File: (b) (6) – Dallas, TX

Date: FEB 2 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alicia G. Burkman, Esquire

ON BEHALF OF DHS: Michelle Allen-McCoy
Assistant Chief Counsel

APPLICATION: Withholding of removal; cancellation of removal

The respondent, a native and citizen of Zimbabwe, filed a timely appeal from the Immigration Judge's June 1, 2010, decision denying her applications for withholding of removal and for cancellation of removal. The record will be remanded.

The Immigration Judge in this case found that the respondent testified credibly. However, he denied withholding of removal because he concluded that she had not shown persecution or a likelihood of persecution on account of a protected ground, and had not shown that the government of Zimbabwe was unable or unwilling to protect her. As to cancellation of removal, the Immigration Judge found that the respondent had not shown the requisite good moral character or exceptional and extremely unusual hardship, or that she merited the relief in the exercise of discretion.

As noted by the Immigration Judge, after the respondent was raped and beaten by the man her parents wanted her to marry, she reported the incident to the police. The individual was arrested, jailed, and brought to trial. He was held for 3 months, but the case was dismissed because the respondent had come to the United States and was not available to testify against him. I.J. at 13. Under these circumstances, we will uphold the Immigration Judge's finding that the respondent did not show that the government of Zimbabwe was unable or unwilling to protect her.[1]

However, given the passage of time and the other facts presented here, we will remand the case for further consideration of the respondent's application for cancellation of removal. On remand, the parties may further address the issues of the respondent's good moral character, the

[1] We therefore find no basis for remanding the case based on any new case law relating to particular social group and domestic violence. *See Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); *see also Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

hardship that her United States citizen daughter will suffer if she relocates to Zimbabwe, and the proper exercise of discretion, on an updated record.

Accordingly, the following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JAN 17 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nathan C. Christensen, Esquire

ON BEHALF OF DHS: Dawnita J. Wilson Grimes
Assistant Chief Counsel

APPLICATION: Cancellation of removal; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated September 6, 2011, which found him removable as charged and pretermitted his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Immigration Judge also denied the respondent's request for voluntary departure in the alternative. *See* section 240B(b) of the Act; 8 U.S.C. § 1229c(b). The respondent's appeal will be sustained, and the record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent's application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge concluded that the respondent was ineligible for cancellation for two reasons. First, he determined that the respondent's 1983 conviction for unlawfully carrying a weapon was an aggravated felony under section 101(a)(43)(E) of the Act, 8 U.S.C. § 1101(a)(43)(E), which made the respondent ineligible for cancellation of removal under section 240A(a)(3) of the Act (I.J. at 4-5). Section 101(a)(43)(E) of the Act lists various firearms offenses that are aggravated felonies; the Immigration Judge referred to the specific federal offense of possession of a firearm by an illegal alien under 18 U.S.C. § 922(g)(5). The relevant portion of that provision makes it illegal for an undocumented alien to "possess in or affecting commerce, any firearm or ammunition."

The Immigration Judge found that the "in or affecting commerce" clause in 18 U.S.C. § 922(g)(5) was merely jurisdictional and was not an element of the offense, pursuant to the Board's decision in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002) (I.J. at 5). On appeal, the respondent contends that the phrase is an element of the offense that cannot be ignored and was not demonstrated by the evidence (Respondent's Br. at 7). The Department of Homeland Security did not argue that the respondent's offense was an aggravated felony, and

declines in its appeal brief to assert this as a basis for pretermitting cancellation of removal (DHS Br. at n.1).

The Board has ruled that the commerce nexus requirement of 18 U.S.C. § 922(g) is a jurisdictional basis not essential to determining whether a state crime is an aggravated felony. *Matter of Vasquez-Muniz, supra.* While that case specifically addressed paragraph (g)(1), our analysis broadly applies to section 922(g) as a whole. *See id.* at 212 ("It would be unreasonable to assume that Congress intended to exclude certain specified crimes from the definition of an aggravated felony simply because they lack a jurisdictional element that would be meaningless to the enacting foreign or state jurisdiction."). The Court of Appeals for the Fifth Circuit agreed with our analysis. *See Nieto Hernandez v. Holder*, 592 F.3d 681, 685 (5th Cir. 2009) ("Because § 922(g)(1)'s interstate commerce element is simply an element that ensures federal jurisdiction, finding that such an element is necessary for a state offense to be one that is 'described in' § 922(g)(1) would undermine Congress's evident intent that jurisdiction be disregarded in applying this definition of 'aggravated felony.'").

Unlike the "in or affecting commerce" clause, however, the provision in section 922(g)(5) requiring that the defendant be an alien *unlawfully in the United States* is a substantive element of the offense. As the state statute of conviction contains no element requiring that the defendant be an alien unlawfully in the United States, it is not a categorical match with 18 U.S.C. § 922(g)(5).[1] *See Descamps v. United States*, 133 S. Ct. 2276 (2013); *Taylor v. United States*, 495 U.S. 575, 600 (1990). Hence, the Immigration Judge erred in concluding that the respondent's offense was an aggravated felony.

The Immigration Judge also determined that the respondent had misrepresented material facts in his application for an immigrant visa in 1989 (Exh. 5); therefore, his lawful permanent resident ("LPR") status was fraudulently obtained and he is ineligible for LPR cancellation of removal (I.J. at 8). *See Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003) (an alien who acquired permanent resident status through fraud or misrepresentation has never been "lawfully admitted for permanent residence" and is therefore ineligible for cancellation of removal under section 240A(a) of the Act). Specifically, the Immigration Judge found that the respondent had not disclosed his 1983 arrest for aggravated assault with a deadly weapon, or the fact that the arrest and other acts had led to the violation of probation for the weapons offense (I.J. at 7; Exh. 5, 7; Tr. at 47-48).

The respondent argues that his case can be distinguished from *Matter of Koloamatangi, supra*, because in that case the alien was clearly ineligible for the requested relief due to the concealed facts, whereas the information the respondent failed to disclose does not lead to a determination that he was necessarily ineligible for permanent residency

[1] There is no dispute that the respondent was convicted under Texas Penal Code § 46.02, which states, in relevant part: "A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club" (Respondent's Br. at 2; Exh. 7).

(Respondent's Br. at 9).[2] In his decision, the Immigration Judge acknowledged that the respondent's arrest for aggravated assault "may not in and of itself have rendered [him] ineligible" for an immigrant visa (I.J. at 7). We agree with the respondent that *Matter of Koloamatangi* may be distinguished, as we ruled in that case that the alien, "obtained his permanent resident status fraudulently and was therefore never 'lawfully' accorded the status required to establish eligibility for cancellation of removal under section 240A(a)." *Id.* at 551; *see also, e.g., Estrada–Ramos v. Holder*, 611 F.3d 318, 321 (7th Cir. 2010) (alien did not disclose conviction which would have precluded him from obtaining permanent resident status); *Gallimore v. U.S. Att'y Gen.*, 619 F.3d 216, 223 (3d Cir. 2010); *Monet v. INS*, 791 F.2d 752, 753 (9th Cir. 1986).

The Immigration Judge determined that although the misrepresentation did not necessarily make him ineligible, "it was certainly relevant to the examiner's exercise of discretion" (I.J. at 7). Contrary to the Immigration Judge's finding, however, the consular officer examining an immigrant visa application does not have the authority to deny the application in the exercise of discretion, if the applicant is otherwise eligible. *See* section 221(g) of the Act, 8 U.S.C. § 1201(g). Therefore, the Immigration Judge erred in pretermitting cancellation of removal on this basis as well.

The Immigration Judge alternatively found that the respondent "failed to sustain his burden of proof" for relief, which appears to be a denial of the respondent's application as a matter of discretion (I.J. at 8-13). *See* section 240(c)(4)(A)(ii) of the Act, 8 U.S.C. § 1229a(c)(4)(A)(ii) (it is the alien's burden to establish that he merits a favorable exercise of discretion in granting the requested relief). The Immigration Judge acknowledged, however, that he did not allow the respondent to call witnesses who would testify as to his "merits and bona fides," because of the determination that the respondent was otherwise ineligible for cancellation of removal (I.J. at 8, 14).

Accordingly, we will remand the case for further consideration of the respondent's application for cancellation of removal. In exercising such discretion, the adverse factors evidencing the respondent's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether a grant of cancellation of removal is in the best interests of this country. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998) (listing factors to be considered). On remand, the respondent may offer additional evidence to meet his burden of proof. *See* section 240(b)(4)(B) of the Act.[3] Accordingly, the following orders will be entered.

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[2] In that case, the alien obtained permanent resident status by virtue of his "marriage" to a United States citizen; however, his marriage was knowingly bigamous, as he was then married to a Tongan national. *Id.* at 549.

[3] The Immigration Judge also denied the respondent's request for voluntary departure "for the reasons set forth above" (I.J. at 14). On remand, if necessary, the Immigration Judge should further consider whether the respondent is statutorily eligible for voluntary departure, and whether he merits such relief in the exercise of discretion. *See* section 240(c)(4)(A)(ii) of the Act; *Matter of Arguelles-Campos*, 22 I&N Dec. 811, 817 (BIA 1999).

ORDER: The respondent's appeal is sustained, and the Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded for further proceedings and the entry of the new decision consistent with the foregoing opinion.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date:

MAR 25 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Chester L. Wheless, Esquire

ON BEHALF OF DHS: Margaret M. Price
Assistant Chief Counsel

APPLICATION: Continuance

The respondent, a native and citizen of Senegal, has appealed from the Immigration Judge's decision dated November 15, 2011.[1] The Immigration Judge found the respondent removable as charged and denied his request for a continuance. The record will be remanded.

The respondent sought a continuance to allow him time to await the adjudication of his appeal of the denial of a visa petition (Form I-130) filed by his United States citizen spouse. The Department of Homeland Security opposed the continuance (Tr. at 21).

The Board, by decision dated August 27, 2012, has ordered that the visa petition appeal filed by the respondent's spouse (petitioner) be remanded for failure of the Director to include documents upon which the Director relied in denying the petition.

In light of the foregoing, the following order will be entered.

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

FOR THE BOARD

[1] The Board previously remanded these proceedings on July 16, 2010.

File: (b) (6) Oklahoma City, OK Date: JUL 28 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Melissa R. Lujan, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated August 19, 2011, denying his applications for cancellation of removal and voluntary departure under sections 240A(b)(1) and 240B(b) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229b(b)(1) and 1229c(b). The appeal will be dismissed in part and sustained in part.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

We agree with the Immigration Judge's conclusion that the respondent failed to establish exceptional and extremely unusual hardship to a qualifying relative, a requisite for cancellation of removal (I.J. at 14). Section 240A(b)(1)(D) of the Act. We recognize his relocation to Mexico would cause some hardship. However, as we explained in *Matter of Monreal*, 23 I&N Dec. 56, 59 (BIA 2001), the hardship standard under section 240A(b)(1) means hardship that is "substantially beyond that which ordinarily would be expected to result from the alien's deportation." The respondent failed to carry his burden of establishing that the hardship to his qualifying relatives would rise to that level.

The respondent's qualifying relatives are his four United States citizen children: (b) (6) (b) (6) (b) (6) and (b) (6) aged (b) (b) (and (years, respectively, at the time of the respondent's hearing in 2011 (Tr. at 19; Exh. 3; I.J. at 3-4). The respondent is married to and lives with the mother of the three younger children (Tr. at 21). The respondent's oldest United States citizen child resides with the respondent and his wife, who also lacks legal status in the United States (Tr. at 19).

The respondent presented evidence that his children suffer from various ailments including vision problems, weight problems, headaches, and stomach aches (Tr. at 59-62; Exh. 4; I.J. at 13-14). Despite these problems, the children are generally doing well in school (Tr. at 59-62; I.J. at 14). Contrary to the respondent's argument on appeal (Resp. Br. at 8-9), these problems are not so serious as to support a finding of exceptional and extremely unusual hardship (I.J. at 14). While it is certain that the departure of the respondent will cause some difficulty for the qualifying relatives, the hardship cannot be considered substantially beyond what is expected when any loved one is subject to removal. *Matter of Monreal, supra.*

The respondent stated in his application and testimony that, if he departs to Mexico, the qualifying relatives may not go with him (Exh. 3; Tr. at 66). The qualifying relatives also have an aunt, uncle, and other extended relatives in the United States (Tr. at 79-80). In the United States, the children would retain access to the United States health care, education, and welfare systems (Tr. at 71). We do not minimize the hardship the children would endure. Further, we have considered the impact of the respondent's departure on his wife as a factor in determining the hardship to the children (Resp. Br. at 8). *See Matter of Recinas,* 23 I&N Dec. 467, 472 (BIA 2002). However, the standard for cancellation of removal is a high one. We agree with the Immigration Judge that the requisite hardship has not been shown (I.J. at 14).

While the respondent's removal could also result in some economic difficulty, such difficulties are generally insufficient to establish a finding of exceptional and extremely unusual hardship. *See Matter of Andazola,* 23 I&N Dec. 319 (BIA 2002) (economic detriment alone is insufficient to support extreme hardship). The respondent was (b) years old at the time of the hearing (Tr. at 53; Exh. 3). The respondent and his wife are relatively young and capable of working (Tr. at 54; Exh. 3). They have been hard-working in the United States and have been able to purchase two cars and a home—although they have an outstanding mortgage on the home (Tr. at 55; Exh. 3).

