IMMIGRATION COURT

(b) (6)

In the Matter of: (b) (6)

Case No.: (b) (6)

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on November 16, 2009 .
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 alternative order of removal to_____.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) other.

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of removal [ ] deferral of removal under Article III of the Convention Against Torture was ( )granted ( ) denied ( ) withdrawn ( ) other.

[ ] A Waiver under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Cancellation of removal under section 240A(a)was ( ) granted ( ) denied ( ) withdrawn ( ) other.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) other.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

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was 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[ ] Adjustment of Status under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.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

[ ] Proceedings were terminated.

[ ] Other: _____

Date: November 16, 2009

C. Bither

CHRISTINE A. BITHER
Immigration Judge

Appeal waived Reserved : A / I / B
Appeal due by: by both

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [X] DHS

DATE: 11/16/09 BY: COURT STAFF DMEIHLS

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other Q6

File: (b) (6)

Date:

In re: (b) (6)

MAR 19 2007

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaye A. Y. Evans, Esquire

CHARGE:

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

Sec. 212(a)(6)(C)(ii), I&N Act [8 U.S.C. § 1182(a)(6)(C)(ii)] - False claim of United States citizenship

APPLICATION: Cancellation of removal under section 240A(a)

In a decision dated May 16, 2000, an Immigration Judge found the respondent removable from the United States, ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and ordered him removed to Mexico. The respondent filed a timely appeal. In a decision dated November 25, 2002, the Board dismissed the respondent's appeal after finding that he had made a false claim to United States citizenship. In that decision, we stated that we need not address the other issues on appeal because our finding that the respondent had made a false claim to United States citizenship was a non-waivable ground of inadmissibility and provided an independent ground of removability. The respondent filed a petition for review of that decision with the United States Court of Appeals for the (b) (6) The respondent also filed a timely motion to reconsider which we denied on June 11, 2003.

On (b) (6) the (b) (6) found that the Board could not have decided the propriety of the false claim of United States citizenship charge without having first determined whether the respondent had committed a crime involving moral turpitude. *See* (b) (6) *v. Ashcroft*, (b) (6) The (b) (6) therefore remanded the record to the Board for consideration of whether the respondent's burglary conviction constitutes a crime involving moral turpitude and whether the respondent is eligible for cancellation of removal under section 240A(a) of the Act. *Id.* In a decision dated April 22, 2005, the Board found that the respondent's burglary conviction under (b) (6) Penal Code § (b) (6) was a crime involving moral turpitude, relying upon (b) (6) case law to that effect, which rendered the respondent statutorily ineligible for for cancellation of removal under section 240A(a) of the Act. The respondent filed a petition for review of this decision.

(b) (6)

In an order dated (b) (6) the (b) (6) remanded the record to the Board for consideration of whether the respondent's burglary conviction constitutes a crime involving moral turpitude under the analysis set forth by the Court in (b) (6) *v. Gonzales*, (b) (6) Cir. 2005), which had been issued after our last decision. We received a post-remand brief only from the respondent, who also states that the Board should consider whether he is eligible for a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c). We find that a remand is warranted in this case in order to allow the Immigration Judge to hold an evidentiary hearing on the issue of whether the respondent's burglary conviction constitutes a crime involving moral turpitude and if not, whether he is eligible for relief from removal.

Accordingly, the following orders shall be entered:

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

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File: (b) (6)

Date: APR 22 2005

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaye A. Y. Evans, Esquire

CHARGE:

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

Sec. 212(a)(6)(C)(ii), I&N Act [8 U.S.C. § 1182(a)(6)(C)(ii)] - False claim of United States citizenship

APPLICATION: Cancellation of removal under section 240A(a)

In a decision dated May 16, 2000, an Immigration Judge found the respondent removable from the United States, ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and ordered him removed to Mexico. The respondent filed a timely appeal. In a decision dated November 25, 2002, the Board dismissed the respondent's appeal after finding that he had made a false claim to United States citizenship. In that decision, we stated that we need not address the other issues on appeal because our finding that the respondent had made a false claim to United States citizenship was a non-waivable ground of inadmissibility and provided an independent ground of removability. The respondent filed a petition for review of this decision with the United States Court of Appeals for the (b) (6) The respondent also filed a timely motion to reconsider which we denied on June 11, 2003. On (b) (6) (b) (6) the (b) (6) found that the Board could not have decided the propriety of the false claim of United States citizenship charge without having first determined whether the respondent had committed a crime involving moral turpitude. *See* (b) (6) *v. Ashcroft*, (b) (6) (b) (6) The (b) (6) therefore remanded the record to the Board for consideration of whether the respondent's burglary conviction constitutes a crime involving moral turpitude and whether the respondent is eligible for cancellation of removal under section 240A(a) of the Act. *Id.* The Board's November 25, 2002, decision will be vacated. The appeal will be dismissed.

