[redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION COURT
[redacted]

In the Matter of:	)	
[redacted]	)	**In Removal Proceedings**
A# [redacted]	)	
Respondent	)	**Honorable Immigration** [redacted]

RESPONDENT'S BRIEF ON ELIGIBITY FOR A 212(C) WAIVER AND IN SUPPORT OF A GRANT OF 212(C) RELIEF

Attachments:

1. *In re* [redacted], [redacted] (BIA June 10, 2014)
2. Decision of Immigration Judge Terry A. Bain
3. *In re* [redacted], [redacted] (BIA June 11, 2012)
4. Affidavit of [redacted], Respondent girlfriend
5. Affidavit of [redacted], Respondent's sister

RESPONDENT'S BRIEF ON ELIGIBITY FOR A 212(C) WAIVER AND IN SUPPORT OF A GRANT OF 212(C) RELIEF

The Respondent, [redacted], through undersigned counsel, asserts that he is eligible to seek a stand alone 212(c) waiver in removal proceedings. He is statutorily eligible to seek this waiver in spite of his post-1996 convictions. If his application for a 212(c) waiver is granted, he will no longer be removable. His post-1996 convictions, on their own, cannot support the charge of removability, because they do not amount to two CIMTs. The Immigration Judge should allow [redacted] to proceed on his application for a 212(c) waiver, and should grant the waiver in the exercise of discretion. [redacted] has a United States citizen girlfriend and two infant children who depend on him for support. He has also shown significant rehabilitation in the last twenty years.

A. [redacted] is eligible for a stand alone 212(c) waiver even though he is in removal proceedings.

At his last master calendar hearing, The Department asserted that [redacted] may not be eligible for a 212(c) waiver because he is in removal proceedings, not exclusion proceedings. The Board of Immigration Appeals recently issued a precedential decision clarifying that individuals like [redacted] are eligible for 212(c). In *Matter of Abdelghany*, 26 I. & N. Dec. 254 (BIA 2014) the Board said,

> it is our judgment that a lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable by virtue of a plea or conviction entered before April 24, 1996, is eligible to apply for section 212(c) relief in removal or deportation proceedings unless:
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> (1) The applicant is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act; or
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> (2) The applicant has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996.

Id. at 272.

[redacted] entered the United States as a lawful permanent resident in 1989 and has never left since that time. *See* Respondent's Notice to Appear. Therefore, he has accrued seven consecutive years of lawful unrelinquished domicile. *See Jaramillo v. INS*, 1 F. 3d 1149 (11th Cir. 1993). He is being charged with removability based on two pleas entered prior to [redacted] 1996. *See* Respondent's Notice to Appear. He is not subject to any of the grounds of inadmissibility relating to terrorism or national security, and he has not served an aggregate prison term of 5 years or more. *Id*. Therefore, [redacted] is eligible for 212(c) relief in these removal proceedings.

B. [redacted] is eligible for a 212(c) waiver even though he has convictions that post-date the repeal of section 212(c).

At his last master hearing, The Department also asserted that [redacted] was not eligible for 212(c) relief because he has convictions that were entered after section 212(c) was repealed. These convictions have no bearing on [redacted]'s eligibility for a 212(c) waiver. *See In re* [redacted], [redacted] (BIA June 10, 2014), Attached at Tab 1. As noted above, [redacted] is statutorily eligible for 212(c) relief as to his pre-1996 convictions. *See Matter of Abdelghany*, 26 I. & N. at 272; *In re Romero* at Pg. 4. The fact that he also has convictions after the repeal of 212(c) does not change that analysis. *See Matter of Abdelghany*, 26 I. & N. at 272; *In Re Romero* at Pg. 5 ("the Attorney General has authority under former section 212(c) to waive the execution of any removability determination…that depends, in whole or in part, on a conviction that resulted from a plea agreement made before April 1, 1997.")

