File: (b) (6)

Date: MAR 15 2012

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amanda E. Gray, Esquire

ON BEHALF OF DHS: Randall W. Duncan
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 sectio 101(a)(43)(F)

APPLICATION: Termination

This case is presently before us pursuant to an order of the United States Court of Appeals for the (b) (6) granting the respondent's petition for review and remanding the matter for consideration of the charge of removability. The Board previously sustained the Department of Homeland Security's (DHS) appeal of an Immigration Judge's September 19, 2008, decision terminating the respondent's proceedings. We reconsider the appeal pursuant to the court's directive, and vacate our prior decision. The appeal will be dismissed.

We review findings of fact, including the Immigration Judge's determination of credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The (b) (6) remanded the matter for consideration of the respondent's motion to terminate proceedings. The court found, contrary to the Board's decision, that the respondent's conviction for extortionate extension of credit in violation of 18 U.S.C. § 892(a) was not categorically an aggravated felony crime of violence. (b) (6) *v. U.S. Atty Gen.* (b) (6) (b) (6) Upon further consideration, we affirm the Immigration Judge's September 19, 2008, decision terminating proceedings against the respondent.

In his September 19, 2008, decision, the Immigration Judge considered whether the respondent's crime was an aggravated felony under the modified categorical approach. The Immigration Judge concluded that the record of conviction did not establish that the respondent assented to the government's proffer of the factual basis for his guilty plea during the plea colloquy. The prosecution outlined the elements of the offense and made a proffer of what the government would present if the case went to a trial. The judge asked the respondent to tell him the factual basis of his

plea, and the respondent stated that he made an extension of credit to Jane Doe with the understanding between himself and Jane Doe that her failure to make repayment could result in the use of criminal means to cause harm to her reputation (Tr. of plea colloquy, p. 15-16). The respondent did not assent to the proffer of the factual basis that would be proved at trial as provided by the prosecution (Tr. of plea colloquy, p. 15-16). *See U.S. v. Palomino Garcia*, 606 F.3d 1317, 1337 (11th Cir. 2010). The Immigration Judge gave "no weight to the prosecutor's belief, however valid, of what would be proved at trial." (I.J. at 3).

The DHS requests that the Board remand the record so that the Immigration Judge can apply the modified categorical approach to evaluate whether the respondent's crime is one "of violence." However, the Immigration Judge already took this course of action. As he evaluated the appropriate evidence, made findings of fact which are not clearly erroneous, and properly applied the modified categorical approach, we are not persuaded that a remand is necessary as set forth by the DHS. In reaching this conclusion, we consider the court of appeal's decision regarding the scope of the criminal statute at issue. *See* (b) (6) *v. Att'y Gen., supra*. Accordingly, the DHS's appeal will be dismissed.

ORDER: The Board's decision of June 17, 2009, is vacated.

FURTHER ORDER: The DHS's appeal is dismissed, and the removal proceedings are terminated.

FOR THE BOARD