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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) [redacted]

Date: NOV 24 2008

In re (b) (6) [redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael K. Mehr, Esquire

ON BEHALF OF DHS: Erica L. Seger
Assistant Chief Counsel

APPLICATION: Redetermination of custody status

This Board has been advised that the respondent's appeal has been withdrawn. *See* 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record will be returned to the Immigration Court without further action. Accordingly, the following order will be entered.

ORDER: The record is returned to the Immigration Court without further action.

FOR THE BOARD

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KLB.

IMMIGRATION COURT

In the Matter of

(b) (6)

(b) (6) Case (b) (6)

RESPONDENT IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on October 30, 2008.
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/applicant 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 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[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation of removal under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.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[ ] Cancellation of removal under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.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.

[X] 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. MOOT

[ ] 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.

[X] Proceedings were terminated. w/o prej

[ ] Other: _____

Date: October 30, 2008

Appeal: WAIVED/RESERVED Appeal Due By:

by both

JAMES DEVITTO
IMMIGRATION JUDGE

(b) (6)

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

IN THE MATTER OF:	**IN BOND PROCEEDINGS**
(b) (6)	**FILE NO.** (b) (6)
Respondent	**DATE:** October 07, 2008

On Behalf of the Respondent:
Michael Mehr, Esq.
(b) (6)

On Behalf of the Department:
Assistant Chief Counsel
Department of Homeland Security
(b) (6)

MEMORANDUM DECISION OF THE IMMIGRATION COURT

I. Procedural History

Respondent is a native and citizen of Afghanistan who was "admitted to the United States at Seattle, Washington, on or about April 23, 1985, as a refugee." (Ex. 1, Form I-862, 3 (emphasis omitted).) "On October 3, 1986, [his] status was adjusted to that of lawful permanent resident under Section 209 of the" Immigration and Nationality Act ("INA" or "the Act"), "effective April 23, 1985." *Id.* He was, "on January 14, 1993, convicted in the Superior Court (b) (6) for the offense of Unlawful Sexual Intercourse [with a] Minor, in violation of (b) (6) (emphasis omitted). *Id.*

On January 16, 2004, on the basis of these allegations, the Department of Homeland Security (the Department) issued a notice to appear, charging Respondent as removable pursuant to INA § 237(a)(2)(A)(iii), "as amended, in that, at any time after admission, [he was] convicted of an aggravated felony as defined in [INA § 101(a)(43)(A)], a law relating to murder, rape, or sexual abuse of a minor." The Department detained Respondent at Eloy Detention Center in Eloy, Arizona.

Respondent has been previously denied bond by an Immigration Judge because he was a danger to society; however, on August 20, 2008, Respondent requested a new bond hearing

(b) (6)

regarding his custody status by written motion to the Court pursuant to 8 C.F.R. § 1003.19(b). On September 9, 2008, the Immigration Judge denied Respondent's motion.

II. Statement of Law

Pursuant to *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) and *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), the Court will apply the general bond provisions of INA § 236(a). In doing so, the Court must undertake a two-step analysis to determine whether the respondent is eligible for bond. First, the Court must find that the respondent's release does not pose a danger to persons or property in the community, and second, that he is likely to appear for any future proceedings. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). Under *Casas-Castrillon*, the Government must establish under a totality of the circumstances analysis "that [the respondent] is a flight risk or will be a danger to the community." *Casas*, 535 at 949. In reviewing the totality of the circumstances, the Court shall consider the following factors: seriousness of crimes committed, if any; prior criminal history; sentences imposed and time served; nonappearance at Court proceedings; probation history; length of residence in the community; and evidence of rehabilitative effort or recidivism. *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994); *Matter of Melo*, 21 I&N Dec. 883, 886 (BIA 1997); *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987).