In *Romero*, the respondent (a lawful permanent resident), was convicted of aggravated felonies in 1989 and 1996. *Id*. at Pg. 1. Then, in 2005, she was convicted of shoplifting and later

placed into removal proceedings. *Id*. at Pg. 2. Because of their decision in *Matter of Abdelghany*, the Board determined that Ms. Romero was statutorily eligible for a 212(c) waiver. *See In Re Romero* at Pg. 4. They declined to decide whether her 2005 shoplifting conviction was a CIMT, but concluded that even if it was, "A grant of 212(c) relief for the [pre-1996] convictions would effectively undermine the respondent's charge of removability for having been convicted of two crimes involving moral turpitude." *Id*. at Pg. 4. In other words, if the IJ decided to grant relief for the pre-1996 convictions, the remaining shoplifting conviction, standing alone, could not support the charge of removability. *Id.*

[redacted]'s situation is nearly identical. The Department has charged him with removability under INA Sections 237(a)(2)(A)(ii) and 237(a)(2)(A)(i)[1]. *See* Respondent's Notice to Appear. In support of those charges, DHS has alleged that [redacted] was convicted of menacing in 2005, attempted robbery in 1994, and sexual misconduct in 1993. *Id*. [redacted]'s removability depends on convictions entered prior to section 212(c) being repealed. *See In Re Romero* at Pg. 4. If the Court were to grant his 212(c) waiver, his 2005 menacing conviction, on its own, could not support either charge of removability. *See Id*. At most, that conviction would be just one CIMT and it occurred more than five years after [redacted] was lawfully admitted into the United States.

The Board's reasoning in *In re Romero* is consistent with what it said in *Matter of Abdelghany;* that "section 212(c) relief is unavailable to any individual in post-IIRIRA removal proceedings who is *removable* by virtue of pleas or convictions entered on or after April 1, 1997." *See* 26 I. & N. at 261 (emphasis added). Because [redacted] is not removable solely for

[1] The Department also charged the Respondent with removability under INA 237(a)(2)(A)(iii), however the Immigration Judge declined to sustain that charge, finding that the Department's evidence was not sufficient to support it.

convictions entered on or after [redacted] 1997, he is eligible for 212(c) relief and this court should hear the merits of his application.

C. [redacted]'s conviction for menacing is not a CIMT.

It is the Department's burden to prove the charges of removability by clear and convincing evidence. [redacted] maintains that his conviction for menacing is categorically not a CIMT and that, even if the court finds it is divisible, the Department has not proven that [redacted] was convicted of a CIMT.

[redacted] pled guilty to N.Y.P.L. 120.14(1), menacing in the second degree. It is defined as:

> He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm;

To determine if a statute constitutes a CIMT, the court must first, "employ the categorical approach, which requires [focusing] on the minimum conduct that has a realistic probability of being prosecuted under" the statute. *See Matter of Chairez-Castrejon*, 26 I&N Dec. at 349, 351 (BIA 2014) (internal quotations omitted); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013). If the minimum conduct does not necessarily constitute a CIMT, then the statute is overbroad, and categorically not a CIMT. *See Descamps v. U.S.*, 133 S.Ct. 2276, 2279 (2013). The statute at issue here contains one indivisible set of elements, of which the minimum conduct does not constitute a CIMT; therefore, the statute is categorically not a CIMT.

The minimum conduct necessary to be convicted under N.Y.P.L. 120.14(1) requires an individual to attempt to place another person in fear of physical injury by displaying a dangerous instrument. This conduct is akin to simple assault, which the Board has found does not constitute a CIMT. *See In re Solon*, 24 I. & N. Dec. 239, 241 (BIA 2007) ("Offenses characterized as simple assaults are generally not considered to be crimes involving moral turpitude.") In *Solon*,

the Board explained that, to determine whether an assault statute constitutes a CIMT, the court should look to the level of intent required as well as the resulting level of harm, although neither, alone, "is determinative of moral turpitude." *In re Solon*, 24 I. & N. Dec 236 at 241. For example, the Board stated, a conviction that contains an element of intent will not be a CIMT if the statute only requires minimal touching, without evidence of actual injury for a conviction. *In re Solon*, 24 I. & N. Dec 236 at 241-242. Here, N.Y. P.L. 120.14(1) does not contain any element of touching, or even attempted touching, and it does not contain any requirement of harm. Therefore, no matter what level of intent is required, the court should find that it is categorically not a CIMT. *See In re Sejas*, 24 I. & N. Dec. 236, 238 (BIA 2007) (finding that Virginia assault and battery against a household member is not a CIMT because it does not require the infliction of physical injury, the injury may be just to the feelings or the mind.)

