Matter of A-V-O-, Respondent

Decided September 17, 2026

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

An alien who has been convicted of an aggravated felony is inadmissible under section 212(a)(8)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(8)(A) (2024), as an alien who is ineligible to citizenship. *Matter of Kanga*, 22 I&N Dec. 1206 (BIA 2000), overruled.

FOR THE RESPONDENT: Maria Davydova, Esquire, Winter Garden, Florida

FOR THE DEPARTMENT OF HOMELAND SECURITY: Lindsay E. Daniels, Counsel

BEFORE: Board Panel: GORMAN, Deputy Chief Appellate Immigration Judge; GALLOW, Appellate Immigration Judge; PICOS, Temporary Appellate Immigration Judge.

GORMAN, Deputy Chief Appellate Immigration Judge:

The respondent, a native and citizen of Nicaragua, appeals from the Immigration Judge's July 29, 2021, decision holding that she is removable as charged and denying her applications for relief and protection from removal. The Board requested and received supplemental briefs from both parties. We will dismiss the appeal.

I. PROCEDURAL AND FACTUAL BACKGROUND

On June 20, 1996, the respondent was admitted into the United States on a visitor visa. She overstayed her period of authorized stay, and in 2004 the Department of Homeland Security ("DHS") issued a notice to appear ("NTA") charging the respondent as removable under section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(B) (2000). On December 15, 2004, the Immigration Judge ordered the respondent removed in absentia. On March 5, 2019, the respondent filed a motion to reopen her removal proceedings, which the Immigration Judge granted.

The respondent admitted the allegations in the NTA and conceded the section 237(a)(1)(B) charge. DHS filed a Form I-261, Additional Charges of Inadmissibility/Deportability, lodging two additional factual allegations and an additional removal charge under section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii) (2018). The Immigration Judge sustained both removal charges and denied the respondent's applications for adjustment of status in conjunction with a section 212(h) waiver and for deferral of removal under the regulations implementing the Convention Against Torture.[1]

II. LEGAL ANALYSIS

A. Aggravated Felony Conviction

The respondent was convicted on January 31, 2020, in the United States District Court for the Southern District of Florida of one count of "Use of Unauthorized Access Device" in violation of 18 U.S.C. § 1029(a)(2), for which she was sentenced to serve 8 months in prison, and one count of "Aggravated Identity Theft," in violation of 18 U.S.C. § 1028A(a)(1), for which she was sentenced to serve 24 months in prison. DHS argues that the respondent's convictions are aggravated felonies under section 101(a)(43)(M)(i) of the INA, 8 U.S.C. § 1101(a)(43)(M)(i) (2024), which defines an aggravated felony as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."

The respondent does not contest the Immigration Judge's determination that the respondent's offenses involve fraud or deceit. The respondent contends instead that her convictions are not for aggravated felonies under section 101(a)(43)(M)(i) of the INA, 8 U.S.C. § 1101(a)(43)(M)(i), because the loss to the victim from her convicted conduct did not exceed the statutory threshold of $10,000. The respondent argues that the indictment and the factual proffer in the record establish that the loss amount tethered to her conviction is $3,450.42. She contends that the Immigration Judge clearly erred in finding that the loss amount tethered to her conviction is $345,100.14 because that monetary amount is assigned to a co-defendant, and not the respondent.

We use a "circumstance-specific" approach to determine whether the respondent's offense involved loss exceeding $10,000. *Nijhawan v. Holder*,

[1] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). 8 C.F.R. §§ 1208.16(c), 1208.17 (2026); 8 C.F.R. § 1208.18(a) (2020). The respondent conceded that her criminal history renders her statutorily ineligible for asylum and withholding of removal under the INA. *See* INA §§ 208(b)(2)(A)(ii), (B)(i), 241(b)(3)(B)(ii), 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i), 1231(b)(3)(B)(ii) (2024).

