IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

Respondent

Case No. (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 11/15/2013
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 was ordered removed from the United States to Japan 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[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is 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[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

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of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.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: Nov 15, 2013

A. ASHLEY TABADDOR
Immigration Judge

Appeal: Waived/Reserved Appeal Due By: 12/16/2013

File: (b) (6) Date: OCT 16 2012

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Todd Becraft, Esquire

ON BEHALF OF DHS: Jillian L. Woods
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in 101(a)(43)(M)(i))

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in 101(a)(43)(M)(ii))

APPLICATION: Termination of proceedings; remand

This appeal was previously before us on August 16, 2004. At that time, the record had shown that the respondent had admitted that, on November 24, 1997, she had been convicted in the United States District Court, (b) (6) of the offense of aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). We affirmed the Immigration Judge's July 15, 2003, decision, which incorporated a June 24, 2003, decision finding that the respondent, a native and citizen of Japan, was removable for having been convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), to wit, "an offense involving fraud or deceit in which the loss to the victim exceeds $10,000." *See* section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii).

Some historical perspective of this matter is warranted. The United States Court of Appeals for the (b) (6) in (b) (6) *v. Gonzales*, (b) (6) employed the "modified categorical approach" to determine whether or not there was a loss for purposes of section 101(a)(43)(M) of the Act, concluding that the respondent's offense did not qualify as an aggravated felony. This decision was issued shortly before *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), which concluded that, when the crime of conviction is missing an element of the generic crime altogether, we can never find that "a jury was actually required to find all the elements of" the generic crime. As *Navarro-Lopez v. Gonzales*, an en banc decision, was deemed to be controlling, the (b) (6) in (b) (6) (b) (6) withdrew (b) (6) The court found that the *Navarro-Lopez*

rule, which requires that the statute of conviction must contain every element of the generic offense before resorting to the modified categorical approach, was for application in determining whether a conviction was an aggravated felony within section 101(a)(43)(M)(i) of the Act for "fraud or deceit in which the loss to the victim or victims exceeds $10,000." The court concluded that, as the statutes of conviction were missing an element of the generic crime under section 101(a)(43)(M)(i), a loss exceeding $10,000, the modified categorical approach did not apply. The court, after determining that the categorical approach was required, again concluded that the respondent's offense did not qualify as an aggravated felony.

Following the (b) (6) opinion in (b) (6) the Supreme Court, in *Nijhawan v. Holder*, 557 U.S. 29 (2009), held that the $10,000 amount of loss threshold in section 101(a)(43)(M)(i) of the Act does not need to be an element of the underlying conviction; rather "it refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." Because the amount of loss is a non-element fact, it can be determined by evidence outside the record of conviction. *Id.* The Supreme Court specifically held, as did the Board in *Matter of Babaisakov*, 24 I&N Dec. 306, 319 (BIA 2007), that a restitution order is appropriate evidence of the amount of loss.

Subsequently, the (b) (6) in (b) (6) *v. Holder*, (b) (6) (b) (6) withdrew (b) (6) Later the same year, the court, in (b) (6) *v. Holder*, (b) (6) withdrew (b) (6) The court, in (b) (6) observed that *Nijhawan v. Holder, supra*, had added a new step to the familiar categorical/modified categorical approaches first announced in *Taylor v. United States*, 495 U.S. 575 (1990). Under the approach set out in *Nijhawan v. Holder*, if the requirement is not an "element" of the crime but is "circumstance specific," the Board must use "fundamentally fair procedures" to determine whether the offender's crime satisfies the description of the offense.

The court, in (b) (6) at (b) (6) found that the Board had followed fundamentally fair procedures in finding that the offense for which the respondent's spouse was convicted resulted in a loss to the government of more than $10,000. Specifically, he had stipulated in the plea agreement that the "total actual tax loss" was $245,126. Noting that, in *Nijhawan v. Holder*, the Supreme Court relied on such a stipulation to conclude that a petitioner's prior crime was an "aggravated felony" under section 101(a)(43)(M)(i), the court stated that it could not conclude that the Board's reliance on such a stipulation was improper. The court observed that, in (b) (6) it had concluded that the record of conviction did not contain sufficient evidence to establish that the respondent's offense resulted in the loss to the Government in excess of $10,000. After noting that the Board was not limited to only those documents used in applying the modified categorical approach, the court determined that the respondent's case should be remanded "so that the agency may determine, in the first instance, what types of evidence it may consider under this newly announced standard and so that the government may have the opportunity to introduce evidence to meet this standard." (b) (6) at (b) (6)

The Supreme Court, in (b) (6) held that convictions under 26 U.S.C. §§ 7602(1) and (2), in which the revenue loss to the Government exceeds $10,000, qualify as aggravated felonies pursuant to section 101(a)(43)(M)(i). The Court affirmed the judgment of the (b) (6) On (b) (6) the (b) (6) judgment in (b) (6) entered on

(b) (6)

(b) (6) took effect as the court issued an order which constituted the court's formal mandate. As we noted above, the court, in (b) (6) determined that the respondent's case should be remanded "so that the agency may determine, in the first instance, what types of evidence it may consider under this newly announced standard and so that the government may have the opportunity to introduce evidence to meet this standard."

The Department of Homeland Security (the DHS) has filed a motion to remand the matter to allow the parties to supplement the record and for the Immigration Judge to consider the issues in the first instance. The respondent argues that the Board should first determine what types of evidence may be considered and then remand to the Immigration Judge with appropriate instructions. Rather than setting out, in an advisory manner, a possible list of the types of evidence which may be considered, we deem it appropriate to remand the record to the Immigration Judge for further proceedings to permit the DHS to present its evidence in the first instance and for the Immigration Judge to consider its admissibility and persuasive value. Also, on remand, the parties may present any additional evidence and additional arguments. The Immigration Judge should issue a new decision addressing whether the DHS has met its burden of proof to demonstrate, by clear and convincing evidence, that the respondent is removable for having been convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, to wit, "an offense involving fraud or deceit in which the loss to the victim exceeds $10,000." The Immigration Judge's decision should include clear and complete findings of fact that are supported by the record. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

The following orders shall be issued.

ORDER: The Board's August 16, 2004, decision is vacated.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD