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 1/26/11.
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[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) other.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of removal [ ] deferral of removal under Article III of the Convention Against Torture was ( )granted ( ) denied ( ) withdrawn ( ) other.

[ ] A Waiver under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Cancellation of removal under section 240A(a)was ( ) granted ( ) denied ( ) withdrawn ( ) other.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[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) other.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[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) other.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[ ] Adjustment of Status under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.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[ ] Respondent's status was rescinded under section 246.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: 1/26/11

Jan D. Latimore
Immigration Judge

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

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: 1/26/11 BY: COURT STAFF _____

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

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

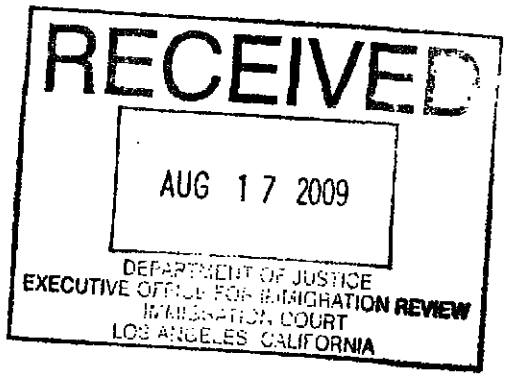
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date: JUL 23 2009

In re: (b) (6)



IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Todd Bennett, Esquire

ON BEHALF OF DHS: Wendy L. Wallace
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Asylum; withholding of removal; Convention Against Torture; termination of proceedings

On (b) (6), the United States Court of Appeals for the (b) (6) in a written decision, remanded this matter to the Board for us to consider whether the Immigration Judge committed an *ultra vires* act by adding *sua sponte* to the Notice to Appear (NTA) specific references for the aggravated felony charge at issue. (b) (6) *v. Mukasey*, (b) (6). On reconsideration, we conclude that the Immigration Judge's act was beyond her jurisdiction, and the record will be remanded.

On September 16, 1998, the Immigration Judge found the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1227(a)(2)(A)(iii), as an aggravated felon, based on his conviction on May 17, 1997, in the Superior Court of California, Los Angeles, of grand theft in violation of section 487(1) of the California Penal Code. On February 28, 2001, the Board remanded the record for a full decision. On remand, the alien applied for asylum from the Philippines. The Immigration Judge denied the respondent's motion to terminate proceedings, found the respondent removable, as charged, and denied the respondent's applications for asylum and withholding of removal to the Philippines pursuant to sections 208(b) and 241(b)(3) of the Act, 8 U.S.C. §§ 1158(b), 1231(b)(3), respectively, and protection pursuant to the Convention Against Torture (CAT). *See* 8 C.F.R. §§ 1208.16-.18. On December 9, 2004, we dismissed the appeal, finding the respondent removable under section 237(a)(2)(iii) of the Act, and ineligible for relief. The Court of Appeals found the motion to terminate for lack of jurisdiction was properly denied by the Immigration Judge. The record was remanded to the Board.

The respondent, a 57-year-old native and citizen of the Philippines, arrived in the United States on or about March 1, 1984. He was convicted on May 1, 1997, in the Superior Court, County of Los Angeles, California of grand theft of property under section 487(1) of the California Penal Code and sentenced to 2 years in prison. He had originally argued that the Notice to Appear did not confer jurisdiction on the Immigration Judge, because it did not reference the particular definitional section of the aggravated felony provision which rendered him removable, and the Notice to Appear either could not be amended or had not properly been amended, citing 8 C.F.R. § 1240.10(e). After the Department of Homeland Security (the "DHS") counsel declined the Immigration Judge's suggestion that counsel move to amend the NTA to add a reference to subdivisions (G) and (M) of section 101(a)(43) but represented that he would not oppose such a motion, the Immigration Judge, over the respondent's objection, amended the NTA to add a reference to subdivisions (G) and (M) (Tr. at 2-5). The Court of Appeals found the Notice to Appear conferred jurisdiction on the Immigration Judge, but that the Immigration Judge had *sua sponte* amended the Notice to Appear in response to the motion to terminate. The Circuit Court remanded so the Board may consider whether the Immigration Judge had erred in amending the Notice to Appear. We find that the Immigration Judge does not have the authority to *sua sponte* amend the Notice to Appear.