557 U.S. 29, 38–43 (2009); *accord Matter of F-R-A-*, 28 I&N Dec. 460, 462 (BIA 2022). The circumstance-specific approach requires an adjudicator to "look to the facts and circumstances underlying an offender's conviction." *Nijhawan*, 557 U.S. at 34; *see also Garcia-Simisterra v. U.S. Att'y Gen.*, 984 F.3d 977, 981 (11th Cir. 2020) (holding that "in order to determine whether the amount of loss exceeds $10,000 . . . we may consider the entire record from a person's conviction"). Further, the loss amount must be tethered to the counts of conviction and "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan*, 557 U.S. at 42 (citation omitted); *accord Matter of F-R-A-*, 28 I&N Dec. at 462.

The respondent's judgment of conviction explicitly identifies the "total loss" from the respondent's convicted conduct as $345,100.14 and orders her to pay $345,100.14 in restitution. *See Nijhawan*, 557 U.S. at 42–43 (holding that it is appropriate to rely on, among other things, a restitution order to determine amount of loss). The judgment also identifies the respondent's co-defendants and orders that "[r]estitution is owed jointly and severally by the defendant and co-defendants in the above case" in the amount of $345,100.14. The fact that the district court also imposed a joint and several obligation upon the respondent's co-defendants to pay the full amount of the victim's loss does not absolve the respondent of her responsibility for the full amount of that loss. *See* Black's Law Dictionary (12th ed. 2024) (defining joint and several liability as "[l]iability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion").[2]

Contrary to the respondent's argument on appeal, the indictment and the respondent's factual proffer do not support her claim that the total loss from her convicted conduct was limited to $3,450.42. Both the indictment and the respondent's factual proffer identify the $3,450.42 figure as the amount that the respondent paid to purchase five cellular phones on July 21, 2018, at a

2 The respondent's contention that the federal district court assigned the full restitution amount of $345,100.14 to one of the respondent's co-defendants is a misreading of the text of the judgment. The respondent appears to base her argument on the fact that, at page 6 of the judgment in the respondent's case, there is a box which lists the respondent's co-defendants and then two separate boxes identifying the "Total Amount" of the loss and the "Joint and Several Amount." The dollar figures appear in the middle of the boxes, which happen to line up with the name of one of the respondent's co-defendants. However, it is clear from a reading of that page, as well as the judgment in its entirety, that the judgment orders the respondent to pay $345,100.14 in restitution for her convicted conduct. Contrary to the respondent's argument, the boxes on page 6 do not mean that only the respondent's co-defendant is responsible for the total loss amount, as well as the "Joint and Several Amount" of $345,100.14.

retail store in Miami, Florida. The reference in the indictment to the respondent's July 21, 2018, purchase of the cellular phones for $3,450.42 is presented in Count One of the indictment as evidence of "at least one" act by the respondent in furtherance of a charged conspiracy by her and her co-defendants to commit violations of 18 U.S.C. § 1029(a)(2).[3] The reference in the respondent's factual proffer to the July 21, 2018, purchase of the cellular phones for the dollar amount of $3,450.42 is presented as one "example" of the respondent's conduct that the parties agree is "sufficient to prove Counts 3 and 10 of the indictment beyond a reasonable doubt."

The record here demonstrates that the $345,100.14 restitution amount is the amount that the sentencing judge ordered the respondent to pay the victim, and that is the associated loss amount tethered to her convicted conduct. Thus, the Immigration Judge properly determined that the respondent was convicted of an aggravated felony under section 101(a)(43)(M)(i) of the INA, 8 U.S.C. § 1101(a)(43)(M)(i), and is removable under that charge.

B. Aggravated Felons are "Permanently Ineligible to Citizenship"

The respondent's aggravated felony convictions render her not only removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), but also unable to fulfill the requirements for naturalization. Section 316(a) of the INA, 8 U.S.C. § 1427(a) (2024), explicitly states that "[n]o person, except as otherwise provided in this title, shall be naturalized, unless such applicant . . . (3) during all the periods referred to in this subsection has been and still is a person of good moral character." Section 101(f)(8) of the INA, 8 U.S.C. § 1101(f)(8) (2024), in turn, precludes a finding of good moral character for "one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43))." *See Sebastian-Soler v. U.S. Att'y Gen.*, 409 F.3d 1280, 1287 n.14 (11th Cir. 2005) (per curiam) (explaining that the alien is "now statutorily ineligible for citizenship by virtue of his having committed aggravated felonies").