If the Government is unable to adequately establish that respondent is either a danger or a flight risk then the Court may consider the following factors in determining the necessity for and the amount of bond: stable employment history; length of residence in the community; existence of family ties; equities in the United States; availability of relief from removal and the likelihood of it being granted; a record of nonappearance at Court proceedings; manner of entry; and previous criminal or immigration law violations. *Drysdale*, 20 I&N Dec. at 817; *Andrade*, 19 I&N Dec. at 489; *Matter of Patel*, 15 I&N Dec. 666, 667 (BIA 1976); *Matter of Sugay*, 17 I&N Dec. 637, 638-39 (BIA 1981); *Matter of Shaw*, 17 I&N Dec. 177, 178 (BIA 1979); *Matter of Spiliopoulos*, 16 I&N Dec. 561, 563 (BIA 1978); *Matter of San Martin*, 15 I&N Dec. 167, 168-69 (BIA 1974); *Matter of Moise*, 12 I&N Dec. 102, 104-05 (BIA 1967); *Matter of S-Y-L-*, 9 I&N Dec. 575, 577 (BIA 1962).

III. Analysis and Findings

The Court finds that the Government has clearly and unequivocally shown that Respondent continues to represents a danger to society. The Court continues to find Respondent to be a danger based on his convictions for the following crimes (b) (6) (b) (6) Driving Under the Influence of Alcohol Within 7 Year[s] of Three or More Convictions (Bond Ex. 4. Abstract of Judgment, 1); and (b) (6) Unlawful Sexual Intercourse (with a Minor) (Bond Ex. 5, Order Admitting Defendant to Probation, 1).

The Court finds that these convictions render Respondent a danger to the persons and places of the United States. Respondent's crime of Unlawful Sexual Intercourse with a minor was accompanied by violence, and the crime of operating a motor vehicle while impaired by alcohol or a controlled substance is extremely dangerous in that it often results in serious injury

(b) (6)

to persons and destruction of property. Further, based on Respondent's repeated alcohol offenses over a sustained time period, and the fact that Respondent's ability to avoid alcohol over the last six years is due almost entirely to his custody status during that time period, the Court does not believe Respondent has been rehabilitated to any significant degree. The Court notes that Respondent has participated in substance abuse prevention programs in the Eloy Detention Center, but the Court also notes that Respondent has taken similar classes before with little success. For these reasons, the Court finds that Respondent currently remains a danger to society.

The Court will enter the following order:

ORDER: **IT IS HEREBY ORDERED THAT** Respondent's motion for custody redetermination be **DENIED**.

October 8, 2008
Date

James A. DeVitto
U.S. Immigration Judge

File: (b) (6)

Date: JUN 27 2008

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael K. Mehr, Esquire

ON BEHALF OF DHS: Kuyomars Golparvar
Deputy 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 (as defined in section 101(a)(43)(A))

APPLICATIONS: Withholding of removal; adjustment of status

The respondent is a native and citizen of Afghanistan. On (b) (6) the United States Court of Appeals for the (b) (6) issued a published decision, remanding proceedings for this Board to determine whether the respondent's offense, unlawful sexual intercourse with a minor in violation of (b) (6) was a particularly serious crime that would render him ineligible for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). (b) (6) *v. Gonzales* (b) (6) The (b) (6) found that we failed to apply the proper legal standard in determining the respondent's eligibility for withholding of removal, and instructed us to specifically consider the facts and circumstances of the respondent's crime in determining whether the respondent committed a particularly serious crime. *Id.* In turn, on January 22, 2007, we remanded the record to the Immigration Judge to determine whether the respondent's offense was a particularly serious crime. On May 1, 2007, the Immigration Judge issued a decision wherein he determined that the respondent had committed a particularly serious crime and reinstated his previous removal order. The respondent subsequently appealed the decision. On September 21, 2007, we again remanded proceedings back to the Immigration Judge, noting that the Immigration Judge did not identify and fully explain the circumstances and underlying facts of the respondent's offense in determining that the respondent committed a particularly serious crime.

The Immigration Judge subsequently conducted further proceedings. The respondent continued to assert that his offense was not a particularly serious crime and that he was eligible for withholding of removal. Additionally, the respondent asserted that he was now eligible for re-adjustment of status, based on an approved I-130 petition filed by his United States citizen wife. On April 3, 2008, the Immigration Judge issued a decision wherein he again found that the respondent's offense was

a particularly serious crime. Further, the Immigration Judge found that this Board's prior remands were limited in scope, precluding him from considering the respondent's eligibility for adjustment of status. The respondent has now appealed from this decision. For the following reasons the respondent's appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this decision.