The Board alluded to this in a footnote in *Solon* itself. *See* 24 I. & N. Dec. 239 at 246 (footnote 5.) The Board stated that N.Y.P.L. Section 120.15, "prohibits some of the lesser conduct traditionally encompassed within common-law assault." The conduct in N.Y.P.L. 120.15 is similar to that in N.Y.P.L. 120.14(1), of which [redacted] was convicted. Section 120.15 provides that, "A person is guilty of menacing in the third degree when, by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury."

The added element of the "dangerous instrument" does not change the conclusion that the statute is not a CIMT. The statute does not require the use or attempted use of that instrument and there is still no requirement of any resulting harm. *See In re Fualaau,* 21 I. &N. Dec. 475, 477 (BIA 1996) ("The statute governing the conviction identified misconduct which simply caused bodily injury, rather than serious bodily injury" therefore it was not a CIMT.) Assault can

only rise to the level of moral turpitude if aggravating factors are present that "significantly increase their culpability." *See Matter of Sanudo,* 23 I. & N. Dec. 968, 971 (BIA 2006); *Matter of Ahortalejo-Guzman*, 25 I. & N. Dec. 465, 465 (BIA 2011). For example, assault and battery with a deadly weapon has been deemed a CIMT, "because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the simple assault and battery category." *Matter of Sanudo,* 23 I. & N. Dec. 968 at 971.

But here, at a minimum, the added element is merely the displaying of a dangerous instrument, without any allegation of use or attempted use of the instrument, and without any allegation of resulting harm. Furthermore, the dangerous instrument does not even have to be one which, if used, could cause harm. *See People v. Brown*, 179 Misc.2d 218, 220 (1998) ("this court similarly finds that the use of a laser beam as alleged in the accusatory instrument could, if proven, constitute the crime of menacing.) Thus, there is a reasonable probability that the minimum conduct was displaying a laser beam with the intent to place another in fear of physical injury. Without an aggravating factor that significantly increases the level of moral depravity beyond that of simple assault, the court should find that N.Y.P.L. 120.14(1) is categorically not a CIMT.

D. [redacted]'s conviction for theft of services is not a CIMT.

In 2009, [redacted] pled guilty to violating N.Y.P.L. 165.15(3). The Department has not alleged that this conviction is a CIMT. However, even if DHS were to amend [redacted]'s NTA, he asserts that this conviction is not a CIMT. N.Y.P.L. 165.15(3) states that

> A person is guilty of theft of services when
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> … 3. With intent to obtain railroad, subway, bus, air, taxi or any other public transportation service without payment of the lawful charge therefor, or to avoid payment of the lawful charge for such transportation service which has been rendered to him, he obtains or

> attempts to obtain such service or avoids or attempts to avoid payment therefor by force, intimidation, stealth, deception or mechanical tampering, or by unjustifiable failure or refusal to pay;

This statute is categorically not a CIMT because, at a minimum, it involves the temporary use of a service that is already running. It does not involve permanently taking- or depriving someone of- their property, nor does it involve inducing someone to perform a service. *See Wala v. Mukasey*, 511 F.3d 102, 106 (2nd Cir. 2007), *citing Matter of Grazley*, 14 I. & N. Dec. 330, 333 (B.I.A.1973) ("ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); s*ee also Decision of Immigration Judge Terry Bain*, attached at Tab 2 (finding that theft of services is not larceny because it is not akin to theft of property.); *In re Hebbar*, 2012 WL 2835238 (BIA 2012), attached at Tab 3 (finding that theft of services is not a generic theft offense).

The Board has held that a prior version of the New York fare evasion statute is not a CIMT. *Matter of G--*, 2 I. & N. Dec. 235 (BIA 1945). In that case, the respondent was convicted of dropping a metal coin, instead of a lawful, monetary coin into a coin slot to ride the subway. *Id.* at 236. The Board found that the statute did not contain a sufficient level of intent to constitute moral turpitude. *Id.* Similarly, the statute at issue here contains only an intent to obtain transportation services. *See* N.Y.P.L. 165.15(3). It does not require an intent to permanently deprive an owner of property. *See Decision of Immigration Judge Terry Bain*; N.Y.P.L. 155.00(2) (defining intent to obtain.) Because N.Y.P.L. 165.15 does not contain an intent to permanently deprive an owner of property, it does not rise to the level of moral turpitude.