The question we must answer here is whether the respondent's inability to satisfy the naturalization requirements also means that she is "permanently ineligible to citizenship" under sections 101(a)(19) and 212(a)(8)(A) of the INA, 8 U.S.C. §§ 1101(a)(19), 1182(a)(8)(A) (2024), and is therefore inadmissible and ineligible to adjust her status.

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[3] The respondent was not convicted on Count One of the indictment. The respondent pled guilty to, and was convicted on, Counts 3 and 10 of the indictment.

In addressing this issue, the Board must begin with the plain language of the INA. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute."). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Matter of C-T-L-*, 25 I&N Dec. 341, 345 (BIA 2010) (explaining that the Board does not "view the language of statutory provisions in isolation but instead [is] charged with reading the words 'in their context and with a view to their place in the overall statutory scheme'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Further, "[w]hen the words of a statute are unambiguous," then a court is precluded from referring to the statute's legislative history to support a contrary construction of the law. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

Section 212(a)(8) of the INA, 8 U.S.C. § 1182(a)(8), explicitly identifies aliens who are "[i]neligible for citizenship" as among those who are inadmissible. It provides in full:

> (8) Ineligible for Citizenship
>
> (A) In General
>
> Any immigrant who is permanently ineligible to citizenship is inadmissible.
>
> (B) Draft Evaders
>
> Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

Section 212(a)(8) of the INA, 8 U.S.C. § 1182(a)(8), was enacted in 1990 with the passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("IMMACT 90"). Prior to IMMACT 90, the INA identified 33 classes of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States," and included as a class:

> Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens

> who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants.

INA § 212(a)(22), 8 U.S.C. § 1182(a)(22) (1952). Thus, the 1990 recodification of former section 212(a)(22) into section 212(a)(8) of the INA, 8 U.S.C. § 1182(a)(8), created two subsections, added the word "permanently" before "ineligible to citizenship," and removed from subsection (A) the exception for aliens seeking to enter as nonimmigrants.

Under a plain language reading of section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A), immigrants who are permanently ineligible to citizenship are inadmissible, and nothing in the text of the provision limits its scope to only immigrants who are ineligible to citizenship due to their evasion of military service. Instead, the statute clearly demarcates two separate categories of aliens who are inadmissible—immigrants who are permanently ineligible to citizenship, and "[a]ny person" who left or remained outside of the United States to evade military service, except for those who departed and seek to reenter as nonimmigrants.

The INA defines the phrase "ineligible to citizenship" as follows:

> The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) [50 U.S.C. App. 454], *or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substation for, any of such sections or Acts*.

INA § 101(a)(19), 8 U.S.C. § 1101(a)(19) (emphasis added). With the exception of a minor technical revision, the terms of this statute have remained the same since the provision was first enacted in 1952, as we observed in *Matter of Kanga*, 22 I&N Dec. 1206, 1211 (BIA 2000). "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). The plain language of the catchall phrase at the end of section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19), is forward-looking and makes clear that persons debarred from citizenship in other sections of the INA are likewise ineligible to citizenship.

Section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19), employs the term "permanently debarred from becoming a citizen" while section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A), uses the term "permanently ineligible to citizenship." We have not found any legal authority that indicates these terms are intended to be interpreted differently from each other, and we therefore consider them *in pari materia*, construing them in like manner with reference to each other. *See Matter of D-E-*, 6 I&N Dec. 698, 701 (BIA 1955) (construing the phrases "permanently debarred from becoming a citizen" in section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19) (1952), and "permanently ineligible to become a citizen" in section 314 of the INA, 8 U.S.C. § 1425 (1952), *in pari materia*).

Thus, under a plain language analysis of sections 101(a)(19), 212(a)(8)(A), and 316(a) of the INA, 8 U.S.C. §§ 1101(a)(19), 1182(a)(8)(A), 1427(a), the respondent's aggravated felony conviction renders her ineligible to naturalize under section 316(a) of the INA, 8 U.S.C. § 1427(a), and therefore "permanently debarred" from citizenship and "ineligible to citizenship" as defined in section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19). She is thus inadmissible under section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A). In short, an alien who has been convicted of an aggravated felony is inadmissible under section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A), as an alien who is ineligible to citizenship.