If the qualifying relatives go with the respondent to Mexico, they will be reunited with their paternal grandparents (Tr. at 64). The qualifying relatives speak Spanish (Tr. at 81). They will be able to obtain some level of education in Mexico (Tr. at 64); therefore, the respondent has not established that the qualifying relatives would be deprived of all educational opportunity. *See Matter of Andazola, supra,* at 323. They will also be able to receive some financial support from relatives remaining behind in the United States (Tr. at 50).

We share the respondent's concern about crime in Mexico (Tr. at 64; Resp. Br. at 9); however, the hardship due to crime is not substantially beyond what would normally be expected by every alien who is returned to Mexico. *See Matter of Monreal, supra.* We do not minimize the hardship the qualifying relatives would endure. However, the standard for cancellation of removal is a high one.

Considering all of the factors presented cumulatively, we agree with the Immigration Judge that the evidence of record does not indicate that whatever difficulties the respondent's qualifying relatives might face upon his removal would rise to the heightened exceptional and extremely unusual standard. *See Matter of Andazola, supra; Matter of Monreal, supra; cf. Matter of Recinas, supra.*

However, we reverse the Immigration Judge's determination that the respondent failed to demonstrate that he merits relief as a matter of discretion (I.J. at 15). In exercising such discretion, the adverse factors evidencing the respondent's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether a grant of relief is in the best interests of this country. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998) (following *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)).

Among the factors deemed adverse to an alien are the nature and underlying circumstances of the removability ground at issue, the presence of additional significant violations of this country's immigration laws, the nature, recency, and seriousness of any criminal record, and other evidence indicative of a respondent's bad character. *Id.* Favorable considerations include family ties in the United States, residence of long duration in this country (particularly from a young age), hardship to the respondent and family if removal occurs, property or business ties, a history of employment, evidence of community service, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *Id.*

Upon our de novo review, we conclude that the respondent's positive factors outweigh the adverse factors in this case. The respondent has a residence of long duration in this country from the age of (b) years in 1995 (I.J. at 11; Tr. at 19). During that time, the respondent has developed significant family ties in the United States, including a wife to whom he has been married 13 years, and 4 young children (I.J. at 3; Tr. at 19, 56). The respondent's family, which includes both his wife and himself, would suffer even greater collective hardship than the hardship suffered by the respondent's qualifying relatives alone, as discussed above. The respondent is employed, owns a home and 2 cars, and is involved in his community's church (I.J. at 3; Exh. 3; Tr. at 55-56). While we agree with the Immigration Judge's conclusions that the respondent is credible and has good moral character (I.J. at 10), we do not find the Immigration Judge's discretionary denial warranted (I.J. at 15, 17).[1] Under the circumstances, we are satisfied that a favorable exercise of discretion would be in the best interests of the United States in this case.

Although the respondent failed to establish the necessary exceptional and extremely unusual hardship to a qualifying relative for cancellation of removal under section 240A(b)(1) of the Act, having determined that the respondent merits a favorable exercise of discretion, the respondent remains eligible for voluntary departure under section 240B(b). Therefore, the record will be remanded for further consideration of the respondent's eligibility for voluntary departure and the

[1] In agreeing with the result reached by the Immigration Judge in denying cancellation of removal, we note our disapproval of the tone and characterizations used by the Immigration Judge in his final decision (I.J. at 15-17). An Immigration Judge's role is to fairly examine the facts and arrive at legal conclusions well-supported by the evidentiary record and within the court's subject matter expertise. Making assumptions or speculating about tax issues or selective service registration is inappropriate. It is equally inappropriate for an Immigration Judge to moralize or lecture a respondent about such issues and their presence in the United States. The gravity of these proceedings speaks for itself without the inappropriate addition of unnecessary and irrelevant commentary by an Immigration Judge.

conditions of such relief. *See* 8 C.F.R. § 1240.26(c). Accordingly, the following orders are entered.

ORDER: The respondent's appeal of the denial of cancellation of removal is dismissed.

FURTHER ORDER: The appeal of the denial of voluntary departure is sustained.

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

FOR THE BOARD

Board Member Edward R. Grant respectfully concurs with the result in this case.

File: (b) (6) – Dallas, TX

Date: MAR 31 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Melissa R. Lujan, Esquire

ON BEHALF OF DHS: Michelle Allen-McCoy
Assistant Chief Counsel

APPLICATION: Adjustment of status

The respondent, a native and citizen of Mexico, has filed an appeal from the Immigration Judge's decision dated February 23, 2012, denying her application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), in the exercise of discretion. We will remand the case to the Immigration Judge for further proceedings.

The respondent argues on appeal that the Immigration Judge's discretionary denial of her application to adjust status was erroneous and an abuse of discretion and should be reversed. Specifically, the respondent argues that the Immigration Judge erred in (1) denying her application pursuant to *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), on the basis of her purported failure to comply with the Court's instructions, and in (2) not weighing her positive equities present in her case against her negative factors, as set forth in *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). *See* Respondent's Appeal Brief at 4-7.

The respondent asserts that the facts in her case differ from those in *Matter of Almanza*, *supra*, in that, in that case, the alien did not submit the documentation that was specifically requested of him and gave no reason for failing to do so. Here, the respondent argues that she did take substantial steps to comply with the specific instructions the Immigration Judge gave her on November 19, 2010, including hiring a tax preparer on December 21, 2010, to prepare her income tax returns, obtaining a tax ID number, paying a portion of a bill she received from the Internal Revenue Service (IRS) in February 2010, and bringing to court documents evidencing the actions she took to comply with the Immigration Judge's instructions. The respondent maintains that the Immigration Judge's refusal to accept the documents she brought to court on April 21, 2011 (Tr. at 53), and consider her reasons for not having fully complied with the instructions he gave her was not reasonable. The respondent further argues that the Immigration Judge did not weigh her key negative factor of not having filed taxes in the United States against her many positive equities, which include her 20-plus years living in the United States with a similarly long history of stable employment, her having two United States citizen children, and her lack of a criminal history. According to the respondent, had the Immigration Judge weighed all the positive and negative factors in her case, he would have found that the positive factors prevailed in her favor. *Id.*

We agree with the Immigration Judge that the respondent did not show full compliance with his instructions despite the five-month continuance he granted her on November 19, 2010. Specifically, the respondent did not bring to court on April 21, 2011, evidence that she had either paid all her delinquent taxes or established a payment plan with the IRS and complete the first two payments. Nor did she bring evidence that she filed her 2005 income tax return (I.J. at 8-13; Tr. at 44-47, 50-53). However, we agree with the respondent that the facts in her case differ somewhat from those in *Matter of Almanza, supra*, so that it would have been reasonable for the Immigration Judge to at least accept the evidence she brought to court on April 21, 2011, and proceed with the adjudication of her application for adjustment of status. We also agree with the respondent that the Immigration Judge's decision should have included an analysis of the positive and negative equities in the respondent's case. *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). As such, we will remand the case for the Immigration Judge to give both parties another opportunity to submit additional evidence pertinent to the issue of the respondent's eligibility for adjustment of status as a matter of discretion and thereafter issue a new decision that includes an analysis of the positive and negative equities in the respondent's case. However, we express no opinion regarding the ultimate outcome of these removal proceedings at the present time. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). Accordingly, the following order shall be entered.

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

FOR THE BOARD

File: (b) (6) - Dallas, TX

Date: MAY 30 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: James Feroli, Esquire

ON BEHALF OF DHS: Michelle Allen-McCoy
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Remand, asylum; withholding of removal; Convention Against Torture

The respondent is a native of Ethiopia and a citizen of Eritrea. He appeals from an April 9, 2012, Immigration Judge decision denying his application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as his request for protection under the Convention Against Torture ("CAT"). The Immigration Judge found that the respondent was not credible and also did not meet his burden of proof for his requested forms of relief. We will remand the record for further proceedings.

The respondent entered the United States on April 27, 2010, had a credible fear interview with an asylum officer on May 13, 2010, and filed his asylum application before the Immigration Judge on April 7, 2011. He alleged past persecution and a well-founded fear of future persecution in Eritrea on account of its population control policy, and a well-founded fear of future persecution on account of his Christian religion. Because of the filing date, the respondent's claims are governed by the amendments to the Act brought about by the passage of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

On appeal, the respondent asserts that the proceedings violated his due process rights because the Immigration Judge relied on the credible fear interview to support his adverse credibility determination. The respondent argues that he met his burden of proof for asylum through credible testimony and sufficient documentation. The respondent also contends that the Immigration Judge erred in not preserving the record and by failing to consider corroborative evidence. In addition, the respondent points out that the Immigration Judge did not provide a separate analysis for his request for protection under CAT and asks that we remand the record for adjudication of that claim.

Contrary to the respondent's assertion, we conclude that his credible fear interview can be relied upon to support an adverse credibility determination, as such a reliance is not a violation of a respondent's due process. *See Fishaye v. Holder*, 2014 WL 930593 at *2 (Mar. 11, 2014 5th Cir.) (affirming an adverse credibility determination based on inconsistencies between a respondent's credible fear interview and hearing testimony); *Alvarado-Rivas v. Holder*, 546 Fed. Appx. 630, 631 (5th Cir. 2013) (same).

In the case at bar, the credible fear interview was not transcribed verbatim, but nonetheless we conclude that it provides sufficient and reliable information on which to base a credibility determination. Specifically, the credible fear worksheet (Form I-870) indicates that the interview, all forms, and other relevant information were translated into Tigrinya for the respondent by a certified translator (Exh. 1 at Form I-870). The memorialization of the interview indicates that the questions asked of the respondent were designed to elicit relevant details of an asylum claim (Exh. 1 at credible fear interview notes). Further, the interview notes do not indicate that the respondent was hesitant to reveal information to the asylum officer or that the respondent did not understand the translator (*Id.*). We find these credible fear interview notes sufficiently reliable to base a credibility determination on, given that all the relevant information was translated into a language the respondent could readily understand, officials asked questions to elicit details of an asylum claim, and there is no indication that the respondent appeared to be reluctant in revealing information to officials. *Ramsameachire, supra*, at 180-81.

As discussed above, we conclude that the proceedings were conducted fairly and the credible fear interview could be used in rendering an adverse credibility decision in this case. However, we will not address the validity of the adverse credibility at this time, but instead will remand the record for two reasons. First, part of the record appears to be missing. The respondent's supplemental affidavit in support of his asylum application is not in the record (See Exh. 4, Form I-589 at 5). We cannot fairly or completely determine whether the adverse credibility determination is clearly erroneous without this document, and will remand for placement of this document in the record. Second, the Immigration Judge did not provide separate analysis of the respondent's request for protection under CAT. The Immigration Judge also did not make sufficient findings of fact for us to address the merits of the claim in the first instance. We cannot make such findings of fact on appeal. 8 C.F.R. § 1003.1(d)(3)(iv).

On remand, we ask the Immigration Judge to include the respondent's supplemental affidavit in the record, make findings of facts as relevant for the respondent's request for protection under CAT, and analyze the respondent's request for protection under CAT. Because we are remanding the record, we decline to address the respondent's other arguments at this time. We do note, however, that the Immigration Judge did not err in declining to accept late-filed documents into the record, because an Immigration Judge may set time limits in which to file document and may deem the opportunity to file such documents waived if not filed by the deadline. 8 C.F.R. § 1003.31(c). However, on remand, the Immiration Judge may afford the respondent an opportunity to submit these documents or any other pertinent evidence.

Accordingly, the following order will be issued.

(b) (6)

ORDER: The record is remanded for further proceedings consistent with this order, and for the entry of a new decision.

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JAN 15 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian K. Bates, Esquire

ON BEHALF OF DHS: Dan Gividen
Assistant Chief Counsel

APPLICATION: Adjustment of status; waiver of inadmissibility under section 212(i) of the Act

The respondent, a native of Pakistan and a citizen of Canada, appeals from the Immigration Judge's decision dated May 4, 2012, denying his application for adjustment of status pursuant to section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), and his application for a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. §1182(i). The Department of Homeland Security (DHS) opposes the appeal. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent filed his adjustment of status application after May 11, 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

As an initial matter, we discern no clear error in the Immigration Judge's adverse credibility finding, which is based on significant inconsistencies in the respondent's testimony (I.J. at 3-8). *See* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C). First, the respondent's testimony that he did not know that he could abandon his lawful permanent resident status by residing abroad for lengthy periods of time (Tr. at 34), is inconsistent with his testimony that he repeatedly returned to the United States in an effort to preserve his lawful permanent resident status because he knew that he could not live abroad for 6 months without losing that status (Tr. at 53). Second, the respondent testified that he did not read the Form I-407 before signing it and that he did not think that it would have any effect on his lawful permanent resident status (I.J. at 4; Tr. at 70, 75). However, prior to being shown the document, he admitted to having signed a statement abandoning his lawful permanent residence, which undermines his claim that he did not read the document and that he was not aware of its effect on his immigration status (Tr. at 44). Third, the respondent testified that his August 2000 encounter with immigration officials began around 6:00 p.m., but the DHS submitted a Form I-213 indicating that the encounter began at 12:00 p.m. and the respondent provided no explanation for the discrepancy (I.J. at 6; Tr. at 71-72). We also agree with the Immigration Judge's findings that the respondent's Texas conviction for tampering with a government document and his admission

that he lied to immigration officials in the past also undermine the credibility of the respondent's testimony in these proceedings (I.J. at 3).

