File: (b) (6) Date: APR - 2 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Holly S. Cooper, Esquire

ON BEHALF OF DHS: Elly Laff
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] -
Controlled substance trafficker

Lodged: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

APPLICATION: Termination; cancellation of removal

This case was last before us on September 27, 2006, when we granted the respondent's motion to reconsider our April 10, 2006, decision dismissing his appeal of the Immigration Judge's December 21, 2005, decision ordering the respondent removed. Our most recent 2006 decision resulted in a precedent, *Matter of* (b) (6) , in which we determined that misprision of a felony in violation of 18 U.S.C. § 4 is a crime involving moral turpitude and that, therefore, the respondent was removable under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). In addition, we found that the respondent was ineligible for cancellation of removal because the "stop-time" rule in section 240A(d)(1)(B) of the Act, 8 U.S.C. § 1229b(d)(1)(B), applied retroactively to the respondent's application and that he could not establish the requisite 7 years continuous residence between his entry to the United States in 1983 and his crime which occurred in 1986.

On (b) (6) the United States Court of Appeals for the (b) (6) reversed our decision in *Matter of* (b) (6) *supra*, finding that misprision of a felony is not categorically a crime involving moral turpitude and remanding for the Board to apply the modified categorical approach to determining whether the respondent's conviction constitutes a crime involving moral turpitude.[1] *Id.* Since neither the Immigration Judge's decision nor our prior order determined whether the respondent was removable under the original charge of removability, i.e., as a

[1] Although the (b) (6) indicated in dicta that, even applying the modified categorical approach, it would not likely find that misprision of a felony is a crime involving moral turpitude, it did not ultimately decide the issue. (b) (6) *v. Holder*, (b) (6) (b) (6)

controlled drug trafficker under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), the (b) (6) also remanded for us to consider the respondent's removability under that charge. *Id.* at (b) (6) The court noted that if we conclude that the respondent is removable under section 212(a)(2)(C) of the Act, we need not reach the issue of whether his conviction constitutes a crime involving moral turpitude. *Id.* at (b) (6)

The Department of Homeland Security ("DHS") has filed a motion to remand proceedings to the Immigration Judge for clarification of his decision regarding whether the respondent's conviction is a crime involving moral turpitude under a modified categorical approach and also for further analysis as to whether the respondent is removable under section 212(a)(2)(C) of the Act. The DHS asserts that a remand is appropriate because these determinations involve fact-finding which must be done by the Immigration Judge and also involves legal issues which the Immigration Judge should assess in the first instance.

The respondent is opposed to a remand. He raises a new argument on appeal that he is not an arriving alien and, therefore, not subject to removal as charged (Respondent's Br. at 6-20 (citing *Vartelas v. Holder*, 132 S.Ct. 1479 (2012))). Furthermore, he argues that even if he is classified as an arriving alien subject to the charges of removability noted above, his conviction is not for a crime involving moral turpitude under the modified categorical approach, and he is also not removable for having engaged in drug trafficking (Respondent's Br. at 13-27). Finally, he asserts that he is eligible for a waiver of inadmissibility under former section 212(c) of the Act and for cancellation of removal (Respondent's Br. at 27-33).

We find that a remand is appropriate inasmuch as further fact-finding is necessary in order to assess both the respondent's removability and, if necessary, his eligibility for relief, as well as due to the amount of time which has passed since the Immigration Judge's decision in 2005 and our decisions in 2006. A remand will allow the Immigration Judge to make factual findings as well as legal determinations in the first instance and it will also allow the parties an opportunity to update the record and provide additional evidence in support of their arguments.

ORDER: The record of proceedings is remanded for further proceedings consistent with this order.

FOR THE BOARD

IMMIGRATION COURT

In the Matter of

(b) (6)

(b) (6)

Case A(b) (6)

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on OCTOBER 10, 2013.
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/applicant 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 ( ) waived/not sought.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[X] Cancellation under Section 240A(a) was (X) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation of removal under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought. If granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation of removal under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought. If granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of status under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought. If granted, it is ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

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

[ ] 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.

[ ] Proceedings were terminated.

[ ] Respondent advised of consequences of reentry of removed aliens (8 USC § 1326).

[X] Other: Application for relief pursuant to INA § 212(c) NOT SOUGHT.

Date: OCTOBER 10, 2013

Appeal: WAIVED RESERVED Appeal Due By:

BOTH

Irene C. Feldman

IRENE C. FELDMAN
IMMIGRATION JUDGE