The Respondent acknowledges that the Second Circuit has previously found theft of services to fit within the definition of a theft offense. *See Abimbola v. Ashcroft*, 378 F.3d 173, 177 (2nd Cir. 2004). However, *Abimbola* addressed only whether theft of services fit within the

aggravated felony theft offense definition; it did not address whether theft of services was a CIMT. *See Id.* Additionally, the Connecticut statute at issue in that case expressly said that in order to be convicted, a person must have had the intent to deprive another of property or appropriate it to himself or a third person. *Id*. at 179. The New York statute at issue does not require that the person have an intent to deprive, but merely an intent to obtain a service. The Board has stated that this does not rise to the level of moral turpitude. *See Wala v. Mukasey,* 511 F.3d at 106; *Matter of Grazley*, 14 I. & N. Dec. at 333; *In re R-*, 2 I. & N. Dec. 819, 828 (B.I.A.1947). Therefore, the court should find that the Respondent's conviction for theft of services is not a CIMT.

E. [redacted] merits a favorable grant of 212(c) relief.

[redacted] has been a lawful permanent resident of the United States for 25 years. *See Notice to Appear*. Since coming to the United States around the age of 20, he has never left. [redacted] has no connection to Jamaica and no family left there for support or to help get him on his feet. *See Affidavit of* [redacted], attached at Tab 5, at ¶ 10.

[redacted]'s family would suffer significant hardship if he were deported. [redacted] has a steady U.S. citizen girlfriend, [redacted], with whom he has two U.S. citizen sons in common, [redacted] and [redacted]. *See Affidavit of* [redacted], attached at Tab 4, at ¶ 4, 9. [redacted] also helps [redacted] raise her daughter, [redacted], as his own. *Id.* at ¶ 14. ICE arrested [redacted] just five days before the birth of his second son, leaving [redacted] alone to care for two children, while nine months pregnant. *Id.* at ¶ 9-10. [redacted] has yet to meet his son, [redacted]. *Id.* at ¶ 10.

[redacted]'s arrest has already been devastating to his 14-month-old son, [redacted]. *See Id.* According to [redacted], [redacted] will bang on their bathroom door screaming "da da", hoping

that his father will come out. *Id.* at ¶ 15. He'll also point out the window, or point at other men, hoping that it is his father returning home. *Id.* If [redacted] is deported, "they will just become another statistic. Another kid growing up without a father." *See Affidavit of* [redacted] at ¶ 8. Because they have no money for airplane tickets or even long distance phone calls, [redacted]'s children will have no relationship with their father if he is deported to Jamaica. *See Id.*

[redacted]'s arrest by ICE has also been devastating for [redacted]. *See Affidavit of* [redacted]. She and [redacted] had recently lost their apartment and moved into a homeless shelter. *Id.* at ¶ 5-6. She is now juggling raising three young children, alone, without any income, and in a shelter that does not even allow her to cook food for her family. *See Id.* at ¶ 13, 17. [redacted] provided emotional and financial support, and a necessary extra set of hands to help with their very young children. *See Id.* [redacted] had steady employment, and the couple was saving money to move out of the shelter and into their own apartment. *Id.* at ¶ 12. If [redacted] is deported, it is likely that [redacted] and the children will remain in the shelter system for many years. *See Id.*

[redacted] acknowledges that he has a significant criminal history, however he has demonstrated substantial rehabilitation. It has been more than 20 years since [redacted] was convicted of a crime for which he had to serve any jail time. It has been nearly ten years since he was arrested for anything arguably violent, and nearly five years since he was last arrested at all. In the last five years, [redacted] has dedicated himself to working and taking care of his family. "[redacted] is not a violent person, not someone who goes looking for trouble…he's been doing so well for so long…" *Affidavit of* [redacted] at ¶ 9. For all these reasons, [redacted] merits a favorable exercise of discretion on his application for a 212(c) waiver.

For the above-stated reasons, the court should find that [redacted] is eligible for a 212(c) waiver. Further, the court should find that, if the waiver is granted, [redacted] would no longer be removable. Finally, the court should hear the merits of [redacted]'s 212(c) application, exercise discretion favorably, and allow [redacted] to return to caring for his infant, United States citizen children.

Respectfully submitted this [redacted] 2014.

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[redacted]

Certificate of Service

I, [redacted] hereby certify that a copy of the attached document was delivered in person to ICE Litigation at [redacted] on the date indicated below.

Signature _____ Date _____