

Falls Church, Virginia 22041

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File: A97 890 810 - San Francisco, CA

Date: MAY 22 2008

In re: DMYTRO LUKYANENKO a.k.a. Dmytro O. Lukyanenko

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Barbara Sehnal Soukup, Esquire

APPLICATION: Redetermination of custody status

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated March 4, 2008. On March 21, 2008, the Immigration Judge issued a bond memorandum setting forth the reasons for his March 4, 2008, decision. The Immigration Judge found that he lacked jurisdiction to redetermine the conditions of the respondent's custody status, inasmuch as the respondent falls within the classes of aliens subject to section 236(c)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1). *See* 8 C.F.R. § 1003.19(h)(2)(i)(D). On appeal, the respondent argues that his conviction does not categorically constitute an aggravated felony, as defined in section 101(a)(43)(A) of the Act (sexual abuse of a minor). We agree. The record reflects that the respondent was convicted for the offense of Unlawful Sexual Intercourse with a Minor in violation of section 261.5(b) of the California Penal Code. The statute provides that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor." Inasmuch as a violation of California Penal Code section 261.5(b) can be committed where the minor is within three years of the age of the perpetrator and the perpetrator is younger than the victim, we agree with the respondent that his crime is not categorically sexual abuse of a minor. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995 (BIA 1999). Consequently, we find that the respondent is not properly included in the category of aliens subject to mandatory detention for bond purposes. *See* 8 C.F.R. § 1003.19(h)(2)(ii).

Inasmuch as the respondent is not subject to mandatory detention under section 236(c)(1) of the Act, we find it appropriate to remand the record to the Immigration Judge to determine whether the respondent is a danger to the community or a risk of flight pursuant to section 236(a) of the Act. Accordingly, the respondent's appeal is sustained and the record is remanded to the Immigration Judge for further proceedings.

  
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FOR THE BOARD