C. Overruling *Matter of Kanga*

Our decision today overturns *Matter of Kanga*, 22 I&N Dec. at 1206, and declines to follow *Matter of Martin-Arencibia*, 13 I&N Dec. 166 (R.C. 1969). The Board previously held in *Matter of Kanga*, 22 I&N Dec. at 1212–15, that the phrase "ineligible to citizenship" in section 212(a)(8) of the INA, 8 U.S.C. § 1182(a)(8), is limited to only those individuals who are ineligible to citizenship due to their evasion of military service. The Board relied on the "legislative and interpretative underpinnings" of sections 101(a)(19), 212(a)(8), 314, and 315, 8 U.S.C. §§ 1101(a)(19), 1182(a)(8), 1425, 1426 (2000), to hold "that, within the meaning of the [INA], the phrase 'ineligible to citizenship' refers to military service evasion." *Id.* at 1212. The Board determined that to rule otherwise would render other statutory provisions superfluous and would undermine the Board's earlier precedential decisions holding that aliens charged with aggravated felonies that also render them inadmissible may apply for waivers of inadmissibility under former section 212(c) of the INA, 8 U.S.C. § 1182(c) (repealed), and section 212(h) of the INA, 8 U.S.C. § 1182(h) (2000). *Id.* at 1212–13.

However, the Board erred in *Matter of Kanga* by failing to apply a plain language analysis to sections 101(a)(19) and 212(a)(8) of the INA, 8 U.S.C. §§ 1101(a)(19), 1182(a)(8). Nothing in the text of section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A), suggests, much less states, that its coverage is limited to aliens who have evaded military service and therefore are ineligible to naturalize pursuant to sections 314 and 315 of the INA, 8 U.S.C. §§ 1425, 1426. Similarly, sections 314 and 315 of the INA, 8 U.S.C. §§ 1425, 1426, do not explicitly state or imply that permanent ineligibility to citizenship arises only under those draft evasion provisions. To read either of those sections as being the exclusive source for permanent ineligibility to citizenship within the INA would require importing a restriction that Congress simply did not write into the INA.

Further, the statutory text of section 212(a)(8)(B) of the INA, 8 U.S.C. § 1182(a)(8)(B), specifically identifies as inadmissible those aliens who have departed from or remained outside the United States to "avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency." There would be no reason for Congress to specifically identify individuals evading military service as inadmissible under that provision if subsection (A) of that statute applied only to military service evaders as the Board held in *Matter of Kanga*, 22 I&N Dec. at 1212.

Moreover, the Board's analysis in *Matter of Kanga*, 22 I&N Dec. at 1212–15, did not address the catchall phrase at the conclusion of section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19). Congress explicitly defined "ineligible to citizenship" at section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19), to include not only individuals who evade military service but also aliens debarred from citizenship under "any" section of the INA or any other Act.

The Board's decision in *Matter of Kanga*, 22 I&N Dec. at 1212–15, improperly strays from this plain language when reasoning that the "legislative history pertaining to the [1952] enactment of section 101(a)(19) and [Board] case law interpreting this provision make clear that its applicability is limited to the military service arena." 22 I&N Dec. at 1211. When the words of a statute are unambiguous, a court is precluded from referring to the statute's legislative history to support a contrary construction of the law. *Connecticut Nat. Bank*, 503 U.S. at 254.