Although this Board's prior order was specific in its direction to the Immigration Judge, jurisdiction passed to him when the case was remanded. *See generally Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007). Therefore, the Immigration Judge had jurisdiction to consider the new evidence that the respondent was eligible for re-adjustment of status pursuant to section 245(a) of the Act, 8 U.S.C. § 1255(a).

Here, the respondent is eligible to receive an immigrant visa, and a visa is immediately available to him based on the approved I-130 petition filed by his United States citizen wife. *See* section 245(a) of the Act. The only remaining issue with respect to his statutory eligibility for re- adjustment of status is whether he is admissible to the United States due to his (b) (6) conviction. *See* section 245(a) of the Act. We note that an alien subject to criminal grounds of deportability having no statutory counterpart in the grounds of inadmissibility is not categorically barred from seeking adjustment of status. *See Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). We further note that in *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007), the (b) (6) (b) (6) held that an alien convicted under (b) (6) was not categorically inadmissible as an alien convicted of a crime involving moral turpitude.

While we recognize that the respondent was convicted under (b) (6) *Quintero-Salazar v. Keisler, supra*, is applicable to the instant case because subsection (c) proscribes sex with a minor 16 years of age or older, while subsection (d) proscribes more serious conduct, that is, sex with a minor under the age of 16. Although the respondent's conviction may still render him inadmissible under the modified categorical approach, we will remand these proceedings to the Immigration Judge for such a determination, and for the ultimate determination of whether the respondent is deserving of adjustment of status as a matter of discretion. As such, we defer consideration with respect to the question of whether the respondent's conviction is a particularly serious crime. Accordingly, the following orders are entered.

ORDER: The respondent's appeal is sustained.

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

FOR THE BOARD

IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

RESPONDENT

Case (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on April 3, 2008.
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 AFGHANISTAN 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 ( ) 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.

[X] Other: THE BIA LIMITED THE PURPOSE OF THIS HEARING. THE RESPONDENT HAS BEEN CONVICTED OF A PARTICULARLY SERIOUS CRIME (ORIGINAL ORDER REAFFIRMED)

Date: April 3, 2008

Appeal: WAIVED/RESERVED Appeal Due By: 3 PAGES DUE 5/5/8

THOMAS MICHAEL O'LEARY
IMMIGRATION JUDGE

EXHIBIT# 54
ID ONLY:
ADMITTED:
JUDGE JDV 4/9/8

File: (b) (6)

In re: (b) (6)

Date: SEP 21 2007

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kevin H. Knutson, Esquire

ON BEHALF OF DHS: Kuyomars Golparvar
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 (as defined in section 101(a)(43)(A))

APPLICATION: Asylum; withholding of removal; cancellation of removal;212(c) waiver
Convention Against Torture

As set out in our (b) (6) Order, the United States Court of Appeals for the (b) (6) remanded this matter to the Board and held, *inter alia*, that the Board failed to apply the proper legal standard in determining the respondent's eligibility for withholding of removal. Specifically, the (b) (6) found that the Board failed to consider the facts and circumstances of the respondent's crime in determining whether the respondent committed a particularly serious crime. (b) (6) *v. Gonzales*, (b) (6) On remand, the (b) (6) directed the Board to engage in a case-specific analysis in determining whether the respondent's offense, unlawful sexual intercourse with a minor in violation of (b) (6) was a particularly serious crime that would render him ineligible for withholding of removal. *Id.* Pursuant to that order, in our January 22, 2007, opinion and order, the Board remanded the record to the Immigration Judge for the limited purpose of determining whether the respondent's offense was a particularly serious crime. In doing so, the Board directed the Immigration Judge to specifically consider each of the factors set forth in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), as directed by the (b) (6) On May 1, 2007, the Immigration Judge issued a decision wherein he determined that the respondent had committed a particularly serious crime and reinstated his previous removal order. The respondent subsequently appealed this decision. For the reasons set out below, the record will again be remanded to the Immigration Judge for further proceedings consistent with this opinion.