It is unclear from the Immigration Judge's decision if he found the respondent statutorily ineligible for relief or if he denied the respondent's applications in the exercise of discretion (I.J. at 8). Accordingly, we will remand the record for the Immigration Judge to clarify the basis of his denial of the respondent's application. In doing so, the Immigration Judge should specifically identify any evidence relied on and explain the reasons for his conclusions in his decision. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of A-P-*, 22 I&N Dec. 468, 474 (BIA 1999). If the Immigration Judge finds it necessary to reach the issue of discretion, he should balance the social and humane considerations presented in the respondent's favor against the adverse factors that diminish his desirability as a permanent resident. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

On remand, the parties shall be permitted to submit additional evidence, including witness testimony. In remanding, we express no opinion on whether the respondent should be granted relief. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). The following order shall be entered.

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

Ellen Rabowitz
FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: MAY 28 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Emmanuel Socks, Esquire

ON BEHALF OF DHS: Dan Gividen
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Zimbabwe, appeals from the Immigration Judge's decision dated May 15, 2012, denying his applications for asylum pursuant to section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c)-.18. The respondent has also filed a motion to remand. The Department of Homeland Security (DHS) opposes the appeal but has not responded to the motion. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent filed his asylum application after May 11, 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

As an initial matter, we are not persuaded by the respondent's assertion that the Immigration Judge was biased or that he acted with impatience or hostility toward the respondent (Respondent's Br. at 23-25). A review of the record reflects that the Immigration Judge conducted the respondent's hearing in a fair and impartial manner and his decision indicates that he objectively considered the respondent's testimony and the documentary evidence in the record.

The respondent's assertion that the Form I-589, Application for Asylum and Withholding of removal, was improperly filed because it was not signed by the preparer is not supported by the record (Respondent's Br. at 16-17). Part E of the application is signed in blue ink by the respondent's former counsel, Lincy George (Exh. 3). We are also not persuaded by the respondent's claim that he was not given sufficient time to review the contents of the Form I-589 (Respondent's Br. at 3, 6). The record reflects that the respondent and his attorney were given the opportunity to review and make changes to the application during the May 15, 2012, hearing (Tr. at 20-23). The respondent expressed some concerns about the documents filed in support of his application, such as the witness list (Tr. at 23-29). However, after reviewing the application

and making several changes, the respondent's counsel indicated that the respondent was "happy" with the application itself (Tr. at 23).

The Immigration Judge's adverse credibility finding appears to be based solely on the fact that the respondent's Form I-589 fails to indicate that he previously applied for asylum in 2009 (I.J. at 12-14; Exh. 3). When questioned about the omission, the respondent testified that it was an oversight and that he did not intend to hide it from the court (Tr. at 81). Although the Immigration Judge declined to accept the respondent's explanation for the omission (I.J. at 12-14), we note that the respondent candidly discussed the original application when questioned (Tr. at 45-46, 65-66). Moreover, the respondent's attorney discussed the existence of the original application with the Immigration Judge when filing the present application (Tr. at 8-9). Under the circumstances, we conclude that this omission, without more, is insufficient to support an adverse credibility finding. Nevertheless, the record will be remanded for further consideration of the respondent's credibility. During the course of the hearing, the DHS raised questions about discrepancies between the respondent's testimony and his claim before the asylum office (Tr. at 65-66). Because it is unclear if the Immigration Judge considered these discrepancies, we will remand the record for the Immigration Judge to make additional findings on the respondent's credibility. In doing so, the Immigration Judge should address the discrepancies raised by the DHS and any other relevant factors relating to the respondent's credibility. *See* section 208(b)(1)(B)(iii) of the Act (stating that a credibility determination must be based on the totality of the circumstances).

In light of the new credibility findings, the Immigration Judge should further consider whether the respondent has met his burden of demonstrating his eligibility for withholding of removal and protection under the Convention Against Torture. *See Efe v. Ashcroft*, 293 F.3d 899, 906-07 (5th Cir. 2002) ("The Convention Against Torture claim is separate from the claims for asylum and withholding of removal and should receive separate analytical attention.").

The Immigration Judge should also further consider the respondent's statutory eligibility for asylum. There is no dispute that respondent did not file an application for asylum within 1 year of his arrival in the United States. *See* section 208(a)(2)(B) of the Act. We agree that the respondent's father's 2011 abduction is insufficient to establish changed circumstances providing an exception to the time bar, particularly in light of the respondent's claim that both he and his uncle were previously abducted multiple times under similar circumstances (I.J. at 18). *See* 208(a)(2)(D) of the Act. However, the record reflects that the respondent was in lawful nonimmigrant status when he filed his initial application in 2009. *See* 8 C.F.R. § 1208.4(a)(5)(iv) (indicating that maintaining lawful nonimmigrant may constitute extraordinary circumstances excusing a delay in filing). On remand, the Immigration Judge should address the impact of the respondent's 2009 asylum application on his statutory eligibility to pursue such relief in removal proceedings.

Because the record will be remanded, we decline to address the arguments raised in the respondent's motion to remand. On remand, both parties shall be permitted to update the evidentiary record and to present additional legal arguments.[1] In remanding, we express no

[1] The record reflects that the Immigration Judge set a filing deadline of April 1, 2012, for all documentary evidence (Tr. at 14). The respondent submitted two identical filings on April

opinion on the respondent's ultimate eligibility for relief. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). The following orders shall be entered.

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

Ellen Riebowitz
FOR THE BOARD

9, 2012, shortly after retaining his current counsel. During the May 15, 2012, hearing, the Immigration Judge declined to admit the filings into the record (Tr. at 13-17). Because the parties will be given the opportunity to update the record on remand, we need not address the respondent's claims that the Immigration Judge erred in excluding the April 9, 2012, filings.

File: (b) (6) - Oklahoma City, OK Date: FEB 13 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Melissa R. Lujan, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The respondent appeals an Immigration Judge's decision dated October 4, 2012. The Immigration Judge denied the respondent's applications for cancellation of removal and voluntary departure under sections 240A(b) and 240B(b) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1229b(b), 1229c(b), respectively. The record will be remanded.

The Immigration Judge found that the respondent, a native and citizen of Mexico, was not a credible witness and held that he did not establish 10 years of continuous physical presence in the United States, good moral character during such time, or exceptional and extremely unusual hardship to his qualifying relatives (I.J. at 18-27).[1] *See* 8 C.F.R. § 1003.1(d)(3)(i)-(ii) (the Board reviews an IJ's factual and credibility findings for clear error, but reviews questions of law, discretion, and all other issues on appeal de novo).

First, we find that the Immigration Judge's adverse credibility finding is not based on specific and cogent reasons (I.J. at 17). For example, the respondent concedes on appeal that his testimony diverged from his application regarding his prior arrests, which caused the Immigration Judge to draw a negative inference (I.J. at 9; Exh. 3 at 7; Tr. at 30-31). However, he argues that he provided the details of his arrests at the hearing (i.e., relating to speeding and lacking a driver's license in 2006, for driving with no license plate in 2008 or 2009, and for his unlawful immigration status in 2009), although he was unsure of the timing of the arrests (Respondent's Br. at 10-12 (*citing* Tr. at 52-55)). He also testified that when he tried to obtain driving records from Tennessee, he was told that none could be located (*Id.*). To the extent that the Immigration Judge found that he did not fully disclose his prior departures from the

[1] The respondent has three United States citizen children. They include three daughters, who were approximately 4 years, 2 years, and 1 year of age, respectively, at the time of the hearing (I.J. at 6; Tr. at 24; Exh. 3 at 6; Respondent's Br. at 1).

United States (I.J. at 7), we find that the respondent offered a reasonable explanation addressing these concerns (Respondent's Br. at 12-14).

With regard to continuous physical presence, the respondent needs to establish that he has been in the United States since at least May 31, 1999. The respondent has provided documentation to establish his presence since March 2000, 9 months less than required (I.J. at 18; Respondent's Br. at 14; Exh. 40K at 87). The respondent testified that he arrived to the United States in 1998 when he was in his teens. He explained that he was living with friends during this time and was paid in cash for his work.

The respondent claims that he left the United States on two occasions (i.e., for 2 months in (b) (6) or (b) (6) 2005, and 13 days in (b) (6) 2005), and that these departures are not sufficient to cause a break in his physical presence (Tr. at 20-21; Respondent's Br. at 15-16). *See* section 240A(d)(2) of the Act. We agree that the two departures did not break his physical presence, as the record does not support the Immigration Judge's decision that the respondent actually intended to permanently move back to Mexico during his first trip (I.J. at 4, 15-16). Specifically, the transcript shows that the respondent explained that he went to visit family in Mexico for his first trip, while stating that he left his clothing and personal items in Tennessee (Tr. at 48-49; Respondent's Br. at 9, 15-16). *See, e.g., Matter of Nelson*, 25 I&N Dec. 410, 412-13 (BIA 2011) (noting how certain "breaks" in continuous physical presence resulting from brief absences from the country are treated for cancellation of removal purposes). Given that we find the respondent credible, we will accept his testimony and conclude that he has sufficiently established his continuous physical presence in the United States (I.J. at 18; Tr. at 17-19).

With regard to good moral character, the Immigration Judge concluded that the respondent could not establish good moral character under the "catch-all provision" at section 101(f) of the Act, 8 U.S.C. § 1182(f) because of the circumstances of his attempt to enter the United States with his wife, his driving without a driver's license, and his employment of undocumented aliens in his business. However, the Immigration Judge did not recognize the need to balance these factors against factors favorable in terms of good moral character, including the respondent's three United States citizen daughters, among others (I.J. at 20-21). Therefore, we find remand warranted for the Immigration Judge to further address the respondent's good moral character.

In addition, further proceedings are necessary to determine whether the respondent's removal would result in the requisite level of hardship to his qualifying relatives. *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). The Immigration Judge considered a note from the middle daughter's doctor that she had bilateral surgical reductions of her hips, and recognized the possibility that more surgery would be required (I.J. at 6; Exh. 4 at 21). However, in concluding that the middle daughter's prognosis and medical needs for the future are "speculative at best," it is not clear whether the Immigration Judge recognized her need, as stated by her doctor, to be "medically followed until maturity" (I.J. at 25, 7; Exh. 4 at 21). *See* Respondent's Br. at 17 (stating that "because [the middle daughter] is so young and her condition is changing as she grows, the medical information on her case changes"). Moreover, the Immigration Judge declined to admit and consider updated medical records offered on the day of the hearing (Respondent's Br. at 17). *See* I.J. at 2; Tr. at 13.

The respondent also states that the middle daughter has an ongoing need for speech therapy (Respondent's Br. at 18). The Immigration Judge afforded "little weight to the respondent's testimony about [the middle daughter's] speech impediment" since it was "unclear" as to her underlying issue (I.J. at 25, 7). *See* Tr. at 27-28, 41 (the respondent testifying that the middle daughter has an upcoming appointment for speech therapy and that her pediatrician stated that "she is not speaking like normal children her age should be"). Given our conclusion that further proceedings are necessary to more fully evaluate the middle daughter's hip condition, the Immigration Judge should provide a discussion of the potential hardships the middle daughter may face in Mexico regarding all of her health issues, including those related to her speech. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (limiting the Board's fact-finding authority and stating that the Board may remand a case if further fact-finding is needed). Accordingly, we also find that further proceedings are necessary to examine whether the respondent's children, particularly the middle daughter, would suffer hardship that is substantially different from or beyond that which would normally be expected from the removal of a close relative.[2]

Finally, the Immigration Judge held that the respondent did not warrant a favorable exercise of discretion for cancellation of removal and for voluntary departure. *See* I.J. at 27-29. However, as noted on appeal, the Immigration Judge did not balance the respondent's equities against the negative factors in this case. *See* Respondent's Br. at 6, 9, 19-22 (stating that he has numerous positive equities—including his long residence in the country with stable employment, documented support from his prior supervisors, strong family ties in the form United States citizen children, the lack of criminal offenses—and noting that he provides financial support to his relatives in Mexico); *see also* section 240(c)(4)(A)(ii) of the Act; *Matter of Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999); *Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972). As such, upon consideration of the record as a whole and a balancing of the appropriate factors, the Immigration Judge should reevaluate whether the respondent merits cancellation of removal as a matter of discretion and should determine—if the respondent continues to seek voluntary departure on remand—whether he can meet the statutory and regulatory requirements for such relief. *See* section 240B(b) of the Act; 8 C.F.R. § 1240.26(c); *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). Furthermore, the Immigration Judge should allow the parties to supplement the record in the remanded hearing with testimonial and documentary evidence as to any of the above issues.

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[2] We also agree with the respondent that the Immigration Judge placed undue weight on the fact that one or two of his children were born after the commencement of proceedings in finding that their hardship considerations should be "diminished" as a result (I.J. at 23; Respondent's Br. at 16-17). While the Immigration Judge cited *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 302 (BIA 1996) for the proposition that the equity of a marriage and the weight given to any hardship to a spouse is diminished if the parties married after the commencement of removal proceedings, with knowledge that the alien might be removed, we note that our decision in *Mendez-Moralez, supra*, was based on whether an applicant had met his burden of establishing relief for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act, 8 U.S.C. 1182(h)(1)(B). Here, the issue is whether exceptional and extremely unusual hardship to a qualifying relative can be established.

