IMMIGRATION COURT
(b) (6)

In the Matter of

(b) (6)
RESPONDENT

Case A (b) (6)
IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JULY 2, 2010.
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.

[X] The respondent/applicant was ordered removed from the United States to Mexico or in the alternative to _____.

[X] Respondent's application for voluntary departure was denied and respondent was ordered removed to Mexico 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[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation of removal under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.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[ ] Cancellation of removal under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.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[ ] Adjustment of status under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.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of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.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.

[ ] Other: _____

_____

Date: JULY 2, 2010

Appeal: WAIVED/RESERVED Appeal Due By:

Both

Irene C. Feldman
IRENE C FELDMAN
IMMIGRATION JUDGE

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date: OCT 2 2 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John M. Pope, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

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; waiver of inadmissibility

This case is presently before us pursuant to a (b) (6) decision of the United States Court of Appeals for the (b) (6) granting the respondent's petition for review, reversing the Board's decision of January 26, 2007, and remanding for further proceedings. The record will be remanded to the Immigration Judge for further proceedings.

The Court determined that the respondent's conviction under Cal. Penal Code § 273.5(a), abuse of a cohabitant, was not categorically a crime involving moral turpitude (CIMT). *See Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). The Court remanded for the Board to apply the modified categorical approach to determine if the respondent's conviction is for a CIMT.

Subsequent to our January 26, 2007, decision in this case, the Attorney General issued his decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008); *see generally Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 n.6 (9th Cir. 2009) (acknowledging decision in *Silva-Trevino*). In *Silva-Trevino*, the Attorney General concluded that to determine whether a conviction is for a CIMT, immigration judges and the Board should do the following: (1) look to the statute of conviction under the categorical inquiry and determine whether there is a "realistic probability" that the criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; (2) if the categorical inquiry does not resolve the question, engage in a modified categorical inquiry and examine the record of conviction; and (3) if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.

(b) (6)

Here, applying the modified categorical approach, the record of conviction does not show whether the respondent inflicted corporal injury on the type of victim which involves a CIMT (Group Exh. 2). *See* (b) (6) *v. Holder*, *supra*, at (b) (6) (citing, e.g., *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993).

Pursuant to *Silva-Trevino*, therefore, step 3 of the CIMT analytical framework provides for consideration of any additional evidence to resolve the matter. However, we conclude that a remand for this purpose is not necessary. This is because the respondent remains removable under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i).

We conclude that a remand is necessary to determine whether the respondent is eligible for cancellation of removal. *See* section 240A(b)of the Act, 8 U.S.C. § 1229b(b). The record does not reflect that the respondent submitted an application for cancellation of removal (Form EOIR 42-B) and the requisite filing fee. *See* 8 C.F.R. §§ 1003.24, 1003.31(a). The respondent indicated an intent to file for such relief (Tr. at 11). The failure to properly file the application shall be addressed on remand with an opportunity for the respondent to file such application. If an application is tendered as required, it will be governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). Accordingly, the respondent would have to properly file his application and fee, and would have the burden to establish that his conviction was not pursuant to any part of the statute that reaches conduct involving moral turpitude. *See Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009).

Accordingly, the following order will be entered.

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

FOR THE BOARD