On appeal, the respondent claims that the Immigration Judge violated his due process rights and his right to confrontation by admitting a police report to establish the underlying facts and circumstances of his offense. In addition, the respondent claims that the court abused its discretion by determining that the respondent's offenses constituted a particularly serious crime. The Department of Homeland Security ("DHS") opposes the appeal and requests the Board to summarily affirm the Immigration Judge's May 1, 2007, decision.

A criminal offense is considered particularly serious based on a consideration of the nature of the offense, the circumstances and underlying facts of the crime, and most importantly, whether the circumstances of the crime indicate that the alien is a danger to the community (*"Frentescu* factors"). *See Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986); *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *see also, Matter of Frentescu, supra*, modified on other grounds, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988). If a crime is particularly serious, it follows that the alien is a danger to the community of the United States. *See Matter of K-*, 20 I&N Dec. 418 (BIA 1991); *Matter of Carballe, supra.*

The respondent contends that the Immigration Judge violated his due process rights by admitting the police report. We disagree. The respondent cites *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996), in his brief on appeal. We find that case inapposite. In *Matter of Teixeira, supra,* the Board examined whether a police report may be considered to determine whether an alien is *deportable* under section 241(a)(2)(C) of the Act, as an alien convicted of a *firearms violation.* However, in this case, the Board is examining a completely separate issue, *i.e.*, whether a police report may be considered to determine whether an alien is *ineligible for relief (withholding of removal)*, as an alien who committed a *particularly serious crime.* Moreover, hearsay is admissible in immigration proceedings, *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003), and the respondent has failed to demonstrate that he was prejudiced by the admission of the police report, *see Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620-21 (9th Cir. 2006) (stating that proof of denial of due process requires an alien to demonstrate that the outcome of the proceedings may have been affected by the alleged violation).

We acknowledge that in *Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007), the United States Court of Appeals for the (b) (6) found that an Immigration Judge erred in relying on the facts recited in a Washington state appellate court opinion which were not admitted or established as the circumstances and underlying facts of the conviction. We find that *Morales v. Gonzales, supra*, is based entirely on purported deference to the Board's precedents in this area, which we respectfully find that the court misread. The (b) (6) quoted a snippet from our decision in *Matter of L-S-*, 22 I&N Dec. 645, 651 (BIA 1999), saying that the Board will "look to the conviction records and sentencing information . . . [but] . . . we do not engage in a retrial of the alien's criminal case or go behind the record of conviction to redetermine the alien's innocence or guilt." However, our decision in *Matter of L-S-, supra*, did not prohibit the examination of other evidence or indicate that only conviction records and sentencing information could be used. In fact, in *Matter of L-S-, supra*, at 654-56, we examined in detail the actual circumstances of the crime, well beyond what is disclosed by the elements of the crime, including sentencing information and information from other participants in the crime. Accordingly, despite the (b) (6) opinion in *Morales, supra*, we see no reason to exclude otherwise reliable information, such as a police report, whether or not it is a conviction record, from consideration in an analysis of a particularly serious crime.

See National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 980 (2005) (finding that a federal court must accept the agency's construction of a statute if the statute is ambiguous and the implementing agency's construction is reasonable). Our practice in this regard has also been followed by the Attorney General. *See Matter of Y-L-, A-G-, R-S-R-,supra.*[1]

However, we also find that the Immigration Judge did not identify and fully explain the circumstances and underlying facts of the respondent's offenses in determining that the respondent committed a particularly serious crime. In a similar manner to his June 10, 2004, decision, the Immigration Judge, other than a brief reference to the plea of no contest and a guilty finding by a (b) (6) court, did not identify and fully explain the circumstances and underlying facts of the conviction (*see* I.J. at 5-6). Instead, the Immigration Judge again focused almost exclusively on the nature of the conviction and the sentence imposed (*see* I.J. at 6-9).

