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 March 28, 2012. 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_____.
[ ] 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 $_____ by _____ for each Respondent.
with an alternative order of removal to_____.
[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn ( ) other.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.
[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.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[ ] Respondent's status was rescinded under section 246 of the INA.
[ ] Respondent 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.
[ ] Relief under Convention Against Torture( )granted ( )denied ( )withdrawn
[ ] The prior order of removal dated _____ is hereby reinstated.
[X] Other: Administrative closure pending Resp. return to the U.S.

Waived / Appeal: A / I / B
Appeal due by:_____

Michael J. Yamaguchi
Immigration Judge

Date: 3/28/12

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [X] PERSONAL SERVICE [X]
TO: [X] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN'S ATTY/REP [X] DHS

DATE: 3/28/12 (if address available) BY: COURT STAFF _____

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

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] Date: DEC 14 2011

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ashwani K. Bhakhri, Esquire

ON BEHALF OF DHS: Brian J. Six
Assistant Chief Counsel

Received
Department of Justice
DEC 20 2011
Executive Office for Immigration Review
Immigration Court
San Francisco, California

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

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

APPLICATION: Termination

This case was originally before us on December 27, 2004. At that time we affirmed the Immigration Judge's August 11, 2004, decision, which incorporated an Immigration Judge's July 19, 2004, order. The Immigration Judge concluded, *inter alia*, that the respondent had been convicted of two or more crimes involving moral turpitude, and ordered him removed. *See* section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). The record had shown that the respondent was convicted, on March 10, 1994, and again on November 3, 1994, of the offense of indecent exposure, in violation of section [redacted] of the [redacted] PENAL CODE. He was convicted on July 31, 2001, of the offense of theft, in violation of section [redacted] of the [redacted] PENAL CODE, and was convicted on May 23, 2002, of the offense of failure to register as a sex offender, in violation of section [redacted] of the [redacted] PENAL CODE. The Immigration Judge, in the aforementioned July 19, 2004, order, concluded, *inter alia*, that a conviction for the offense of indecent exposure, in violation of [redacted] PENAL CODE § [redacted] was categorically a crime involving moral turpitude. The Immigration Judge declined to address whether a conviction for the offense of failure to register as a sex offender, in violation of [redacted] PENAL CODE § [redacted] was a crime involving moral turpitude.

On [redacted] the United States Court of Appeals for the [redacted] vacated our decision, which had found the respondent's indecent exposure convictions to be turpitudinous, and remanded this case to us to consider the following: whether the offense of failure to register as a sex offender under [redacted] PENAL CODE § [redacted] was a crime involving moral turpitude or apply the

modified categorical approach to the offense of indecent exposure in light of the (b) (6) decision in (b) (6) *v. Gonzales*, (b) (6) which had held that the full range of conduct encompassed by (b) (6) PENAL CODE [redacted] did not constitute a categorical crime involving moral turpitude. *See* (b) (6)

On May 1, 2007, we again affirmed the Immigration Judge's August 11, 2004, decision. We noted that it was subsequent to the (b) (6) vacation of our December 27, 2004, decision and remand, that we issued our precedent decision, *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), which was dispositive. In *Matter of Tobar-Lobo*, *supra*, we held that the willful failure to register by a sex offender who has been previously apprised of the obligation to register, in violation of (b) (6) PENAL. CODE [redacted], is a crime involving moral turpitude. We concluded that the respondent, by reason of his convictions for theft and for willful failure to register by a sex offender, in violation of (b) (6) PENAL. CODE § (b) (6) was removable as an alien convicted of two or more crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act. Thus, we found it unnecessary to consider whether, applying the modified categorical approach, one of the respondent's 1994 convictions for indecent exposure, in violation of (b) (6) PENAL CODE § (b) (6) represented a crime involving moral turpitude.

In a decision entered on (b) (6) the (b) (6) again remanded the matter to the Board, noting that the law impacting the respondent's case had changed considerably since we had issued our May 1, 2007, decision. This included the court's decision in (b) (6) *v. Mukasey*, (b) (6), which involved a (b) (6) statute similar to (b) (6) PENAL. CODE § (b) (6) The court, in (b) (6) *v. Mukasey*, *supra*, based upon de novo review, rejected the Board's reasoning in *Matter of Tobar-Lobo*, *supra*, and concluded that the mere failure to register by a sex offender can not constitute a crime involving moral turpitude. Thereafter, the court, in (b) (6) *v. Holder*, (b) (6) (b) (6) (en banc), held that *Chevron* deference was owed to unpublished Board determinations as to whether a crime involves moral turpitude if those decisions rely on a prior Board precedent that is dispositive of the interpretive issue; the court expressly overruled (b) (6) *v. Mukasey supra*, to the extent it applied a de novo standard of review. The court, in (b) (6) *supra*, further noted that it was subsequent to the Board's 2007 decision that the Attorney General issued his decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). The court pointed out that the scienter requirement in *Matter of Silva-Trevino*, *supra*, appeared to be in tension with the Board's decision in *Matter of Tobar-Lobo*, *supra*, as the (b) (6) courts had applied (b) (6). PENAL. CODE (b) (6) in a manner to make it, in effect, a strict liability crime. The court concluded that, in light of the significant intervening developments, the matter was being remanded to allow the Board to reconsider whether the respondent's conviction for failure to register as a sex offender was a crime involving moral turpitude. The court further observed that the Board may consider the issue which had been left open, whether the respondent's conviction for indecent exposure was a crime involving moral turpitude.