In light of the foregoing, we will remand the matter for further analysis of the respondent's eligibility for cancellation of removal and voluntary departure.

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

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: DEC 19 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kelli J. Stump, Esquire

ON BEHALF OF DHS: Jack D. Spencer
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, has appealed the Immigration Judge's October 1, 2012, decision denying her application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security ("DHS") opposes the appeal. For the reasons set out below, the respondent's appeal will be sustained, in part; and the record will be remanded to the Immigration Judge for further proceedings.

In his October 1, 2012, decision, the Immigration Judge concluded that the respondent had not demonstrated that her removal from the United States would result in the requisite "exceptional and extremely unusual hardship" to her United States citizen ("USC") son and daughter, who were 12 and 17 years old, respectively, at the time of the hearing (I.J. at 3, 12). In assessing hardship, the Immigration Judge did not consider the medical evidence relating to the USC children's disabled father because he was not a qualifying relative (I.J. at 10; Exh. 3, Tab M). Alternatively, the Immigration Judge denied the respondent's application for cancellation of removal as a matter of discretion (I.J. at 11-12).

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application for relief was filed after May 11, 2005, and is thus subject to the statutory amendments made by the REAL ID Act of 2005 (I.J. at 7; Exh. 2). *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). We initially address the Immigration Judge's discretionary denial of the respondent's cancellation application.

To determine whether the respondent merits cancellation of removal as a matter of discretion, we "must balance the adverse factors evidencing . . . [her] undesirability as a permanent resident with the social and humane considerations presented . . . [on her] behalf to determine whether the granting of [cancellation of removal] appears in the best interests of this country." *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). Among the factors deemed adverse to an alien are the nature and underlying circumstances of the removability ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id.* Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (*e.g.*, affidavits from family, friends, and responsible community representatives). *Id.*

Upon de novo review, we disagree with the Immigration Judge's denial of cancellation of removal as a matter of discretion (I.J. at 12). In doing so, we acknowledge the respondent's adverse factors, such as working in the United States without authorization, not furnishing work authorization to her employer, and not paying federal income taxes (I.J. at 4, 12; Tr. at 51-54, 58). However, these adverse factors are outweighed by the following favorable factors: (1) the respondent's extensive family ties in the United States, including her three United States citizen children, who were 12, 17, and 21 years old at the time of the hearing (I.J. at 3; Tr. at 20, 28, and 36); (2) the respondent' residence in the United States since 1999; (3) the apparent hardship the respondent's children will face if she is removed (I.J. at 5, and 11; Tr. at 22-23, 25, 32-33, and 37-38); and, (4) her work history (I.J. at 7-8; Exh. 3).

In addition, we deem it appropriate to remand this record to the Immigration Judge for further analysis of the remaining dispositive issue of exceptional and extremely unusual hardship. In assessing whether the respondent's qualifying relative children will suffer "exceptional and extremely unusual hardship" under section 240A(b)(1)(D) of the Act, the Immigration Judge did not consider the voluminous medical evidence relating to the children's disabled father (I.J. at 10; Exh. 3, Tab M). Although the Immigration Judge correctly stated that the children's father is not a qualifying relative under section 240A(b)(1)(D) of the Act, his disabilities and supporting medical documentation are relevant insofar as they may affect the hardship to the respondent's children (Exh. 3, Tab M). *See Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001) (stating that "[f]actors relating to the applicant himself or herself can only be considered insofar as they may affect the hardship to a qualifying relative.").

Consequently, on remand, when assessing hardship to the qualifying relative children, the Immigration Judge should consider the medical evidence regarding their father insofar as it may affect their hardship. In particular, the Immigration Judge should make specific factual findings regarding (a) the family's living arrangements and the father's ability to support his children in light of his medical conditions; and (b) the effort and cost to the children associated with taking

care of their father in light of his medical conditions. In addition, given the passage of time, the parties should have the opportunity to present additional hardship evidence regarding the children. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained with respect to the Immigration Judge's discretionary denial of the respondent's application for cancellation of removal.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: NOV 28 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Steve Spurgin, Esquire

APPLICATION: Cancellation of removal under section 240A(b)

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's decision denying her application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). She has also filed a motion to remand. The motion will be granted.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

As it pertains to her motion, the respondent has submitted documentation establishing that she has applied for a U nonimmigrant visa, and she argues that the proceedings should be continued until the Department of Homeland Security adjudicates her application. *See Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012) (setting forth the factors for deciding whether to grant a motion to continue based on a pending U visa application). We will remand these proceedings for the Immigration Judge to consider the respondent's motion for a continuance in light of *Matter of Sanchez Sosa*, *supra*, which was decided after the hearing.

Accordingly, the following order will be entered.

ORDER: The motion is granted, and these proceedings are remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

File: (b) (6) - Dallas, TX

Date: FEB - 3 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kichul Kim, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Ghana, has timely appealed the Immigration Judge's October 24, 2012, decision finding him removable as charged and pretermitting his application for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The record will be remanded.

We review the findings of fact made by the Immigration Judge 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). Since the respondent submitted his application on or after May 11, 2005, it is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent admits that on (b) (6), 2011, he pleaded guilty to evading arrest, a criminal offense under Texas law (I.J. at 3; Exh. 2). *See* TEX. PENAL CODE § 38.04 (2011). The Immigration Judge determined that the offense was a crime involving moral turpitude ("CIMT") (I.J. at 6). *See* section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i). As a result, he concluded that the respondent was ineligible for cancellation of removal. *See* section 240A(b)(1)(C) of the Act; *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010). On appeal, the respondent argues that the offense is not a CIMT because it is not inherently base or vile, and he did not cause injury to the police officers arresting him (Respondent's Br. at 4-5).

In assessing whether a particular state criminal offense is a CIMT, we first compare the language of the statute to the generic offense to determine whether they "categorically" match. *See Amouzadeh v. Winfrey*, 467 F.3d 451, 454–55 (5th Cir. 2006); *see also Matter of Silva-Trevino, supra*. If, however, the statute "has multiple subsections or an element phrased in the disjunctive, *such that some violations of the statute would involve moral turpitude and others not*, we apply the modified categorical approach, under which we examine the record of conviction to determine under which subsection the alien was convicted and which elements formed the basis for the conviction." *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825 (5th Cir. 2012) (emphasis added).

According to the Texas statute, a person "evades arrest" if he "intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him." TEX. PENAL CODE §38.04(a) (2011). Subsection (a) describes the basic offense, and subsection (b) provides

that the offense is a class A misdemeanor, but it is a felony if certain factors are present, including the use of a vehicle.[1]

The Immigration Judge concluded that the statute was divisible because "the crime can be committed in multiple [] ways" (I.J. at 4). However, a statute is only divisible, for this purpose, if one alternative matches an element in the generic offense and the other does not. *See Esparza-Rodriguez v. Holder, supra; see also Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276, 2281 (2013). The Immigration Judge erred, therefore, in assuming without considering whether all offenses included in section 38.04 are categorically a CIMT.

If the Immigration Judge determines that a criminal statute is divisible, he must next employ the "modified categorical approach," and look to the record of conviction to determine under what subsection the respondent was convicted. *See Matter of Silva-Trevino, supra*, at 690, 698-99; *Descamps v. United States, supra*, at 2884-85 (discussing the Court's jurisprudence on the modified categorical approach). Generally, the documents included in the conviction record include the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. *See Matter of Silva-Trevino, supra*; *Bianco v. Holder*, 624 F.3d 265, 269 (5th Cir. 2010). The Immigration Judge used the police report, which is not part of the record of conviction in this case, to determine that the respondent's offense was a CIMT (I.J. at 5; Exh. 2). Only if the record of conviction is inconclusive may we "consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question." *Matter of Silva-Trevino, supra*, at 708.

Accordingly, we will vacate the Immigration Judge's decision, and will remand for further proceedings. On remand, the Immigration Judge should consider and determine whether a conviction under section 38.04 of the Texas Penal Code is categorically a CIMT. If necessary, he should apply the modified categorical approach to determine the subsection under which the respondent was convicted, and whether the offense is inherently base, vile, or depraved. In remanding, we make no conclusions concerning the legal issues or the outcome of the case.

ORDER: The Immigration Judge's decision is vacated.

FURTHER ODER: The record is remanded for further proceedings and the entry of the new decision consistent with the foregoing opinion.

FOR THE BOARD

[1] Thus, the respondent's description of the levels of severity of the offense is incorrect (Respondent's Br. at 4).

File: (b) (6) – Dallas, TX

Date: MAR 23 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marc Esquenazi, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of China, appeals from the Immigration Judge's decision dated November 16, 2012, denying her applications for asylum pursuant to section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal pursuant to section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A), and protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c)-.18. The Department of Homeland Security has not responded to the appeal. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent filed her asylum application after May 11, 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge made an adverse credibility determination with respect to the respondent based on discrepancies between her husband's testimony and information contained in her asylum application and the two change of address forms she filed with the court (Exh. 2; Tr. at 61-65). Based on his finding that the information provided by the respondent was inconsistent with her husband's testimony concerning their living arrangements in the United States, the Immigration Judge determined that the respondent was not a credible witness and denied her applications for relief. However, the record reflects that the respondent did not personally testify about her living arrangements in the United States and she was not questioned about or otherwise given an opportunity to respond to the discrepancies relied on by the Immigration Judge.

Upon review of the record, we find it necessary to remand proceedings for the Immigration Judge to provide the respondent an opportunity to testify concerning her living arrangements in the United States and to respond to the discrepancies identified by the Immigration Judge. *Cf. Matter of O-D-*, 21 I&N Dec. 1079, 1095 (BIA 1998) (recognizing that prior inconsistent statements may not be used to impeach credibility unless the witness is afforded the opportunity to deny or explain the inconsistency). On remand, the Immigration Judge should further consider the respondent's credibility, and should consider the totality of the circumstances, including any other discrepancies in the record. *See* section 208(b)(1)(B)(iii) of the Act. The Immigration Judge should specifically identify any evidence relied on and explain the reasons

for his conclusions in his oral or written decision. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of A-P-*, 22 I&N Dec. 468, 474 (BIA 1999).

In light of the foregoing, the record will be remanded to the Immigration Judge for further proceedings and the entry of a new decision. In remanding, we express no opinion on the respondent's ultimate eligibility for relief. *See Matter of L-O-G-*, 21 I&N Dec. 413, 422 (BIA 1996). The following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: FEB – 6 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Melissa R. Lujan, Esquire

ON BEHALF OF DHS: Jack D. Spencer
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The respondent appeals the Immigration Judge's November 1, 2012, decision. The Immigration Judge denied the respondent's applications for cancellation of removal and voluntary departure under sections 240A(b) and 240B(b) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229b(b), 1229c(b), respectively. The record will be remanded.

The respondent, a native and citizen of Mexico, argues that the Immigration Judge's denial of cancellation of removal should be reversed. The Immigration Judge—after holding that the respondent demonstrated the requisite 10 years of continuous physical presence in the United States and good moral character during such time—denied cancellation of removal upon finding that the respondent did not (1) establish exceptional and extremely unusual hardship to his qualifying relatives or (2) merit relief as a matter of discretion (I.J. at 7-14).[1] We review an Immigration Judge's findings of fact for clear error and review all other issues, including whether the parties have met their relevant burden of proof and issues of discretion, under a de novo standard. *See* 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii) (2014).

We affirm the Immigration Judge's conclusion that the respondent did not establish the requisite level of hardship to his four United States citizen children. *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). We disagree with the initial argument raised by the respondent that the Immigration Judge did not consider the aggregate effect of his children's hardship (Respondent's Br. at 7-8). In particular, the Immigration Judge provided an assessment of the totality of the hardship factors in this case and recognized that hardship to the respondent's

[1] The record reflects that the respondent's qualifying relatives, who are United States citizens, include three sons ((b) (6) , (b) (6) (b) (6) and a daughter ((b) (6) who were (b) (b) (and (years of age, respectively, at the time of the hearing (I.J. at 2-3, 8; Tr. at 17-18).

children would occur in the event of his removal, but concluded that it did not rise to the level of exceptional and extremely unusual hardship (I.J. at 9-12). *See Matter of Recinas, supra,* at 472.

Next, we see no clear error in the Immigration Judge's fact-finding as to the children's health and well-being. First, while the respondent suggests that (b) (6) could still suffer physical and developmental delays as a result of her premature birth, he has not disputed the Immigration Judge's finding that despite being born premature, (b) (6) is presently in good health (I.J. at 3, 9; Tr. at 23; Respondent's Br. at 8). Also, the respondent has not contested the Immigration Judge's finding that (b) (6) is healthy and has no issues in school (I.J. at 3, 9; Tr. at 23-24).

With respect to (b) (6) the Immigration Judge noted that he is also in good health and has no medical problems despite having "some behavior and learning issues at school" (I.J. at 3). *See* Tr. at 24. In particular, the Immigration Judge observed that although the respondent requested that (b) (6) be held back from advancing grades on two occasions, the school declined to do so and permitted him to advance normally (I.J. at 3; Tr. at 32-33; Exh. 4 at 167). Although the respondent states that (b) (6) suffers from cognitive issues—while citing to his specific learning disability and his school's implementation of an individualized educational program—it is not apparent that (b) (6) 's difficulties are of such severity that he will suffer hardships substantially beyond the ordinary level of hardship that would be expected when a close family member leaves this country (Respondent's Br. at 9-11). *See Matter of Monreal, supra,* at 59, 62, 65.