The Board in *Matter of Kanga* similarly strayed from a plain language analysis when it cited concerns that holding that aliens with aggravated felony convictions are ineligible to citizenship and therefore inadmissible under section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A), would render superfluous other provisions of the INA, including sections 212(a)(9)(A)(i) and (ii), 8 U.S.C. § 1182(a)(9)(A)(i), (ii) (2000), and would also undermine prior decisions of the Board interpreting the applicability of certain waivers of inadmissibility. 22 I&N Dec. at 1212–13. Given that the provisions of sections 101(a)(19) and 212(a)(8)(A) of the INA, 8 U.S.C. §§ 1101(a)(19), 1182(a)(8)(A), were in effect decades before the aggravated felony provisions of the INA were enacted in 1990, Congress may not have considered the full degree of interplay between the different provisions. This is not a reason, however, to ignore the plain language of the INA and read a limitation into sections 101(a)(19) and 212(a)(8)(A) of the INA, 8 U.S.C. §§ 1101(a)(19), 1182(a)(8)(A), that is not in the statutory text. *See Barton v. Barr*, 590 U.S. 222, 239 (2020) (noting that "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication," and that"[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text").

The Board in *Matter of Kanga* also reasoned that if Congress had intended aggravated felons to be inadmissible, it would simply have added an aggravated felony conviction to the list of categories of inadmissibility at section 212(a) of the INA, 8 U.S.C. § 1182(a), "particularly in the context of the amendments made to the Act in 1996, which included significant changes, both to the definition of an aggravated felony and to the immigration consequences of having been convicted of such an offense." *Matter of Kanga*, 22 I&N Dec. at 1213. This reasoning, however, is based on speculation and not consistent with the plain language of the INA. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Further, because Congress defined the term "ineligible to citizenship" in 1952 in a forward-looking manner to include aliens "permanently debarred from" citizenship under any section of the INA or other Act, there was no reason for Congress to add, by way of the 1996 amendments to the INA, an aggravated felony conviction to the list of categories of inadmissibility at section 212(a) of the INA, 8 U.S.C. § 1182(a). Once Congress rendered (by way of the 1990 enactments to the INA) an aggravated felon unable to meet the requirements for citizenship under section 316 of the INA, 8 U.S.C. § 1427, that same aggravated felon was rendered ineligible to citizenship under section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19), and inadmissible under section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A). *See Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 109 (2014) (recognizing that subsequent legislative events are particularly ill-suited to determine prior intent where the subsequent actions do not alter the already-enacted statutory provision or otherwise "shed light on what . . . Congress intended" in its original enactment); *see also Matter of Campos-Torres*, 22 I&N Dec. 1289, 1293 (BIA 2000) ("Our task is not to improve on the statute or to question the wisdom of it, but rather to interpret the language that was enacted as law.").

The Board in *Matter of Kanga*, 22 I&N Dec. at 1214, also cited to "[r]elevant case law [that] has consistently discussed section 101(a)(19) of the Act with respect to military service and with reference to sections 314 and 315 of the Act." However, with the exception of *Matter of Martin-Arencibia*, 13 I&N Dec. at 166, which is discussed below, the cited decisions do not advance the holding in *Matter of Kanga* because they only addressed aliens who had evaded military service. Nothing in those decisions, which precede by decades the enactment of the aggravated felony provisions of the INA, discusses whether an alien convicted of an aggravated felony is ineligible to citizenship and therefore also inadmissible under section 212(a)(8)(A) of the INA, 8 U.S.C. § 1182(a)(8)(A).

We recognize that before *Matter of Kanga*, an Immigration and Naturalization Service regional commissioner issued *Matter of Martin-Arencibia*, 13 I&N Dec. at 166, holding that the alien's conviction for murder, although it rendered him unable to establish good moral character under section 101(f)(8) of the INA, 8 U.S.C. § 1101(f)(8), and therefore also ineligible to naturalize under section 316 of the INA, 8 U.S.C. § 1427, did not render him "ineligible to citizenship" under section 101(a)(19) of the INA, 8 U.S.C. § 1101(a)(19), or excludable under former section 212(a)(22) of the INA, 8 U.S.C. § 1182(a)(22). The regional commissioner held that the definition of "ineligible to citizenship" is unambiguous but also found support for his position in the legislative history to the 1952 enactment which stated that the term "ineligible to citizenship" is "confined in its reference to such aliens as draft evaders, avoiders, or deserters." *Id*. at 167. However, the reasoning in *Matter of Martin-Arencibia*, 13 I&N Dec. at 167, like that in *Matter of Kanga*, 22 I&N Dec. at 1212–15, was legally erroneous because it did not apply the plain language canon of statutory construction. Thus, in this decision, the Board expressly departs from the reasoning and holding of both decisions.

