UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

File Nos.: (b) (6)

In the Matters of:

(b) (6)

Respondents

IN REMOVAL PROCEEDINGS

CHARGES: Section 237(a)(1)(B) of the Immigration and Nationality Act ("INA") – *Nonimmigrant who remained in the United States beyond authorized period*

APPLICATIONS: Motion to Reopen; Motion to Terminate Proceedings

ON BEHALF OF RESPONDENT:
Alberto Lopez, Esquire
Quintanilla Law Firm, ALC
(b) (6)

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
(b) (6)

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondents, (b) (6) and (b) (6) (b) (6) are husband and wife. Respondents were placed in consolidated removal proceedings before this Court on October 22, 2004, when the U.S. Department of Homeland Security ("Department") filed Notices to Appear ("NTAs") with the Court. Ex. 1, at 1. In the NTAs, the Department alleged that respondents, natives and citizens of Peru, were admitted to the United States at Miami, Florida, on or about September 11, 2003, as nonimmigrants with authorization to remain until March 9, 2004. *Id.* The Department further alleged that the respondents remained in the United States beyond March 9, 2004, without authorization. *Id.* Accordingly, the Department charged the respondents with removability pursuant to INA section 237(a)(1)(B). *Id.*

Appearing before the Court at a master-calendar hearing held on November 15, 2004, the respondents admitted the factual allegations contained in their respective NTAs and conceded the charges of removability. Based on these pleadings, the Court directed Peru as the country of

removal. The respondents then requested relief from removal in the form of asylum, withholding of removal, and protection under the Convention Against Torture. On January 7, 2005, (b) (6) (b) (6) testified as to the merits of the respondent's claims. At the conclusion of the hearing, the Court denied the respondent's claims to relief based on a finding of adverse credibility and a failure to show past persecution or a well-founded fear of future persecution and instead granted voluntary departure. The Court issued a written decision on January 12, 2005. On February 4, 2005, the respondents appealed the decision to the Board of Immigration Appeals ("Board"). The Board affirmed the decision of the Court, and the respondents appealed to the United States Circuit Court of Appeals for the (b) (6) On (b) (6) the (b) (6) remanded the proceeding to the Board, holding that substantial evidence did not support the adverse credibility determination and that the Board was not required to deem respondent's testimony credible on remand. *See* (b) (6) *v. Holder*, (b) (6) (b) (6) On July 30, 2009, the Board remanded the proceeding to this Court with instructions to make further findings of fact and law as necessary.

On April 15, 2011, the respondents submitted to the Court a Motion to Advance, in which they indicated that they sought to withdraw all their pending applications for relief and instead to request only pre-conclusion voluntary departure to Peru. Resp.s' Mot. Advance 1. The Court granted the Motion and advanced the hearing to June 14, 2011.

On the date of the advanced hearing, the respondents failed to appear. Their attorney informed the Court that the respondents had already departed the United States because of an employment opportunity that arose in Venezuela, and the attorney submitted to the Court documentary evidence in the form of airline ticket receipts and copies of the respondents' passports with Venezuela admission stamps. *See* Resp.s' Additional Supp. Docs. Exs. C1, D1. Observing that these documents contained no evidence from the U.S. Consulate that the respondents were in Venezuela, the Court resolved to proceed *in absentia*. Thus, based upon documentary evidence submitted by the Department, the Court found that removability had been established and accordingly ordered the respondents removed to Peru. The Court noted, however, that it would consider a motion to reopen to grant voluntary departure, if additional evidence of the respondents' departure were presented.

On December 5, 2011, the respondents filed the instant Motion to Reopen ("Motion"). In their Motion, the respondents request that their proceedings be reopened so that the *in absentia* removal orders may be rescinded and the proceedings be terminated. Resp.s' Mot. 1. On December 12, 2011, the Department filed an Opposition to Respondents' Motion to Reopen and Terminate, arguing that the respondents' Motion to Reopen does not meet the standards for *sua sponte* reopening. Dept.'s Opp. Br. 1. On December 20, 2011, the respondents filed a Reply to the Department's Opposition. *See* Resp.s' Reply. Having considered the parties' arguments and the evidence in the record in light of the applicable law, the respondents' Motion to Reopen will be GRANTED and their Motion to Terminate will be DENIED.

II. LAW & ANALYSIS

A. Motion to Reopen

An immigration judge may upon his or her own motion at any time reopen or reconsider any case in which he or she has made a decision. 8 C.F.R. § 1003.23(b)(1) (2011). The decision to grant or deny a motion to reopen is within the discretion of the Immigration Judge. *Id.* § 1003.23(b)(1)(iv) (2011). The Board has stated that "the power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Proceedings should be reopened *sua sponte* only under "exceptional" circumstances. *Id.*

Exceptional circumstances warranting an exercise of the Court's *sua sponte* authority are present here because the Court previously represented to the respondents that it would reopen their cases in order to consider their applications for voluntary departure if they were to file a motion to reopen presenting additional evidence of their departure from the United States. In reliance of the Court's prior representation, the respondents have submitted this Motion accompanied by documents from the U.S. Embassy in Lima, Peru, indicating that they presented themselves to the U. S. Citizen and Immigration Services' Lima, Peru Field Office at the U.S. Embassy. *See* Resp't Mot. Ex. E1. Therefore, the Court will exercise its *sua sponte* power to reopen the respondents' case in order to rescind the *in absentia* removal orders.