We find that the respondent has been convicted of a crime involving moral turpitude. The evidence of record shows that he was convicted on November 1, 1993, of second-degree burglary under (b) (6) Penal Code § (b) (6) sentenced to 181 days imprisonment in the (b) (6) County jail, with credit for 48 days served, with 3 years probation, and that this conviction was expunged upon successful completion of probation, pursuant to the rehabilitative statute provision set forth a (b) (6)

(b) (6)

Penal Code § (b) (6) *See* Exhs. 2-4. The respondent's burglary conviction is a crime involving moral turpitude. *See People v.* (b) (6) (1988); *People v.* (b) (6)
(b) (6)

In addition, we note that although the parties dispute whether the respondent was convicted of a felony or a misdemeanor (Tr. at 30-37), they do not dispute that he was convicted of second-degree burglary under (b) (6) Penal Code § (b) (6) (Tr. at 67-68). Whether the respondent's conviction was for a misdemeanor or a felony is not relevant for purposes of establishing his removability under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), or his eligibility for relief from removal. His conviction for second-degree burglary is a crime involving moral turpitude regardless of its classification for sentencing. Moreover, his conviction remains for immigration purposes despite having been expunged under Calif. Penal Code § 1203.4. *See* (b) (6) *v. INS*, (b) (6)

The respondent is statutorily ineligible for cancellation of removal under section 240A(a) of the Act because he cannot meet the continuous residence requirement. The respondent's November 1, 1993, conviction occurred before the respondent had acquired 5 years of lawful permanent residency and 7 years of residency after having been admitted as a temporary resident. *See* section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1); *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

We next turn to the respondent's claim that he should not be removed for making a stupid mistake by presenting another person's United States birth certificate to attempt entry into the United States. One of the charges against the respondent was that he falsely represented himself to be a citizen of the United States at the border check point in Ysidro, California on December 13, 1997, in violation of section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii). *See* Exhs. 1, 1A. The Act provides that "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . is inadmissible." *See* section 212(a)(6)(C)(ii) of the Act.

Here, it is undisputed that the respondent is a native and citizen of Mexico; that he became a lawful permanent resident of the United States on April 23, 1989; that he tried to enter the United States in a vehicle at the border check point in Ysidro, California on December 13, 1997; that he presented someone else's California birth certificate as his own to gain entry into the United States; and that during the secondary interview at the border check point, it was discovered that he was born in Mexico. *See* Tr. at 27, 28, 29, 30; Exhs. 1, 1A. The respondent maintains that he lost or misplaced his alien identification card, that he did not know the proper procedure for replacing his card, and that he made a mistake of judgment when he presented the birth certificate at the border check point (Respondent's Br.). Under the Act, an alien who falsely claims that he is a United States citizen to obtain a benefit under the Act may be admissible if the alien establishes that he or she "reasonably believed at the time of making" the representation that he or she was a citizen of the United States. *See* section 212(a)(6)(C)(ii)(II) of the Act. We find that the respondent's explanation that he made a mistake of judgment does not satisfy the statutory requirement. The respondent has, therefore, failed to establish that he is admissible. As the respondent's falsely claiming United States citizenship cannot be waived as a ground of inadmissibility and provides an independent ground for

his removability, we need not decide any other issue raised on appeal. *See* section 212(a)(6)(C)(i)(ii) of the Act. *See also* (b) (6) *v. INS*, (b) (6)

Finally, we address the respondent's claim that the charging documents were not sufficient and that the proceedings should have been terminated. The respondent's argument grows out of the Immigration Judge's questioning the wisdom of accepting the respondent's plea to the charges in the Notice to Appear because (1) he was not represented by counsel when he entered his plea, and (2) she believed that as drafted, the respondent may not have understood to what he was admitting (Tr. at 14, 15). At issue here is, therefore, whether the charging documents provided the respondent with sufficient notice to satisfy the requirements of due process.

To satisfy the requirements of due process, the charging documents must have given the respondent notice of the charges against him and he must have been given the opportunity to meet the charges in a full and fair hearing. *See Singh v. INS*, 213 F.3d 1050 (9th Cir. 2000); *Matter of Raqueno*, 17 I&N Dec. 10 (BIA 1979); *Matter of Chery and Hasan*, 15 I&N Dec. 380 (BIA 1975). Our review of the record of proceedings reveals that the Immigration Judge resolved the questions she raised. First, she requested the Immigration and Naturalization Service to revise the charging document. Second, she permitted the respondent, over the objection of the Service, to re-enter his plea after the Service served upon the respondent the Notice of Additional Charges of Inadmissibility/Deportability. *See* Exhs. 1, 1A; Tr. at 9-11, 14, 15, 23-30. In addition, the respondent has not identified the harm he suffered. We are satisfied, therefore, that the respondent was given sufficient notice of the charges against him and that he had a fair hearing in which he had the opportunity to meet the allegations against him. *See Singh v. INS*, *supra*; *Matter of Raqueno*, *supra*; *Matter of Chery and Hasan*, *supra*. For all of the above reasons, the respondent's appeal is dismissed.

Accordingly, the following orders shall be entered:

ORDER: The Board's November 25, 2002, decision is vacated and the respondent's appeal is reinstated.

FURTHER ORDER: The appeal is dismissed.

FOR THE BOARD