D. Retroactivity

As we are explicitly overruling Board precedent in *Matter of Kanga*, a retroactivity analysis applies. *See Matter of Cordero-Garcia*, 27 I&N Dec. 652, 656 (BIA 2019) (discussing when a Board decision constitutes a change in law). The test for retroactivity requires the Board to consider the following factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 658 (citation omitted). Although the issue presented here is not one of first impression, this decision is explicitly overruling long-standing Board precedent to the contrary, and therefore the first three factors in the test articulated above support applying the holding here prospectively.

Further, as the Board's holding here is a significant change with respect to the long-standing rule as to whether aggravated felons may be admissible (assuming eligibility for any relevant waivers) and therefore eligible for adjustment of status, we recognize that this change would impose a burden on not only the respondent and her expectations during the course of these removal proceedings regarding her eligibility for relief from removal, but may also lead to reopening proceedings in which aggravated felons were granted waivers of inadmissibility and adjustment of status. As to the fifth factor in the test above, we hold that the Board's interest in applying the new rule articulated is not strong enough to outweigh the past expectations on the prior rule, particularly as it was articulated in Board precedent, which warrants applying this decision only prospectively. Thus, this decision will apply only to aliens seeking admission as immigrants who incur an aggravated felony conviction based upon a plea of guilty or nolo contendere made, or a jury verdict entered, after the date of this decision.

E. Applications for Relief and Protection from Removal

As we are overruling *Matter of Kanga* but applying our decision prospectively only, we must address the Immigration Judge's denial of the respondent's applications for a section 212(h) waiver, adjustment of status, and CAT deferral of removal. We affirm the Immigration Judge's holding that the respondent did not establish that the denial of admission would cause extreme hardship to a qualifying relative, namely her United States citizen husband or son, as required for a section 212(h) waiver of inadmissibility in conjunction with her application to adjust status under section 245(a) of the

INA, 8 U.S.C. § 1255(a) (2024).[4] The respondent does not challenge this holding with respect to her husband; therefore, that aspect of her claim is waived. *See Matter of Voss*, 28 I&N Dec. 107, 108 n.2 (BIA 2020) (an issue addressed in an Immigration Judge's decision is waived when a party does not challenge it on appeal).

The respondent contends that the Immigration Judge erred in holding that she did not establish that the denial of admission will cause extreme hardship to her United States citizen son. She argues that the Immigration Judge did not sufficiently consider the impacts to the respondent's son if she is separated from him or if the son moves with her to Nicaragua. On the contrary, the Immigration Judge's decision makes fulsome findings of fact as to the impact to the respondent's son under both scenarios. No clear error exists in the Immigration Judge's findings, including the findings that the respondent and her husband gave her sister custody of their son, and that her sister is caring for their son, including ensuring that he is seen by a doctor for his well-child visits. Thus, we affirm the Immigration Judge's holding that the respondent did not demonstrate that denial of her admission would cause her son extreme hardship.

We also affirm the Immigration Judge's alternative holding denying the respondent's application for a section 212(h) waiver in the exercise of discretion. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (listing negative and positive factors relevant to evaluating a section 212(h) waiver in the exercise of discretion). The Immigration Judge properly considered the relevant factors, including "the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country," as well as "favorable considerations" such as "family ties in the United States, residence of long duration in this country (particularly where the alien began his [or her] residency at a young age)," and "evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives)." *Id.*; *see also Matter of Y-S-P-T-*, 29 I&N Dec. 776, 778–79 (BIA 2026) (denying a section 212(h) waiver in the exercise of discretion).

No clear error exists in the Immigration Judge's findings that the respondent is a long-time resident of the United States, has suffered serious hardships including the murder of her mother when she was 4 years old,

[4] The respondent does not dispute that her convictions for use of unauthorized access device and aggravated identity theft are for crimes involving moral turpitude that render her inadmissible. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2024).

graduated from high school, and has a United States citizen son. We also discern no clear error in the Immigration Judge's findings that the respondent has a lengthy, extensive, and serious criminal record, including arrests for shoplifting and credit card fraud and the federal convictions for use of unauthorized access device and aggravated identity theft.