The Immigration Judge only has the authority delegated to him or her by the Attorney General. 8 C.F.R. § 1003.10(b). It is the function of the Immigration Judge to adjudicate the case and not to bring charges. *See* 8 U.S.C. §§ 1229a(a) and (b); 8 C.F.R. § 1240.1(a) (authority of the Immigration Judge). The initiation of removal proceedings through the issuance of a Notice to Appear is covered by section 239 of the Act, 8 U.S.C. § 1229; *see* 8 C.F.R. §§ 2.1, 239.1(a) (issuance of Notice to Appear). The DHS alone has prosecutorial discretion to commence proceedings. Section 242(g) of the Act, 8 U.S.C. § 1252(g); *Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000) (and cases cited therein) (INS has unreviewable prosecutorial discretion); *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); *see also Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119-20 (9th Cir. 2001). The regulations allow the Service (now the DHS) to lodge additional or substituted charges of deportability or factual allegations in writing at any time during the proceeding. 8 C.F.R. §§ 1003.30, 1240.10(e).

In response to the motion to terminate, the Immigration Judge found she had jurisdiction and attempted to clarify the charge through a request to the counsel for DHS, who refused to comply. The Immigration Judge, guided by the allegation of a conviction for grand theft, then modified the Notice to Appear to designate the two subsections of 8 U.S.C. § 1101(a)(43) which appeared applicable, *i.e.*, (G) and (M), and granted the respondent a continuance for preparation.

Although the DHS counsel acceded to the emendations to the Notice to Appear suggested by the Immigration Judge in response to the respondent's motion to terminate, he did not initiate them. Such a modification does not fall under the Immigration Judge's duty to explain the charges under 8 C.F.R. § 1240.10(a)(6), nor the general authorization to take "any appropriate action," pursuant to 8 C.F.R. § 1240.1(a), as such action would not be consistent with the law and regulations giving this function to the DHS.[1] Therefore, the Court of Appeals found this act was a *sua sponte*

[1] The Immigration Judge, however, could grant the respondent's motion to terminate, if the respondent's due process rights would have been compromised by proceeding without clarification of the charge.

emendation or modification of the Notice to Appear. As noted in the Court of Appeals' remand order, no prejudice need be shown to reach this result.[2] Thus, we conclude the respondent was charged and found removable solely under section 237(a)(2)(A)(iii) of the Act, which is referenced by section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), a definitional section having numerous parts labeled (A) through (U). The Court of Appeals found this charge sufficient to convey jurisdiction to the Immigration Judge.

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores,* 507 U.S. 292, 306 (1993). At the core of these due process rights is the right to notice of the nature of the charges and a meaningful opportunity to be heard. *See, e.g., Kwong Hai Chew v. Colding,* 344 U.S. 590, 596-98 (1953); *Kaczmarczyk v. INS,* 933 F.2d 588, 596 (7th Cir. 1991) (citing cases). Therefore, we will remand the record to allow the Immigration Judge to determine whether the respondent has been provided sufficient detail to understand the basis for the charges of removability, or to allow the DHS to amend the Notice to Appear to avoid any prejudice to the alien, if appropriate. *See e.g., Brown v. Ashcroft,* 360 F.3d 346, 352 (2d Cir. 2004) (evidence at hearing adequate notice); *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) (upholding a finding of removability for a conviction constituting an attempt to commit an aggravated felony although the alien was not charged with an attempt). The Immigration Judge may then make a new finding on the issue of removability.

Accordingly, the record will be remanded.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the above decision.

FOR THE BOARD

[2] We presume that the Court of Appeals found the respondent had standing to raise this issue. *Cf. Brito v. Mukasey,* 521 F.3d 160 (2d Cir. 2008) (alien must show concrete, particularized, actual or imminent injury to have standing).