. Romero-Orbe*, 853 F.3d 1333, 1334 (8th Cir. 2017). We affirm the Immigration Judge's determination that the respondent's conviction is for an offense that is a particularly serious crime given that the Immigration Judge considered the relevant factors, all of which indicate the seriousness of the offense. As a result of his conviction for a particularly serious crime, the respondent is ineligible for withholding of removal. Section 241(b)(3)(B)(ii) of the Act.

For these reasons, we affirm the Immigration Judge's denial of the respondent's applications for adjustment of status with a waiver of inadmissibility under sections 209(a) and (c) of the Act and for withholding of removal. Accordingly, we will dismiss the respondent's appeal.

We do not affirm the Immigration Judge's determination that the respondent has established eligibility for deferral of removal under the Convention Against Torture (IJ at 20). The Immigration Judge's prediction as to what will happen to the respondent when he is removed to South Sudan is a factual determination that is reviewed for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-A-F-*, 27 I&N Dec. 778, 779 (A.G. 2020) (the Board reviews predictive factual findings for clear error); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (stating that the Board may overturn an Immigration Judge's findings of fact only when it "is left with the definite and firm conviction that a mistake has been committed.") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). In finding that the respondent would be targeted by the South Sudanese government based on his relationship with his father, who has had no known contact with the country since he left in the 1990s after serving a short time as a member parliament in the Sudanese National Congress, the Immigration Judge relied on vague and conclusory statements of witnesses that did not establish the likelihood of a personal risk to the respondent (IJ at 7, 15; Tr. at 123, 135; Exh. 12).[2]

The Immigration Judge found that it was more likely than not that the respondent would be targeted for torture as a political adversary of the South Sudanese government (IJ at 15). This finding is not supported by the record and is therefore clearly erroneous. The Immigration Judge credited a letter from a South Sudanese community leader stating that the respondent's father has spoken out in opposition to the South Sudanese government, but the letter lacks detail and identifies no person within the South Sudanese government who might have knowledge of the respondent's father and his criticisms (IJ at 15; Exh. 12). Vague assertions about the respondent's father's criticisms, without more, such as evidence that his criticisms have been disseminated in South Sudan, are insufficient to support the Immigration Judge's decision to credit the community leader's conclusion that the respondent's father is viewed as a political traitor to the Dinka tribe and the President of South Sudan (IJ at 15; Exh. 12). The respondent's father testified about his prior political involvement in Sudan in the 1990s and his decision to seek asylum in the United States decades ago, but he did not testify about any recent or specific threats (Tr. at 113-36). The respondent also did not identify a specific or current threat against either his father or himself (Tr. at 87-90). *See Malonga v. Mukasey*, 546 F.3d 546, 556 (8th Cir. 2008) (upholding the denial

[2] South Sudan became an independent nation in 2011 (IJ at 7; Exh. 11).

[redacted]

of Convention Against Torture protection where the alien did not testify about any recent, specific threats that he would be tortured in the country of removal).

The Immigration Judge's reliance on country conditions evidence that South Sudanese government forces routinely target people for detention, torture, and unlawful killing based on perceived political affiliation, does not supply the factual basis for finding the respondent at personal risk of torture, either (IJ at 16; Exh. 11). The punishments inflicted by the government on its perceived political opponents include holding individuals in squalid detention centers without charge, beatings and electric shocks, imposition of death sentences, revenge killings by military forces, and government-imposed extrajudicial killings (IJ at 16-18; Exhs. 11, 17).[3] The gravity of government abuses, however, does not provide grounds on which to conclude that the respondent will be targeted for such abuse. *See Jima v. Barr*, 942 F.3d 468, 473 (8th Cir. 2019) (finding that a pattern of human rights abuses in a given country is not sufficient to determine that a particular person will be in danger of torture). Also, the pattern of violence against perceived political opponents does not demonstrate a likelihood that the respondent will be among those who are abused. *See Lasu v. Barr*, 970 F.3d 960 (8th Cir. 2020) (explaining that reports of violence against members of a particular group of people is insufficient to demonstrate that an alien is similarly situated to members of that group such that he faces a personal risk of torture) (citing *Jima v. Barr*, 942 F.3d at 473).

Accordingly, the respondent has not demonstrated that it is more likely than not that he would be targeted for torture as a political opponent of the South Sudanese government or for any other reason. Although the Immigration Judge found that the respondent's mental health problems might cause him to be imprisoned, the Immigration Judge did not find that the respondent is at risk of torture due to his mental health (IJ at 19). We are not persuaded by the respondent's argument that the record evidence establishes harm by the government against mentally ill persons that rises to the level of torture, much less his theory that the South Sudanese government would target him for mistreatment due to his mental health issues (Respondent's Br. at 19). That the respondent is in therapy, has taken medication due to mental health concerns, and might have angry outbursts does not establish that he would be targeted for torture (Respondent's Br. at 19). *See Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (finding that an alien was not eligible for Convention Against Torture protection based on a series of unsupported suppositions that he needed medication to act within the confines of the law, that such medication would be unavailable in the country of removal, and that as a result he would be incarcerated and tortured). Further, the harm that the respondent fears based on his mental health issues, that he could be held if determined by a judge to be dangerous pending a medical evaluation to determine that he is not a threat, is not torturous conduct (Respondent's Br. at 19). 8 C.F.R. § 1208.18(a).

We do not affirm the Immigration Judge's determination that it is more likely than not that the respondent will be tortured upon his return to South Sudan. The Immigration Judge impermissibly strung together a series of suppositions related to activities of the respondent's father, and how

[3] The Immigration Judge took administrative notice of the U.S. Department of State 2019 South Sudan Human Rights Report, and labeled the report as Exhibit 17, although that report is not included in the record (IJ at 3, n. 1).

they might be revealed to and interpreted by unknown individuals within the government of South Sudan, to find that the respondent more likely than not faces a personal risk of torture (DHS's Br. at 10). *Matter of J-F-F-*, 23 I&N Dec. at 917-18. The record does not support the Immigration Judge's finding that South Sudanese authorities will likely target the respondent for torture more than 20 years after his family left the country. Although the respondent's father expressed concerns about the respondent's safety in South Sudan, the respondent did not present evidence that he or his father has received any recent threats or information indicating that either of them is at risk of harm. Neither the respondent nor his parents was previously tortured (IJ at 15). The respondent has presented insufficient evidence to establish that he faces a personal risk of torture in South Sudan. *See id.* (providing that to establish a claim under the Convention Against Torture, an alien must demonstrate that each step in the hypothetical chain of events resulting in the alien's torture will more likely than not occur).

For these reasons, we will therefore sustain the DHS's appeal and vacate the Immigration Judge's decision insofar as it grants the respondent's application for protection under the Convention Against Torture.

Accordingly, the following orders will be entered.

ORDER: The Department of Homeland Security's Appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision is vacated insofar as it grants protection under the Convention Against Torture.

FURTHER ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent is ordered removed to South Sudan.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $813 for each day the respondent is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted] **Petitioner,** **v.** **William BARR,** **Attorney General,** **Respondent.**	**No.** [redacted] **Immigration File No.** [redacted] **Petition for Review** **from the Decision of the** **Board of Immigration Appeals** **[DETAINED]**

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I electronically filed the foregoing ADDENDUM with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: March 5, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Cir. R. 28A(h), I certify that the foregoing ADDENDUM has been scanned for viruses and is virus-free.

Dated: March 5, 2021

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