Additionally, we see no clear error in the Immigration Judge's conclusion that (b) (6) has no educational problems or issues and that his asthma "is well-controlled and does not limit his physical ability" (I.J. at 3). *See* I.J. at 9-10; Tr. at 24-25, 33; Exh. 4 at 81-82. While the respondent states that the Immigration Judge erred in speculating as to (b) (6) 's health, the Immigration Judge did not state that (b) (6) 's asthmatic condition was "cured" but did recount the respondent's testimony that (b) (6) has not needed his inhaler for over a year (I.J. at 2-3; Tr. at 32; Respondent's Br. at 11-12). Further, despite the respondent's blanket contention that he cannot pay for such care in Mexico, he has shown no clear error in the Immigration Judge's finding that no evidence was presented to show that (b) (6) 's asthma "cannot be treated adequately in Mexico" (I.J. at 10). *See* Respondent's Br. at 12. Also, the respondent has demonstrated no clear error in the Immigration Judge's finding that all of his children are bilingual in Spanish and English and are of a relatively young age, factors which may ease their transition to life in Mexico (I.J. at 5, 11; Tr. at 35). *See Matter of Recinas, supra,* at 472.

Further, the respondent has not established any clear error in the Immigration Judge's conclusion that his home, which was almost paid off at the time of the hearing below, has a value of approximately $20,000 and that this asset could be relied on "to ease his and his family's transition" to Mexico (I.J. at 11). *See* Tr. at 37; *see also Matter of Recinas, supra,* at 469. Also, even accepting the respondent's contention that his wife and four children would join him in Mexico if he is denied relief and that they, consequently, would encounter economic difficulties and societal risks in terms of increased exposure to criminal activity, he has not shown that his removal would cause hardship that is substantially different from or beyond that which normally would occur following deportation to a less developed country (Tr. at 13, 28; Respondent's Br. at 12-14). *See Matter of Monreal, supra,* at 59, 62, 65. In particular, the respondent has not refuted the Immigration Judge's observation that there is no requirement for applicants to return to a

particular town or community in their native country and, moreover, he has shown no clear error in the Immigration Judge's conclusion that parts of Mexico remain safe for him and his family (I.J. at 12). While we recognize that the respondent's children will experience hardship, we do not see sufficient evidence in the record to reverse the Immigration Judge's holding that the respondent did not establish the requisite degree of hardship to his qualifying relatives.

We turn next to the issue of discretion. We disagree with the Immigration Judge's overall balancing of the positive and negative factors in determining that the respondent did not warrant cancellation of removal as a matter of discretion (I.J. at 12-14; Tr. at 66; Respondent's Br. at 14-19). The Immigration Judge was particularly troubled by the respondent's tax filings which indicated that he was married despite the fact that he testified that he was not married (I.J. at 2, 4, 13; Group Exh. 4; Tr. at 17, 30-32, 36-37, 56-58). However, we are not persuaded that such misinformation should warrant a discretionary denial of relief, particularly where the respondent presents evidence on appeal showing that common law marriages are recognized in Oklahoma. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (allowing the Board to take administrative notice of commonly known facts). Moreover, the Immigration Judge did not balance the respondent's positive factors, including his consistent work history and church activities, as well as his close family ties (Exh. 4-G; Tr. at 60; Respondent's Br. at 16-19).

Also, as noted by the respondent, it appears that the Immigration Judge's finding that he was arrested in August 2012 for resisting an officer by obstruction (a charge that remains pending), and simple assault, was erroneous given that the record reflects that he was only arrested for the former charge (I.J. at 4, 13; Exh. 2 at 2; Exh. 4 at 200-207; Tr. at 34; Respondent's Br. at 15-16). *See generally Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995). Further, the respondent's other infractions are not sufficiently serious so as to warrant a discretionary denial for relief when balanced with the other relevant factors (I.J. at 13; Exh. 2 at 2; Respondent's Br. at 16).

In light of our decision to reverse the Immigration Judge's discretionary determination, we find it necessary to remand the record for voluntary departure under section 240B(b) of the Act. We agree with the respondent that the Immigration Judge's decision that such relief was abandoned (i.e., because of the inadequacy of the questions the respondent was asked in demonstrating whether he has the means and intention to depart the United States) is not supported by the record (I.J. at 14; Respondent's Br. at 19-20). As noted by the respondent, the record shows that he requested post-conclusion voluntary departure as an alternate form of relief at several points during the proceedings, including at the outset (Tr. at 6, 65-66; Respondent's Br. at 19). Further, as the respondent is not barred from voluntary departure, and given the lack of any opposition from the Department of Homeland Security (DHS) to such relief, we find that he established eligibility for voluntary departure, and has shown that the balance of the discretionary factors in this case supports his request for relief, as discussed above.

Therefore, we will remand the record to the Immigration Judge to provide the necessary voluntary departure advisements to the respondent. *See, e.g.*, 8 C.F.R. § 1240.26(c); *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). Accordingly, the following orders will be entered.

ORDER: The respondent's appeal with respect to cancellation of removal is dismissed.

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

FOR THE BOARD

File: (b) (6) - Oklahoma City, OK Date: FEB 20 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven F. Langer, Esquire

ON BEHALF OF DHS: Jack D. Spencer
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's decision dated November 5, 2012. The Immigration Judge denied the respondent's applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158(a) and 1231(b)(3), respectively, and for protection under the Convention Against Torture ("CAT"). *See* 8 C.F.R. §§ 1208.16-.18 (2015). The Immigration Judge also denied the respondent's request for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The appeal will be dismissed as to eligibility for asylum and withholding of removal, but the record will be remanded with respect to voluntary departure.[1]

The respondent does not allege any past persecution (I.J. at 3, 12) but fears future harm as a result of the killing of three relatives after she entered the United States in 2008 (I.J. at 3-4). *See* Respondent's Br. at 1 (stating that her cousin was murdered in (b) (6) 2010 by gang members in "[a]s part of a pattern of targeting police officials, and possibly as a warning to other female officers"). We see no clear error in the Immigration Judge's positive credibility finding for both witnesses (I.J. at 7) but agree with his legal conclusion that the respondent did not qualify for the above forms of relief. *See* 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). Despite the respondent's untimely application (I.J. at 11-12; Exh. 3), we will presume for purposes of appeal that she is statutorily eligible to seek asylum. *See* section 208(a)(2)(D) of the Act.

In examining the respondent's claim of having a well-founded fear of persecution, we agree with the Immigration Judge that she has not established that any protected ground under the Act

[1] The respondent does not contest the denial of her application for protection under the CAT.

will be at least one central reason for her persecution (I.J. at 12). *See* section 208(b)(1)(B)(i) of the Act; *see also Rivera-Barrientos v. Holder*, 666 F.3d 641, 646-47 (10th Cir. 2012) (describing an applicant's burden to establish a requisite nexus under the REAL ID Act). During the hearing before the Immigration Judge, the respondent described her proffered social group as "membership in the family of a decedent, including a law enforcement officer, and membership would cause her to suffer harm or including harm against her person and/or a chilling effect on any public activities by her including political opinion and family is of note and family members have been targeted [sic]." *See* I.J. at 8; Tr. at 19-22; Respondent's Br. at 4. Despite the respondent's arguments on appeal (Respondent's Br. at 4-7), she has shown no error in the Immigration Judge's holding that this group "is disjointed" and "lacks both particularity and social visibility." *See* I.J. at 9 ("The claimed social group is not finite" and "is not particular [as] it does not allow the Court to identify a group of individuals who share a common immutable characteristic"). *See Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (a valid particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) (same). Specifically, we disagree with the respondent that because the deaths of her relatives "were easily accessible to the public" that this suffices in demonstrating social visibility (Respondent's Br. at 7), which is now known as social distinction. *See id.*; *see also Rivera-Barrientos v. Holder, supra,* at 651 (the "distinct component of social visibility is that the applicant's community is capable of identifying an individual as belonging to the group"). Moreover, despite arguing that threats and "repeated violence" amount to "limiting factor[s] for this social group" (Respondent's Br. at 6), the respondent does not recognize that a social group may not be circularly defined by the fact that it is at risk of being persecuted. *See, e.g., Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 n.14 (BIA 2014).

Furthermore, while family background may constitute a particular social group in certain circumstances (Respondent's Br. at 5, 16), the respondent has not shown that the Immigration Judge clearly erred in finding that both she and her witness indicated (i.e., in their respective testimonies) that the three relatives were killed as a result of random acts of violence rather than a protected ground under the Act (I.J. at 3, 5, 12, 15). *See* Tr. at 34-35, 40-41; *see also Matter of N-M-*, 25 I&N Dec. 526, 528 (BIA 2011) (A persecutor's motive is a matter of fact to be determined by the IJ and reviewed by us for clear error). While the respondent takes issue with the Immigration Judge's conclusion—by arguing that the questions in this regard were confusing and inconsistent with the evidentiary record (Respondent's Br. at 8-11)—we see insufficient basis in the record to adopt the respondent's reasoning, particularly where no witness expressed a lack of understanding during such questioning. *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) ("An Immigration Judge is not required to accept a respondent's assertions, even if plausible, where there are other permissible views of the evidence based on the record.").

The respondent further states that the Immigration Judge did not consider evidence which "shows a pattern of murdering police chiefs in general, with a developing pattern of targeting female police chiefs" (Respondent's Br. at 10-11). However, she has cited to no binding case law or legal authority showing that victims of such abuse qualify as a statutory ground (I.J. at 13-14). Even accepting her contention, she has not provided specific and probative evidence showing that she is similarly situated to such police chiefs or officers. *See, e.g., Rivera-Barrientos v Holder, supra,* at 653 (noting the alien's claim that she would be viewed as

belonging to a specific social group that suffers a "pattern of persecution" but finding that the "evidence in the record suggests that gang violence is widespread in El Salvador, and that MS-13 directs harm against any individual where doing so may promote the gang's interests.").

The respondent also argues that the Immigration Judge erred by "tersely dismiss[ing]" her political asylum claim (Respondent's Br. at 7). However, she has not addressed the Immigration Judge's finding that she provided "no testimony on what [her] political opinion is" with respect to fearing return to Mexico (I.J. at 10). Also, despite her conclusory contention that "it is likely that the political opinion of the deceased has been imputed onto the family of the deceased, including [herself]" (Respondent's Br. at 7-8), she offers no coherent discussion or specific examples showing how any political opinion has been imputed to her. Therefore, we find no support for her argument that she demonstrated a fear of persecution based on her actual or imputed political opinion. *See Rivera-Barrientos v. Holder, supra,* at 646; *see also Estrada-Escobar v Ashcroft*, 376 F.3d 1042, 1047-48 (10th Cir. 2004) (discussing the petitioner's lack of evidence showing persecution on account of an imputed political opinion).[2]

In sum, even presuming that the respondent is statutorily eligible to seek asylum, she did not meet her burden of proof for such relief or for withholding of removal under the Act (I.J. at 14-15). We also note that the respondent—despite stating in her Notice of Appeal ("NOA") that the Immigration Judge "erred or abused his discretion in denying . . . relief under the Convention Against Torture"—has not offered any substantive argument on appeal as to her eligibility under the Convention Against Torture. *See* NOA at 2; I.J. at 15-16. As such, that application is not properly before us. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by a party on appeal).

However, upon our de novo review, we find that the Immigration Judge erred in denying voluntary departure in discretion. Specifically, while the Immigration Judge recognized that the respondent has not been in the United States for a long period of time, while noting her criminal conviction for disorderly conduct (I.J. at 16), his order does not reflect whether her two United States citizen children were adequately considered (Respondent's Br. at 18-20). *See Matter of Arguelles-Campos*, 22 I&N Dec. 811, 817 (BIA 1999) ("discretion may be favorably exercised in the face of adverse factors where there are compensating elements such as long residence here [or] close family ties in the United States"). Also, the record shows that the Department of Homeland Security did not oppose a grant of voluntary departure (Tr. at 45). As we find that the respondent's positive factors outweigh her negative considerations for this minimal form of relief, we will remand the record to the Immigration Judge to provide all advisals that are required upon granting voluntary departure. *See Matter of Gamero*, 25 I&N Dec. 164, 168 (BIA 2010); *see also Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (describing a remand for a limited purpose). Accordingly, the following orders will be entered.

[2] We need not address the Immigration Judge's finding with respect to internal relocation (I.J. at 14-15; Respondent's Br. at 17) as we are affirming his underlying decision that the respondent did not show that a statutory ground was or will be at least one central reason for her persecution.

(b) (6)

ORDER: The respondent's appeal is dismissed as to asylum and withholding of removal.