Accordingly, we will remand the record to the Immigration Judge to hold additional hearings, as necessary, and for the limited purpose of determining whether the respondent's offense was a particularly serious crime that would render him ineligible for withholding of removal. As stated in our January 22, 2007, decision, upon remand, the Immigration Judge should specifically consider each of the *Frentescu* factors, consisting of the nature of the respondent's conviction, the circumstances and underlying facts of the respondent's conviction, the type of sentence imposed, and whether the circumstances of the crime indicate that the respondent will be a danger to the community, as directed by the (b) (6) and determine whether the respondent's crime constitutes a particularly serious crime that would render him ineligible for withholding of removal. Upon remand, the Immigration Judge shall also specifically identify and discuss the circumstances and underlying facts of the respondent's conviction.

Accordingly, the following order will be entered.

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

FOR THE BOARD

[1] Insofar as *Matter of L-S-, supra,* referenced only "conviction records and sentencing information," its phraseology was admitted ill-advised. Nevertheless, such a formulation makes no sense (it not comporting with a categorical approach which would limit permissible recourse to only the record of conviction), since there is no reason to restrict use of reliable information to sentencing information once the boundaries of the categorical approach are found not to apply.

IMMIGRATION COURT

In the Matter of [redacted]

[redacted]

RESPONDENT

Cas[redacted]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on May 1, 2007.
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 AFGHANISTAN 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 ( ) 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.

[X] Other: RESPONDENT HAS BEEN CONVICTED OF A PARTICULARLY SERIOUS CRIME. ORIGINAL ORDER OF JUNE 10, 2004 REAFFIRMED

EXHIBIT # 36 DEC 5 2007 DATE TMO JUDGE

Date: May 1, 2007

Appeal: WAIVED/RESERVED Appeal Due By:

5 + resp
Ae 5/31/07

THOMAS MICHAEL O'LEARY
IMMIGRATION JUDGE

File: (b) (6)

Date: JAN 22 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kevin H. Knutson, Esquire

ON BEHALF OF DHS: Sarah L. Hartnett
Assistant Chief Counsel

RECEIVED
DEPARTMENT OF JUSTICE
07 JAN 31 PM 12:11
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
OFC OF IMMIGRATION JUDGE
ELOY, AZ

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: Withholding of removal

On (b) (6) the United States Court of Appeals for the (b) (6) remanded this matter to the Board. In its decision, the (b) (6) concluded that the Board properly determined that the respondent was removable for having committed an aggravated felony and applied the proper legal standard in determining that the respondent did not qualify for relief under the Convention Against Torture. It concluded, however, that the Board failed to apply the proper legal standard in determining the respondent's eligibility for withholding of removal. In the remand, the (b) (6) directed the Board to engage in a case-specific analysis that addressed all of the factors set forth in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), in determining whether the respondent's offense was a particularly serious crime that would render him ineligible for withholding of removal. The record of proceeding will be remanded to the Immigration Court for further proceedings consistent with this order.

In its brief in response to the (b) (6) remand, the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) requested that the Board remand the record of proceeding to the Immigration Court because a case-specific analysis is "a fact-specific analysis that must be first addressed by the Immigration Court." The respondent joined the DHS's motion to remand. We agree with the parties' position that a case-specific analysis is "a fact-specific analysis that must be first addressed by the Immigration Court." *See generally* 8 C.F.R. § 1003.1(d)(3)(i) (prohibiting the Board from engaging in *de novo* review of findings of fact); *see also Matter of Frentescu*, *supra* (requiring, in part, an analysis of the circumstances and underlying facts of the respondent's conviction). Hence, we will remand the record of proceeding to the Immigration Court for the limited purpose of determining whether the respondent's offense was a particularly serious crime that would render him ineligible for withholding of removal. Upon remand, the Immigration Court should specifically consider each of the *Frentescu* factors, including the nature of

the respondent's conviction, the circumstances and underlying facts of the respondent's conviction, the type of sentence imposed, and whether the type and circumstances of the respondent's crime indicates that the respondent will be a danger to the community, as directed by the (b) (6) determine whether the respondent's crime constitutes a particularly serious crime that would render him ineligible for withholding of removal.

Accordingly, the following order will be entered.

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

Brian M O'Leary

FOR THE BOARD