B. Motion to Terminate

The respondents also request that the Court terminate their removal proceedings upon reopening. *See* Resp.s' Mot. 1. The Court may terminate a respondent's removal proceedings only if the Department improvidently commenced the proceedings, the facts of the case cannot support the alleged charge of removability or inadmissibility, or the respondent has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors. *See Altamirano v. Gonzales*, 427 F.3d 586, 596 (9th Cir. 2005) (remanding with instructions to grant a motion to terminate where the facts could not support a charge of inadmissibility); *Matter of R-D-*, 24 I&N Dec. 221, 225-26 (BIA 2007) (affirming the Court's decision to terminate proceedings on the basis that "the respondent was an arriving alien and was therefore not removable under section 237(a)(1)(B) of the [INA] as an admitted alien present in the United States in violation of law"); *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998) (recognizing the Department's right to move to terminate a respondent's removal proceedings as "improvidently begun" by virtue of the fact that the respondent is subject to reinstatement of a prior deportation order); 8 C.F.R. § 1239.2(f) (2011) (providing that "[a]n immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors"). Thus, termination is generally inappropriate where removability or inadmissibility has been established. *See Matter of Richardson*, 25 I&N Dec. 226, 230 (BIA 2010) (upholding a denial of a motion to terminate where "the respondent's removability from the United States ha[d] been established"); *Matter of Ruiz-Romero*, 22 I&N Dec. 486, 492 (BIA 1999) (concluding that the

Court "properly denied the respondent's motion to terminate" because the evidence "support[ed] a finding of deportability").

The Court finds that termination of the respondents' removal proceedings at this point would be inappropriate. The respondents have already admitted the factual allegations and conceded the charges of removability contained in their respective NTAs. Thus, because the respondents' removability has been established based on their pleadings, denial of their Motion to Terminate is proper. *See Matter of Richardson*, 25 I&N Dec. at 230; *Matter of Ruiz-Romero*, 22 I&N Dec. at 492.

III. CONCLUSION

For the reasons set forth above, the Court finds that the respondents have demonstrated exceptional circumstances warranting *sua sponte* reopening of their removal proceedings in order to rescind the *in absentia* removal order in their cases. However, the Court finds that termination of their removal proceedings at this point would be inappropriate. Nevertheless, the respondents established their eligibility for voluntary departure at a prior hearing and have presented additional evidence of their departure from the United States. Accordingly, the Court will enter the following orders:

ORDERS

IT IS HEREBY ORDERED that the respondents' Motion to Reopen be **GRANTED.**

IT IS FURTHER ORDERED that the respondents' orders of removal be **RESCINDED.**

IT IS FURTHER ORDERED that the respondents' Motion to Terminate be **DENIED.**

IT IS FURTHER ORDERED that, in lie of removal, the respondents' request for pre-conclusory voluntary departure pursuant to section 240B(a) of the INA be **GRANTED,** provided that respondents depart from the United States at their own expense within no more than 120 days from the date of issuance of this decision and pursuant to such conditions as may be imposed by the Department and that respondents post a bond in the amount of $500.00 within five business days of the date of issuance of this decision.

IT IS FURTHER ORDERED that should respondents fail to depart the United States voluntarily when and as required, the order granting voluntary departure shall lapse without further notice or hearing and the following alternate order shall become effective at once: Respondents shall be removed to Peru pursuant to the charges contained in the NTAs.

IT IS FURTHER ORDERED that should respondents fail to depart the United States voluntarily when and as required, respondents shall then become subject to civil penalties in the amount of $3,000.00 in addition to the bond.

IT IS FURTHER ORDERED that should respondents fail to post a bond in the amount of $500.00 within five business days of the date of issuance of this decision, the order granting voluntary departure shall lapse without further notice or hearing and the alternate order of removal shall take effect the following day.

IT IS FURTHER ORDERED that should respondents file a post-order motion to reconsider the present decision during the period allowed for voluntary departure, the grant of voluntary departure shall automatically terminate and the alternate order of removal shall take effect immediately.

DATE: 2/2/12

D. D. Sitgraves

D.D. Sitgraves
Immigration Judge

Files: (b) (6)

Date: JUL 30 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Edgardo Quintanilla, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (both respondents)

APPLICATION: Asylum, withholding of removal

In an order dated (b) (6) the United States Circuit Court of Appeals for the (b) (6) (b) (6) remanded the proceeding to the Board so that the agency could make determinations on the respondent's credibility and burden of proof for relief in the first instance.

In light of the (b) (6) request to revisit the foregoing issues, and given our limited fact finding authority, we are inclined to remand the proceeding in order to provide the Immigration Judge the opportunity to make further findings of fact and law as necessary, in the first instance. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (limiting the Board's fact-finding authority and stating the Board may remand the proceeding to the Immigration Judge where further fact-finding is needed). The Immigration Judge shall provide the parties the opportunity to submit further testimony and documentary evidence, including current country reports relevant to the respondent's applications for asylum and withholding of removal.[1]

ORDER: The record is remanded to the Immigration Judge for further proceedings and issuance of a new decision and as directed by the Circuit Court's order.

FOR THE BOARD

[1] The respondent applied for protection under the Convention Against Torture. However, as noted by the (b) (6) that claim has been waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).