We note that, in the instant case, in (b) (6) *supra*, the court concluded that the full range of conduct encompassed by (b) (6) PENAL CODE § (b) (6) did not constitute a categorical crime involving moral turpitude. In addition, in (b) (6) *supra*, the court suggests that the issue of whether the respondent's conviction for failure to register as a sex offender was a crime involving

(b) (6)

moral turpitude cannot be resolved under the "categorical approach." As, pursuant to *Matter of Silva-Trevino*, at 690, 698-99, a modified categorical approach is to be taken, this requires the inspection of specific documents comprising the alien's record of conviction to discern the nature of the underlying conviction. We would point out that if the record of conviction is inconclusive, the Attorney General has held that, because moral turpitude is not an element of the crime, evidence beyond the record of conviction may be considered when evaluating whether an alien's offense constituted a crime involving moral turpitude. *Id.* at 690, 699-701. Moreover, the Attorney General's holding in *Matter of Silva-Trevino* has yet to be applied to the respondent's 1994 convictions for indecent exposure or his 2002 conviction for failure to register as a sex offender.

Although the respondent argues that a remand by the Board is unnecessary, as we noted above, the Immigration Judge, in his July 19, 2004, order, concluded that a conviction for the offense of indecent exposure, in violation of (b) (6) PENAL CODE § (b) (6) was categorically a crime involving moral turpitude, and declined to address whether a conviction for the offense of failure to register as a sex offender, in violation of (b) (6) PENAL CODE § (b) (6) was a crime involving moral turpitude. As the findings of fact were limited, in order for this Board to address the specific issues raised by the (b) (6) we deem it advisable at this time to remand the record to the Immigration Judge so that the parties may have an opportunity to supplement the record with additional relevant evidence, if appropriate. The Immigration Judge should thereafter issue a new decision, setting forth findings of fact and conclusions of law, on the issue of whether, in light of *Matter of Silva-Trevino, supra*, the respondent, in addition to his theft offense, has been convicted of a second crime involving moral turpitude, and is removable on the remaining charge, as an alien convicted of two or more crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act. We will vacate our May 1, 2007, decision and remand the record for further proceedings and the issuance of a new decision.

The following orders shall be issued.

ORDER: The Board's decision dated May 1, 2007, is vacated.

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

FOR THE BOARD

Depart... Justice
DEC 2 0 2011
Executive ... Review
... Virginia

File: (b) (6)

Date: MAY 01 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ashwani K. Bhakhri, Esquire

ON BEHALF OF DHS: James A. Lazarus
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

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

APPLICATION: Termination

This case was last before us on December 27, 2004. At that time we affirmed the Immigration Judge's August 11, 2004, decision concluding that the respondent is removable from the United States as an alien convicted of two or more crimes involving moral turpitude. *See* section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). The record shows that the respondent was convicted, on March 10, 1994, and again on November 3, 1994, of the offense of indecent exposure, in violation of (b) (6) PENAL CODE (b) (6) He was convicted on July 31, 2001, of the offense of theft in violation of section (b) (6) of the (b) (6) PENAL CODE, and was convicted on May 23, 2002, of the offense of failure to register as a sex offender in violation of (b) (6) PENAL CODE § (b) (6) On (b) (6) the United States Court of Appeals for the (b) (6) (b) (6) vacated our decision, which had found the respondent's indecent exposure convictions to be turpitudinous, and remanded this case to us to consider whether the failure to register as a sex offender under (b) (6) PENAL CODE § (b) (6) is a crime involving moral turpitude or to apply the modified categorical approach in light of the (b) (6) decision in (b) (6) *v. Gonzales*, (b) (6) which held that the full range of conduct encompassed by CAL. PENAL CODE (b) (6) does not constitute a categorical crime involving moral turpitude. The appeal will be dismissed.

The respondent was admitted to the United States as an immigrant in May 1990. He was served with a Notice to Appear on January 20, 2006, charging him with, *inter alia*, removability under section 237(a)(2)(A)(ii) of the Act, as an alien convicted of two or more crimes involving moral

turpitude. This charge was based on the respondent's two 1994 convictions for indecent exposure, his 2001 theft conviction, and his 2002 conviction for failure to register as a sex offender. In his June 2004 motion to terminate these proceedings, the respondent admitted to the four convictions, and conceded that the theft conviction was for a crime involving moral turpitude. On appeal, the respondent argues that none of the other three convictions, under (b) (6) PENAL. CODE § (b) (6) or under (b) (6) PENAL. CODE § (b) (6) is a crime involving moral turpitude, and requests that the removal proceedings be terminated. He asserts that, while his failure to register was willful (Respondent's Brief at 12), the statutory language of (b) (6) PENAL. CODE § (b) (6) requires a finding that this conviction is not for a crime involving moral turpitude–that is, the conduct resulting in a conviction is required to be willful but not evidence of the type of "evil intent" typically categorized as turpitudinous conduct.

Subsequent to the (b) (6) vacation of our December 27, 2004, decision and remand, the Board issued a precedent decision, *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), which is dispositive of the instant matter. In *Tobar-Lobo*, we held that the willful failure to register by a sex offender who has been previously apprised of the obligation to register, in violation of (b) (6) PENAL. CODE (b) (6) is a crime involving moral turpitude. Accordingly, we find that the respondent, by reason of his convictions for theft and for willful failure to register by a sex offender, in violation of (b) (6) PENAL. CODE § (b) (6) is removable as an alien convicted of two or more crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act. Thus, we need not address the remaining arguments presented on appeal.

The following order shall be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD