IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on May 10, 2007. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn

[ ] Withholding of removal was ( )granted ( ) denied ( ) withdrawn

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under Section 240A(a) was ( )granted ( )denied ( )withdrawn

Respondent's application for:

[ ] Cancellation under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn, If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) witholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[X] Proceedings were terminated.

[ ] Other: _____.

Date: May 10, 2007

EUGENE PUGLIESE
Immigration Judge

Appeal: Waived ~~Reserved~~ Appeal Due By:

LME

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6) Date:

In re: (b) (6)

SEP 27 2006

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Regis Fernandez, Esquire

APPLICATION: Reopening

The respondent's case is before us upon remand from the United States Court of Appeals for the (b) (6) pursuant to (b) (6) *v. Attorney General of the United States*, (b) (6) (b) (6) The motion to reopen will be granted, and the record will be remanded.

This case was before us last on May 3, 2005, when we denied as untimely the respondent's motion to reopen filed on February 18, 2005. In denying the motion to reopen, we noted that it was more than 9 months late, since it was due on or before May 17, 2004, but was not filed until February 18, 2005. We cited the regulation at 8 C.F.R. § 1003.2(c)(2), which requires motions to reopen to be filed generally within 90 days after the date on which the final administrative decision was rendered. We also found that the respondent had not demonstrated eligibility for any of the regulatory exceptions to the time and number restrictions on motions to reopen, pursuant to 8 C.F.R. § 1003.2(c)(3). Finally, we declined to grant sua sponte reopening.

In our prior decision dated April 16, 2004, we summarily affirmed an Immigration Judge's decision dated January 23, 2003. In that 2003 decision, an Immigration Judge found the respondent removable as charged, as convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I); denied his motion to terminate proceedings; determined that he did not demonstrate eligibility for any relief from removal; and ordered him removed from the United States to the Dominican Republic.

We now grant reopening sua sponte, upon favorable exercise of our discretion. In the motion to reopen, the respondent argues that his 1999 New Jersey conviction for promoting prostitution, which is the conviction underpinning the removability charge against him, has been set aside. With the motion, the respondent forwarded a September 24, 2004, order from the Superior Court of New Jersey, which order states that the respondent's guilty plea and conviction are vacated, in light

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of "the court having heard the argument of counsel, and for other good cause shown." On its face, the criminal court's order does not identify the reason that the conviction was vacated. The respondent contends that his conviction was vacated because he was provided ineffective assistance from the attorney who represented him in his 1999 criminal proceedings. In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), we held that, if a criminal court vacates an alien's conviction for reasons related solely to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the criminal proceedings, the conviction is not eliminated for immigration purposes. *See also Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes).

In this case, the United States Court of Appeals for the (b) (6) has indicated that, based on the record, it is unclear whether the conviction was vacated due to a procedural or substantive defect in the underlying criminal proceedings. (b) (6)

This Board cannot engage in such factfinding at the appellate level. *See* 8 C.F.R. § 1003.1(d)(3)(i), (iv). *See also Matter of S-H-*, 23 I&N Dec. 462, 463 (BIA 2002) (finding that, under the new regulatory provisions, the Board of Immigration Appeals has limited fact-finding ability on appeal). We find it appropriate to reopen the removal proceedings and remand the record, so that the Immigration Judge may evaluate the effect of the criminal court's order on the 1999 conviction supporting the removal charge against the respondent, in light of *Matter of Pickering, supra.*

ORDER: The Board's May 3, 2005, decision is vacated; the motion to reopen is granted; the proceedings are reopened; and the record is remanded to the Immigration Court for further proceedings and for the issuance of a new decision, consistent with this opinion.

FOR THE BOARD