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

FOR THE BOARD

File: (b) [redacted] – Dallas, Texas

Date: AUG 21 2014

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marc Esquenazi, Esquire

ON BEHALF OF DHS: Lynn G. Javier
Assistant Chief Counsel

APPLICATION: Continuance; adjustment of status

The respondent appeals the Immigration Judge's November 29, 2012, decision denying the respondent's request for a continuance to allow the respondent to pursue an application for adjustment of status with the Department of Homeland Security (DHS). The record will be remanded.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

We conclude that a further evaluation of the respondent's motion for a continuance is warranted. The decision to grant or deny a continuance is within the discretion of the Immigration Judge, if good cause is shown, and that decision will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing. *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); 8 C.F.R. §§ 1003.29, 1240.6. Here, the Immigration Judge found that the respondent was ineligible for adjustment of status based upon a determination that a prior visa petition filed on behalf of the respondent had been denied by the DHS under section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c). However, the Immigration Judge mischaracterized the legal import of the prior visa petition denial, as does the DHS in its brief on appeal.

While that denial, set forth in a decision dated September 28, 2010, referred to section 204(c) of the Act and stated that it is "apparent" that the marriage was one of convenience, this determination does not have a conclusive effect on the adjudication of a subsequent visa petition or application for adjustment of status. *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). Rather, in order to deny a subsequent visa petition under 204(c), the DHS must establish by substantial and probative evidence that the prior marriage was entered into in order to evade the immigration laws. *Matter of Tawfik, supra*; *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1998). Notably, the DHS did not make such a determination when it approved the subsequent visa petition filed on the respondent's behalf by his mother. DHS's contention that this petition was approved in error is unavailing. In light of the foregoing, the record will be remanded to reevaluate the respondent's

motion for a continuance. On remand, the parties shall be given an opportunity to submit additional evidence regarding the status of any adjustment application filed with the DHS.

Accordingly, the following order shall be entered:

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JUN 19 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Adjustment of status

The respondent, a native and citizen of Zambia, has appealed from the Immigration Judge's decision dated November 28, 2012, denying the relief of adjustment of status pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, in discretion. The record will be remanded to the Immigration Judge.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

This case had previously been before us on May 23, 2011, when we dismissed the respondent's appeal of an earlier Immigration Judge decision, and November 16, 2011, when we granted the respondent's motion to reopen – based on his eligibility for a waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) – and remanded the record to the Immigration Judge for further consideration of the respondent's applications. On remand, the Immigration Judge found the respondent eligible for a waiver pursuant to section 212(h) of the Act but did not conduct a new analysis and make a new finding on the exercise of discretion regarding adjustment of status. Rather, the Immigration Judge relied on his prior decision and the Board's May 23, 2011, decision in this regard. However, under the circumstances of this case, we find it appropriate for the Immigration Judge to conduct a new analysis and make a new finding regarding whether adjustment of status should be granted in the exercise of discretion at the present time based on current evidence. On remand, both parties may submit additional evidence.

Accordingly, the following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Oklahoma, OK

Date: JUN 12 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Myong O. Chung, Esquire

ON BEHALF OF DHS: Jack D. Spencer
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry of adjustment of status under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i) -
Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment of status

The respondent, a native and citizen of Chad, appeals from the March 5, 2013, decision of the Immigration Judge pretermitting his application for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, and ordering him removed from the United States.[1] The appeal will be sustained and the record remanded.

We review the findings of fact, including determinations of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether or not 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 respondent conceded removability under section 237(a)(1)(B) of the Act, as being in the United States in violation of the law. Further, the Immigration Judge found that, in a prior hearing, another Immigration Judge had found the respondent removable under section 237(a)(1)(A) of the Act, as being inadmissible for marriage fraud. Finally, the Immigration Judge concluded that the respondent was ineligible to adjust his status under section 204(c) of the Act, 8 U.S.C. § 1154(c). The respondent argues on appeal that he is eligible to adjust his

[1] Although the respondent also applied for cancellation of removal, it was determined that he is not eligible for this relief and this has not been raised on appeal. Thus, this application is waived.

status and that he should have been provided an opportunity to demonstrate that he did not engage in marriage fraud.

The respondent has been married twice. A Petition for Alien Relative (Form I-130) was filed on his behalf by his first spouse, and the United States Citizenship and Immigration Services (USCIS) denied the respondent adjustment of status, based on this petition, on July 8, 2009. The respondent did not file a motion to reopen those proceedings. These removal proceedings began with the issuance of the Notice to Appear on September 29, 2009. The respondent married his current spouse on (b) (6), 2009, and a new visa petition filed on his behalf, based on this marriage, was approved by USCIS.

The respondent first appeared before an Immigration Judge on April 12, 2010, at which time he conceded his removability for being in the United States in violation of the law, but he denied that he had engaged in marriage fraud (Tr. at 7-8). A further hearing was found necessary to review the marriage fraud charge and to determine the respondent's eligibility for adjustment of status. A second hearing was held on March 5, 2012, at which time a new Immigration Judge found that the previous Immigration Judge had sustained the charge of removability for marriage fraud and the respondent was, therefore, not eligible for adjustment of status based on the currently approved visa petition (Tr. at 12-20).

The Immigration Judge erred in finding that removability for marriage fraud had previously been sustained. This is not supported by the record. Although a finding of past marriage fraud is a bar to approval of a visa petition and adjustment of status,[2] at the time of the hearing before the Immigration Judge, the respondent had an approved visa petition based on his current marriage. Under these circumstances, the record will be remanded for the Immigration Judge to consider the respondent's eligibility for adjustment of status. However, adjustment of status involves a discretionary determination, and the prior finding of marriage fraud is relevant to whether relief should be granted in the exercise of discretion. Based on the foregoing, the following order will be entered.

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

FOR THE BOARD

[2] Section 204(c) of the Act; *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990).

File: (b) (6) – Dallas, TX

Date: MAR 24 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paul S. Zoltan, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Lodged: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] - Convicted of firearms or destructive device violation

APPLICATION: Waiver of inadmissibility under section 212(h)

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated March 25, 2013, denying his application for a waiver of inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).[1] The Department of Homeland Security (DHS) has not responded to the appeal. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was initially charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act (Exh. 1). This charge was sustained by Immigration Judge D. Anthony Rogers during the October 7, 2009, hearing (I.J. at 2; Tr. at 60). The DHS filed a Form I-261 (Additional Charges of Inadmissibility/Deportability) lodging an additional charge under section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C), but withdrew this charge at the hearing on March 25, 2009 (Tr. at 53-54, 59-60, 64). Nevertheless, the current Immigration Judge sustained the charge under section 237(a)(2)(C) of the Act in his March 25, 2013, decision (I.J. at 2-3). Because that charge was withdrawn and the respondent was not charged under section 237 of the Act at the time of the Immigration Judge's decision, his determination on the respondent's

[1] The Immigration Judge denied the respondent's application for cancellation of removal for certain permanent residents pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b(a). Because the respondent does not challenge the denial of that application, we deem the issue waived on appeal (Respondent's Br. at 5)

deportability was improper and that portion of his decision will be vacated. *See Matter of D-K-*, 25 I&N Dec. 761, 769-70 (BIA 2012) (holding that it was improper for the Immigration Judge to make a determination on the alien's deportability where the alien was not properly charged under section 237 of the Act).

In an embedded decision, Immigration Judge Rogers found the respondent to be statutorily eligible for a waiver of inadmissibility under section 212(h) of the Act but denied his application in the exercise of discretion (Tr. at 141-43; I.J. at 3-6). Such a determination requires a balancing of the adverse factors evidencing the respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the granting of a section 212(h) waiver on his behalf is in the best interest of this country. *See Matter of Mendez*, 21 I&N Dec. 296, 299-302 (BIA 1996) (citing *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978) (discussing the relevant discretionary factors for a waiver of inadmissibility under section 212(c) of the Act)). Among the factors deemed adverse to an alien are the nature and underlying circumstances of the inadmissibility ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident in this country. *Matter of Marin*, *supra*. Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly where the inception of the residence occurred while the alien was of young age), evidence of hardship to the alien's family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). *Id.* at 584-85.

Immigration Judge Rogers denied the respondent's application in the exercise of discretion based solely on his tax history (Tr. at 141-42). It is unclear if he balanced the adverse factors with the positive equities presented by the respondent in denying the application. Under these circumstances we find it necessary to remand for the Immigration Judge to further consider whether the respondent warrants a waiver of inadmissibility under section 212(h) of the Act and to enter a new decision.[2] In doing so, the Immigration Judge should specifically identify any evidence relied on and explain the reasons for his conclusions in his oral or written decision. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of A-P-*, 22 I&N Dec. 468, 474 (BIA 1999).

[2] In addressing the respondent's eligibility for cancellation of removal, the current Immigration Judge balanced the adverse factors with the positive equities presented by the respondent and denied his application in the exercise of discretion (I.J. at 7-8). However, the Immigration Judge did not conduct a discretionary analysis with regard to the respondent's application for a waiver under section 212(h) of the Act, which he determined to be settled under the law of the case (I.J. at 3).

(b) (6)

In light of the forgoing, the record will be remanded for further proceedings. In remanding, we express no opinion on the respondent's ultimate eligibility for relief. *See Matter of L-O-G-*, 21 I&N Dec. 413, 422 (BIA 1996). The following orders will be entered.

ORDER: The Immigration Judge's decision is vacated with respect to the respondent's deportability under section 237(a)(2)(C) of the Act.

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

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: OCT 29 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carl Bush, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Continuance; voluntary departure

The respondent appeals from the Immigration Judge's April 3, 2013, decision that ordered the respondent removed from the United States to Mexico. On appeal, the respondent argues that the Immigration Judge incorrectly denied his motion for a continuance and the respondent also contends that the Immigration Judge improperly foreclosed his request for the privilege of voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The record will be remanded to the Immigration Judge for further proceedings.

Under 8 C.F.R. § 1003.1(d)(3), the Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. We need not consider whether the respondent established good cause for a continuance of his removal proceeding as the Immigration Judge incorrectly informed the respondent that he could not pursue post-conclusion voluntary departure pursuant to section 240B(b) of the Act unless he had articulated some form of relief (Tr. at 47). Section 240B(b) of the Act does not require that post-conclusion voluntary departure may only be sought in combination with the pursuit of other relief from removal. *See Matter of C-B-*, 25 I&N Dec. 888, 891 (BIA 2012). Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings.

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: APR 21 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: George Anibowei, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law (conceded)

APPLICATION: Adjustment of status

The respondent, a native and citizen of Nigeria, appeals from the Immigration Judge's May 1, 2013, decision pretermitting her application for adjustment of status under section 245(a) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255(a). The appeal will be sustained, and the record remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i) (2013). We review de novo all other issues, including whether the parties have met the relevant burden of proof and issues of discretion and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was previously the beneficiary of an approved Alien Relative Petition (Form I-130) filed by her former husband, a United States citizen, on March 11, 2008 (Amended United States Citizenship and Immigration Services (USCIS) Notice of Intent to Revoke dated November 16, 2009).[1] On January 28, 2010, USCIS revoked the approved visa petition based on its determination that the petitioner had not presented sufficient evidence of a bona fide marriage and the petitioner had entered into a marriage of convenience for the purpose of evading the immigration laws (USCIS Decision dated January 28, 2010). The Board dismissed an appeal from the visa revocation determination on August 4, 2010, concluding that USCIS's revocation was supported by good and sufficient cause (August 4, 2010, Board Order). *See Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Thereafter, the respondent's marriage ended and she married her current husband, also a United States citizen (I.J. at 2). The respondent's current husband filed a visa petition on her behalf that was approved on September 20, 2011 (I.J. at 2; Resp't October 3, 2012, Documentary Submission at Tab A).

[1] Some of the facts recited in this order were not formally found by the Immigration Judge but may be administratively noticed based on the submission of records from USCIS. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of S-H-*, 23 I&N Dec. 462, 465-66 (BIA 2002).

On February 18, 2010, removal proceedings commenced with the filing of a Notice to Appear alleging that the respondent was deportable under section 237(a)(1)(B) of the Act, 8 U.S.C. § 1227(a)(1)(B). The respondent conceded removability and sought adjustment of status (I.J. at 1-2). On May 1, 2013, the Immigration Judge determined that the respondent was ineligible to adjust her status under section 245(a) of the Act because she was barred by section 204(c) of the Act, 8 U.S.C. § 1154(c) (I.J. at 2). Specifically, the Immigration Judge found that there was an affirmative finding of marriage fraud under section 204(c) of the Act in conjunction with the visa petition filed by the respondent's first husband (I.J. at 2). This appeal followed.

The respondent disputes the Immigration Judge's determination that there was a prior finding of marriage fraud under section 204(c) of the Act (Resp't Br. at 4-5; I.J. at 2). In USCIS's January 28, 2010, revocation of the visa petition filed by the respondent's prior spouse, USCIS cited section 204(c) of the Act in concluding that the respondent's first marriage was a "marriage of convenience entered into for the sole purpose of evading the immigration laws" (USCIS Decision dated January 28, 2010). However, the petitioner appealed USCIS's decision. The Board dismissed the appeal, concluding there was good and sufficient cause to revoke the visa petition approval in that the petitioner did not meet his burden of proving a bona fide marriage (August 4, 2010, Board Order). The Board did not make a marriage fraud determination (August 4, 2010, Bd. Order).