The Immigration Judge correctly found the respondent had engaged in the criminal conduct when she was an adult, and, rather than demonstrating evidence of having learned from her earlier mistakes, her criminal behavior escalated in its seriousness over time. The respondent also admitted that she knew she was engaging in criminal behavior. Under our de novo review, we conclude that the negative factors outweigh the positive factors and support the denial of a section 212(h) waiver in the exercise of discretion. In the absence of a section 212(h) waiver, the respondent remains inadmissible, and the Immigration Judge therefore correctly denied her application for adjustment of status under section 245(a) of the INA, 8 U.S.C. § 1255(a).

We also affirm the Immigration Judge's denial of the respondent's application for CAT deferral of removal as the respondent has not met her burden of proving that she is more likely than not to be tortured upon return to Nicaragua. 8 C.F.R. §§ 1208.17 (2026), 1208.18(a)(1) (2020). On appeal, the respondent argues that her "anti-government beliefs" will place her in danger upon return to Nicaragua. The Immigration Judge correctly found insufficient evidence that anyone in Nicaragua is interested in the respondent's political opinions or would likely torture her upon return. *See Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (holding that "an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review"). The respondent's citation to the general country conditions evidence in the record is not sufficiently particularized to her to meet her burden of proof. 8 C.F.R. § 1208.18(a)(1) (torture must be "intentionally inflicted" on a person to qualify for CAT protection).

Lastly, the respondent contends that her due process rights were violated because the Immigration Judge questioned the credibility of her claims of abuse by her family members given that she filed a motion to reopen these proceedings, which was supported by affidavits from the same family members attesting that the respondent was part of a loving, kind, and supportive family. According to the respondent, the Immigration Judge's discussion of the evidence reflects an "inherent personal bias and complete lack of knowledge or understanding of childhood and sexual abuse" and establishes that she was not given a full and fair hearing in accordance with her due process rights.

The respondent's argument is unavailing. The Immigration Judge properly reviewed the record in full and raised questions and concerns with evidence and testimony that contradicted other evidence in the record. The fact that the Immigration Judge raised questions and concerns with the credibility of some of the testimony and evidence, as well as the respondent's legal tactics in moving to reopen these proceedings, does not establish improper bias on the part of the Immigration Judge. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."); *see also Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (stating that "an applicant is not denied a fair hearing merely because the immigration judge has a point of view about a question of law or policy"). Further, the Immigration Judge provided the respondent an opportunity to present her testimony and that of her witnesses in full, and the Immigration Judge reviewed all of the record evidence presented in adjudicating the respondent's claims for relief and protection. We conclude that the respondent received a full and fair hearing.

III. Conclusion

The respondent's convictions for use of unauthorized access device in violation of 18 U.S.C. § 1029(a)(2) and aggravated identity theft in violation of 18 U.S.C. 1028A(a)(1) are aggravated felonies as defined in section 101(a)(43)(M) of the INA, 8 U.S.C. § 1101(a)(43)(M), and thus render her removable as charged under section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii). We affirm the Immigration Judge's determinations that the respondent is inadmissible and did not establish her eligibility for a section 212(h) waiver, adjustment of status, or CAT protection. *Matter of Kanga*, 22 I&N Dec. at 1206, is overturned prospectively, and the Board declines to follow *Matter of Martin-Arencibia*, 13 I&N Dec. at 166.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

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 DHS, 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 $998 for each day the respondent is in violation. *See* section 274D of the INA, 8 U.S.C. § 1324d (2024); 8 C.F.R. § 280.53(b)(14) (2026).

Further, any respondent that has been denied admission to, removed from, or has departed the United States while an order of exclusion, deportation, or removal is outstanding and thereafter enters, attempts to enter, or is at any time found in the United States shall be fined or imprisoned not more than 2 years, or both. *See* INA § 276(a), 8 U.S.C. § 1326(a) (2024).