The Immigration Judge clearly erred in stating that there was a prior finding of marriage fraud under section 204(c) of the Act that rendered this respondent ineligible to adjust her status (*see* I.J. at 2). The Board has consistently held that USCIS has the exclusive authority to determine if an alien's prior marriage was "entered into for the purpose of evading the immigration laws" under section 204(c) of the Act during adjudication of a visa petition. *See, e.g., Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990) ("Accordingly, [under section 204(c) of the Act] *the district director* must deny any subsequent visa petition for immigrant classification filed on behalf of such alien . . ." (emphasis added)); *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978) ("The section 204(c) decision is to be made on behalf of the Attorney General *by the District Director in the course of his adjudication of the subsequent visa petition.*" (citing *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974)) (emphasis added)). Accordingly, an Immigration Judge has no authority to apply section 204(c) of the Act in adjudicating an application for adjustment of status.

To be eligible for adjustment of status under section 245(a) of the Act, a respondent must show that she: (1) has filed an application for adjustment of status; (2) is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (3) has an immigrant visa immediately available to her. *See* section 245(a) of the Act; 8 C.F.R. § 1245.1(a). In addition, she must demonstrate that she merits relief in the exercise of discretion. There is no dispute that this respondent has applied for adjustment of status. The respondent is also the beneficiary of an approved visa petition as the spouse of a United States citizen, with a visa immediately available to her. *See* section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i).

The Immigration Judge must still decide whether the respondent is admissible and whether to grant adjustment of status in the exercise of discretion. *See* section 245(a) of the Act. Consequently, we will remand the record for the Immigration Judge to consider respondent's

adjustment of status application in the first instance. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

FOR THE BOARD

File: (b) (6) - Oklahoma City, OK Date: JUL 23 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carl Bush, Esquire

APPLICATION: Continuance; voluntary departure

In a decision dated May 7, 2013, the Immigration Judge found the respondent removable, denied his request for a continuance and ordered the respondent removed from the United States after the respondent declined to accept pre-conclusion voluntary departure under section 240B(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a). The respondent, a native and citizen of Mexico, has appealed from the decision. The record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. §1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent contends that the Immigration Judge erred in failing to continue his case in the hope that he may qualify for relief as a consequence of immigration reform legislation that may be passed in the future. The Immigration Judge denied the respondent's request for a continuance because prospective legislation is speculative (I.J. at 2-3). Moreover, the respondent declined to accept pre-conclusion voluntary departure and made no application for relief from removal. Thus, the Immigration Judge properly denied the respondent's motion to continue. *See Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that an alien should not be granted a continuance "as a dilatory tactic to forestall the conclusion of removal proceedings"); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983); 8 C.F.R. §§ 1003.29 and 1240.6. We also find that the respondent has not demonstrated any resultant prejudice that amounts to a due process violation. *See Alzainati v. Holder*, 568 F.3d 844 (10th Cir. 2009).

The respondent further argues that the Immigration Judge did not consider his request for post-conclusion voluntary departure pursuant to section 240B(b)(1) of the Act, 8 U.S.C. § 1229c(b)(1), as an alternative form of relief from removal *See Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (holding that if an alien indicates that he or she will not waive appeal and is therefore ineligible for voluntary departure under section 240B(a)(1) of the Act, the Immigration Judge should consider the respondent's eligibility for voluntary departure at the conclusion of the proceedings under section 240B(b)(1) of the Act). The Immigration Judge has not considered the respondent's request for voluntary departure at the conclusion of proceedings under section 240B(b)(1). Accordingly, record is remanded for the Immigration Judge to consider the respondent's eligibility and the following orders will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

File: (b) (6) – Tulsa, OK Date: OCT -8 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Timothy Lee Cook, Esquire

APPLICATION: Remand; removability

ORDER:

The respondent moves the Board to remand this matter to the Immigration Judge for further proceedings. He asserts that during the pendency of his appeal, subsequent to the Immigration Judge's May 15, 2013, decision, his conviction for domestic assault and battery by strangulation and carrying a firearm while under the influence was vacated. Review of the evidence submitted on appeal reveals that the respondent's motion to vacate his conviction was allowed by the District Court of (b) (6) County, Oklahoma on (b) (6) 2013, and his admission to counts one and two were vacated and set aside.[1]

Consequently, the proffered evidence raises the question as to whether or not the vacated conviction remains a conviction within the meaning of the immigration laws under current Tenth Circuit and Board precedent. Additional fact-finding to determine its effect on the proceeding as a matter of law, is required. *See Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002).

Accordingly, the respondent's motion is granted and the case is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[1] Proceedings before the Immigration Judge in this matter were completed in Tulsa, Oklahoma through video conference pursuant to section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).

File: (b) (6) - Dallas, TX

Date: MAR 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sandra Cheng, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent is a native and citizen of China. He appeals from a June 11, 2013, Immigration Judge decision finding him not credible and consequently denying his application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as his request for protection under the Convention Against Torture ("CAT"). The appeal will be sustained and we will remand for further proceedings.

The respondent filed an asylum application with an asylum officer in December 2010 that was referred to an Immigration Judge, alleging past persecution and a well-founded fear of future persecution on account of his religion. Because of the filing date, his claims are governed by the amendments to the Act brought about by the passage of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). On appeal, the respondent argues that the Immigration Judge violated his due process rights by denying a motion to continue from his fifth counsel. The respondent also asks that his case be transferred to another Immigration Judge.

Upon *de novo* review, we conclude that the Immigration Judge erred in denying the respondent's June 4, 2013, motion for a continuance, because he violated the respondent's right to due process. 8 C.F.R. § 1003.29; *Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1987) (concluding that the discretionary decision to deny a continuance for lack of good cause shown will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing). The Immigration Judge pointed out that each time the respondent switched counsel, the new counsel asked for another continuance each time a merits hearing date neared (I.J. at 8-9). The Immigration Judge noted that four out of the five counsels representing the respondent share the same address and contact information (I.J. at 5-8; Exhs. 100-04). The respondent has been represented by counsel since March 30, 2011, twenty days after his Notice to Appear was issued (I.J. at 5; Exh. 100).

However, the Immigration Judge concluded without supporting evidence that the alleged dilatory tactics of the respondent's numerous counsels extended to the respondent personally (I.J. at 7-10). We determine that the Immigration Judge's reference to the respondent's and his instant counsel's alleged "antics" was inappropriate (*see* I.J. at 8-9). In addition, the Immigration Judge erred in concluding that the respondent had waived his right to counsel when his latest attorney did not come to the hearing, especially given that the respondent's attorney wanted to participate by telephone and the respondent wanted to talk with her. The Immigration Judge refused to allow the respondent's attorney to participate telephonically and would not allow the respondent to contact his attorney for advice (*see* Tr. at 16-17). We conclude that the absence of counsel may have been a contributing factor in the perceived lack of the respondent's credibility. As a result of these conclusions and actions on the part of the Immigration Judge, the respondent did not receive a full and fair hearing and his due process rights were violated. *See De Zavala v Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (requiring a respondent to make "an initial showing of substantial prejudice" in order to succeed on a due process claim). Accordingly, we deem a remand appropriate.

On remand, we ask that the Immigration Judge conduct a full and complete hearing. The Immigration Judge should make any findings of fact necessary to fairly and fully adjudicate the respondent's requests for relief. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (the Board generally cannot make additional findings of fact as needed to fully develop the record on appeal). In particular, after taking additional testimony as necessary, the Immigration Judge should render a new credibility determination. As relevant, the Immigration Judge should analyze the merits of the respondent's claims for relief. The parties also should be allowed to present testimony and documentary evidence regarding the conduct of the respondent's counsels. *Id.* Finally, a review of the record does not indicate that the transfer of the record to a different Immigration Judge is warranted in this instance. Although the Immigration Judge erred, we can understand his frustration with counsel's perceived tactics, and we do not conclude that his conduct of the proceedings evinced bias, prejudgment or a lack of impartiality.

Accordingly, the following order will be issued:

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with this order, and for the entry of a new decision.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: JUN - 2 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David L. Sobel, Esquire

APPLICATION: Cancellation of removal under section 240A(b)

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's decision, dated June 11, 2013, which pretermitted the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The appeal will be sustained.

On appeal the respondent argues that he received ineffective assistance of counsel and requests that we remand the record to the Immigration Judge for consideration of his application for cancellation of removal. We review an Immigration Judge's findings of fact for clear error; but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i),(ii). Under the totality of the circumstances, we find it appropriate to remand the record to the Immigration Judge to consider the respondent's application for cancellation of removal, given the evidence in the record that the application was timely served on the Department of Homeland Security, that it was submitted to the Immigration Court, albeit with technical errors, and that the errors which led to its rejection for filing were the fault of former counsel, not the respondent. Accordingly, the following order will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

File: (b) (6) - Dallas, TX

Date: FEB 25 2015

In re: (b) (6)

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Patricia Freshwater, Esquire

APPLICATION: Asylum; withholding of removal

The applicant, a native and citizen of Senegal, has appealed the Immigration Judge's decision dated August 27, 2013, which denied her applications for asylum under section 208(b)(1)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1158(b)(1)(A), and withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A).[1] The Department of Homeland Security ("DHS") did not file a response to the appeal. The appeal will be dismissed in part and the record remanded for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge 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 their relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). The applications for relief from removal are governed by the amendments to the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge determined that the applicant's asylum application was statutorily barred because it was untimely filed and she did not demonstrate that she qualified for an exception to the filing deadline (I.J. at 8). Sections 208(a)(2)(B), (D) of the Act; 8 C.F.R. §§ 1208.4(a)(2), (4)-(5). This determination has not been disputed or challenged on appeal. Accordingly, the applicant's appeal of the Immigration Judge's decision denying her asylum application will be dismissed.

The Immigration Judge denied the application for withholding of removal under the Act for failure of proof. In this regard, the Immigration Judge found that the applicant did not establish past persecution; she did not establish a well-founded fear of future persecution; and she has not demonstrated that her alleged persecutor was or is the government of Senegal or an individual whom the government is or was unable or unwilling to control (I.J. at 9-12).

[1] The applicant did not appeal the Immigration Judge's decision denying her application for protection under the Convention Against Torture ("CAT") pursuant to 8 C.F.R. §§ 1208.16-1208.18. We deem this issue waived.

Due to our limited fact-finding ability on appeal, we find it necessary to remand the record for further clarification, findings, analysis and consideration of the applicant's eligibility for withholding of removal under the Act. We are unable to meaningfully review the Immigration Judge's determination that there was no past persecution on the basis that the "one isolated incident of a family conflict" was "not motivated by [female genital mutilation ('FGM')]" (I.J. at 9). That determination reflected an incorrect legal standard. Under governing precedent, the pertinent question is not whether alleged persecutors were motivated by FGM per se, but whether persecution was or would be motivated by a statutorily protected ground, such as membership in a particular social group *See Matter of A-T-*, 24 I&N Dec. 617, 622-23 (A.G. 2008) (recognizing that the applicant's claim was not "FGM persecution" but persecution on account of membership in a particular social group, and that past persecution creates a presumption that the applicant's future life or freedom would be threatened "on account of the *same statutory ground*," not that the particular act of persecution suffered in the past will recur) (emphasis in original); *Matter of A-T-*, 25 I&N Dec. 4, 8 (BIA 2009) (likewise stating that the applicant's claim should "not be characterized as FGM persecution; rather it was a claim of 'persecution on account of membership in a particular social group'"); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "at least one central reason" standard for mixed-motive cases in the context of an application for withholding of removal under the Act).

Here, the applicant claims eligibility for relief on the basis of harm and feared harm allegedly arising from membership in a proposed particular social group consisting of Fulani women in Senegal who have not been subjected to FGM and who oppose the practice. On remand, upon applying the correct legal standard, the Immigration Judge should reconsider the applicant's claim of past persecution and make specific findings regarding, inter alia, whether the harm experienced by the applicant in Senegal rose to the level of past persecution, whether her membership in a particular social group was "at least one central reason" for the alleged persecution, and whether the Senegalese government was unable or unwilling to control the applicant's alleged persecutor at that time.

Should the Immigration Judge find that the applicant experienced past persecution on account of a protected ground in Senegal, he should thereafter apply the regulatory framework applicable in determining the applicant's overall eligibility for withholding of removal. *Matter of D-I-M-*, 24 I&N Dec. 448, 449-51 (BIA 2008). Should the Immigration Judge again find that the applicant did not establish past persecution, the Immigration Judge should determine whether the applicant independently established that she faces a clear probability of being subjected to FGM against her will or of facing other persecutory harm on account of a protected ground upon her return to Senegal. In this regard, the Immigration Judge should consider the totality of the record evidence, which includes, inter alia, written declarations and the applicant's testimony regarding her personal experience and alleged past and recent specific threats against her, which the Immigration Judge did not mention in his analysis (I.J. at 9-11). Additionally, while the Immigration Judge mentioned internal relocation, he did not make any further findings on this issue, and should do so in accordance with the applicable analytical framework if he chooses to reach the issue on remand (I.J. at 9). *See Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012) (discussing analytical framework for determining whether the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and whether, under all the circumstances, it would be reasonable to expect the applicant to do so).

On the issue of government complicity, the Immigration Judge should determine, based again on the totality of the record evidence, whether the applicant has established that the Senegalese government was or would be unable or unwilling to control the applicant's family members, despite any applicability of existing law deeming female genital mutilation to be a criminal offense.[2] *See, e.g.*, Exh. 2, Tab U at 87 (State Department Country Report for 2011, stating that although FGM is illegal in Senegal, many persons still practiced it openly and with impunity); Tab V at 107 (State Department Country Report for 2012, stating that the law prohibiting violence against women was not enforced, particularly when the violence occurred within the family).

In remanding this case, we intimate no opinion regarding the applicant's remaining arguments on appeal and her ultimate eligibility for withholding of removal under the Act. Both parties should have the opportunity to submit updated evidence on remand. The following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision on the application for withholding of removal under the Act.

FOR THE BOARD

[2] To the extent (if any) that the Immigration Judge intended to determine that "familial conflict" or "family action" can never constitute "persecution" under the Act, we disagree (I.J. at 12). Serious harm inflicted by family members can constitute "persecution" for purposes of withholding of removal if the pertinent government was (for purposes of past persecution) or is (for purposes of feared future persecution) unwilling or unable to control that action.

File: (b) (6) - Dallas, TX

Date: MAR 17 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Donglai Yang, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Turkey, appeals the Immigration Judge's decision, dated September 5, 2013, which denied his applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3) and protection under the Convention Against Torture. The respondent's appeal will be dismissed, but the record will be remanded to allow the respondent to apply for voluntary departure.

We review an Immigration Judge's findings of fact for clear error; but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i),(ii). The respondent's asylum application was filed after May 11, 2005, and is, therefore, governed by the provisions of the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42, 45 (BIA 2006).

Initially, the respondent argues the Immigration Judge erred because he did not provide the respondent with a competent Turkish interpreter. After inquiring at multiple hearings, the respondent informed the Immigration Judge that he wanted to proceed in English, and that he was fluent in English (I.J. at 5; Tr. at 1, 4, 8, 21, 44-45, 55). The respondent was represented by counsel at his earlier hearings and no request was made for a Turkish interpreter during those hearings, as the respondent indicated he spoke English (Tr. at 4, 8, 12-20). Upon our review, we find no error by the Immigration Judge conducting the hearing in English as the respondent advised the Court that he spoke and understood English.

We find no clear error in the Immigration Judge's finding that the respondent lacked credibility due to the inconsistencies between his in court testimony, his asylum application, his personal statement submitted in support of his asylum application, and the written pleadings submitted by his attorney (I.J. at 3; Exh. 3; Written Pleadings). For example, the respondent admitted, in writing, that he entered the United States in Detroit, Michigan, on (b) (6), 2008, with an H2B visa, but during his in court testimony, he claims that he entered in Chicago, Illinois, on (b) (6), 2008 (I.J. at 3-4, 7-8; Tr. at 34-38).

The Immigration Judge noted the respondent's higher level of education and observed that he held a Bachelor's Degree in teaching mechanics (I.J. at 8; Tr. at 41-42). Moving on to the claimed protected ground, the respondent testified that he was not a member of any political party and did not belong to a political party (I.J. at 8; Tr. at 48-49). However, the respondent's

personal affidavit found with the asylum application indicated that he is against the Islamic government and is a member of the Republican People's Party ("CHP"), which opposes the government (I.J. at 8; Tr. at 49; Exh. 3). The Immigration Judge found this a discrepancy between the respondent's application and in court testimony.

When asked about his fear of returning to Turkey, the respondent indicated that he fears the government due to his computer posts and "tweets," which criticize the current government, but the respondent did not provide any proof of his computer activity (I.J. at 8; Tr. at 47-50). During his in court testimony and after several inquiries by the Immigration Judge, the respondent did not raise his fear of the government's mandatory military service, but his asylum statement indicates that he fears for his life and freedom due to the mandatory military service (I.J. at 8; Tr. at 52; Exh. 3). The respondent apparently left Turkey after the Turkish armed forces provided him with a two year deferment, and a warrant was issued for his arrest (I.J. at 9, 11). In light of the foregoing, we affirm the Immigration Judge's determination that the respondent lacked credibility due to his contradictory statements amongst his testimony, pleadings, and written application (I.J. at 9).

The respondent contends the Immigration Judge did not provide an opportunity for him to explain or clarify the discrepancies between his testimony and the asylum application. In fact, the Immigration Judge specifically examined the respondent regarding these matters (Tr. at 45-46, 49, 52, 53-54). Furthermore, after the Immigration Judge asked if there were any other reasons he feared returning to Turkey, the respondent did not mention the Turkish government wanted to harm him in response to the compulsory military service (Tr. at 45-46, 49, 52, 53-54).

We also agree with the Immigration Judge that due to the respondent's lack of credibility the record does not contain sufficient evidence to establish that it is more likely than not that the respondent will be tortured upon his return to Turkey by or at the instigation of or with the consent or acquiescence (including willful blindness) of a public official or other person acting in official capacity, for purposes of protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(c) and 1208.18; *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 350-52 (5th Cir. 2006). The respondent fears arrest by the government, because he violated the compulsory military service and the in retaliation for his tweets and computer writings. We agree with the Immigration Judge's decision to deny relief under the Convention Against Torture, because the respondent lacked credibility and did not submit any evidence to corroborate his testimony concerning his computer posts (I.J. at 12-13; Tr. at 54).

The law provides an alien the right to request relief from removal, including voluntary departure. *See* 8 C.F.R. § 1240.11(b). It appears that the respondent is statutorily eligible for that relief, and the DHS has not offered any evidence that voluntary departure should not be granted as a matter of discretion. As the respondent was pro se and did not expressly request voluntary departure or understand the legal consequences that a removal order would have on his ability to immigrate and reside in the United States in the future, we find it appropriate to remand the record to the Immigration Judge to enable the respondent to apply for voluntary departure. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

(b) (6)

FURTHER ORDER: The record is remanded to the Immigration Judge only to allow the respondent to apply for voluntary departure.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK

Date: MAR 18 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence E. Davis, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge decision dated October 21, 2013, denying her application for relief. The appeal will be sustained and the record remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The denial of the respondent's application for cancellation rests solely on an adverse credibility determination. The Immigration Judge found that the respondent made "multiple false statements" in her application for relief and failed to disclose her criminal history in connection with that document (I.J. at 7-8). The Immigration Judge found that the respondent incorrectly claimed in the application that she had a daughter named (b) (6), while it was later revealed in testimony that (b) (6) was her niece. He found that the respondent had failed to disclose the existence of a daughter named (b) (6), living illegally in the United States, on her application. The Immigration Judge found that the respondent had also falsely stated on the application that her mother was deceased, while it was revealed in testimony that the mother was actually alive and residing in Mexico with her husband. Finally, the Immigration Judge suggested that the respondent had attempted to conceal her conviction for petty theft by checking a box on the application to indicate that she had never been arrested, and testifying that she had never been arrested. He noted that when government counsel "confronted" the respondent with her criminal history, the respondent simply replied that she was confused.

We do not find that the record supports the Immigration Judge's adverse credibility determination. The respondent listed her niece (b) (6) in Part 6 of her cancellation application under the section styled "Information About Your Family" (Exh. 3). The respondent may well have regarded her niece as member of her family. In all other supporting documentation, including a psychologist's report and tax returns, it appears that the respondent accurately identified only her two United States-born citizen biological children as her offspring, and she provided birth certificates to establish that fact. Moreover, the respondent did not claim (b) (6) as a qualifying relative for cancellation purposes. She correctly noted on her application that her niece was born in Mexico and has no legal status in the United States, so it

would appear that no advantage could be derived from deliberately mis-identifying the child as a daughter. Therefore, we cannot agree with the Immigration Judge's conclusion that this information was placed on the application with the intent to deceive.

The omission of the respondent's Mexican-born daughter (b) (6) from the application and the identification of the respondent's mother as deceased also appear to be attributable to poor preparation, and done without any intent to deceive. As noted in the Immigration Judge's decision, (b) (6) was 21 years old at the time of the hearing and living in Texas. Thus, the respondent may no longer have considered her part of the family when she completed the application. Similarly, the respondent testified that her mother, who was not claimed as a qualifying relative for cancellation purposes, left the family when she was 5 years old and later remarried (Tr. at 63). We discern no attempt to deceive in providing this inaccurate information.

The Immigration Judge's statements with regard to the respondent's testimony about her criminal history are not strictly accurate. The respondent did not testify that she had never been arrested; she simply confirmed to government counsel that her application indicated that she had no arrests (Tr. at 48). The Immigration Judge's conclusion that the respondent attempted to deceive the court in this regard is illogical since the respondent was placed in removal proceedings as a result of the arrest, which was acknowledged early in these proceedings by her attorney, and a copy of the respondent's conviction record was evidently provided by counsel at the hearing in this matter (Exhs. 2, 5; Tr. at 6, 16, 22). Moreover, except perhaps in the exercise of discretion, it appears that no benefit would have been derived from deceiving the court, since the petty theft was the respondent's only criminal transgression and would not affect her statutory eligibility for relief (Tr. at 7).

We do not condone the omissions and inaccurate or incomplete information reflected in the respondent's cancellation application. However, we are unable to conclude that the respondent's conduct in that regard was deliberate and intended to mislead or deceive the Immigration Court. We find, therefore, that the record does not support the Immigration Judge's adverse credibility determination, and that his findings in support of that determination are in error. The record will be returned to the Immigration Judge to conduct further proceedings to determine if the respondent is otherwise credible, whether she meets the eligibility requirements for cancellation, and whether the respondent is deserving of that relief in the exercise of discretion.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: SEP 15 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Belinda Arroyo, Esquire

APPLICATION: Cancellation of removal under section 240A(b) of the Act

The respondent, a native and citizen of Kenya, appeals from the Immigration Judge's decision dated October 21, 2013, which denied his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b).[1] The Department of Homeland Security has not replied to the respondent's brief on appeal. The record will be remanded.

We review Immigration Judges' findings of fact for clear error, but we review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). Because the application was filed after May 11, 2005, it is subject to the provisions of the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge found that the respondent was credible but determined that he did not satisfy the statutory requirements for cancellation of removal of good moral character and exceptional and extremely unusual hardship and that he did not establish that relief was warranted in the exercise of discretion (I.J. at 8, 9-14). We find that a remand is in order.

With respect to the good moral character issue, the sole basis for the Immigration Judge's adverse finding was the respondent's June 30, 2005, false claim to United States citizenship, which now falls outside the relevant 10-year period (I.J. at 2). Section 240A(b)(1)(B) of the Act. *See Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005).

With respect to the hardship issue, we find that the Immigration Judge's reliance on Board precedent concerning female genital mutilation (FGM) in the asylum context is misplaced (I.J. at 12). *See Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007) (holding that an alien may not establish eligibility for asylum or withholding based solely on a derivative fear of FGM). As the Immigration Judge acknowledged, the context of asylum is distinct from the issues in an application for cancellation of removal, where the focus is solely on the potential hardship to

[1] In order to resolve any issue as to the timeliness of the appeal of the Immigration Judge's decision, which was mailed on October 22, 2013, the Board takes the appeal on certification. 8 C.F.R. § 1003.1(c).

qualifying relatives. The Immigration Judge did not meaningfully address the respondent's credible testimony concerning the likelihood that his United States citizen daughters may be subjected to FGM or the extensive documentary evidence the respondent submitted concerning the prevalence and practice of FGM in Kenya (I.J. at 6, 12-13; Exh. 4). Specifically, he did not explain why, in light of the testimony and evidence of record, he found speculative the possibility of FGM being inflicted on the respondent's daughters. In addition, the Immigration Judge did not address in sufficient detail the issue of possible internal relocation in light of country conditions in Kenya.

Finally, with respect to discretion, the Immigration Judge's decision lists the respondent's adverse factors but does not balance them against, or even discuss, his positive equities (I.J. at 13-14). *Matter of Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001); *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). In addition, his categorical analysis of the respondent's false claim to United States citizenship is contrary to Board precedent (I.J. at 10). *See Matter of Guadarrama*, 24 I&N Dec. 625, 626-27 (BIA 2008) (holding that a false claim to United States citizenship does not require a finding that an applicant lacks good moral character). In making the adverse findings on discretion (as well as good moral character), the Immigration Judge did not consider that good moral character is not destroyed by a single lapse. *Id.* at 627 (citations omitted).

Under the circumstances, we find that it is appropriate to remand the record for further consideration of the respondent's claim, to include updating the record as necessary. Accordingly, the following order will be entered.

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

Edward R. Grant

FOR THE BOARD

File: (b) (6) - Oklahoma City, OK

Date:

DEC - 2 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kichul Kim, Esquire

ON BEHALF OF DHS: Margaret M. Price,
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

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

Lodged: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Removability

On December 10, 2013, an Immigration Judge found the respondent removable as charged, and ordered the respondent removed. The respondent, a native and citizen of South Korea, now appeals. The appeal will be sustained. The record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On (b) (6) 2004, the respondent was convicted of two counts of the unlawful sale or transfer of a precursor substance under OKLA. STAT. TIT. 63, § 2-328. On (b) (6) 2011, the District Court of (b) (6) County, State of Oklahoma, vacated the conviction on constitutional grounds based on ineffective assistance of counsel (I.J. at 2; Exh. 3, 4).

On appeal the respondent argues that the Immigration Judge erred in ruling that the conviction was not vacated for immigration purposes (I.J. at 3-5; Respondent's Br. at 2). In

reaching his conclusion, the Immigration Judge relied on *Chaidez v. United States*, 133 S. Ct. 1103 (2013), in which the Supreme Court concluded that *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that an attorney has an affirmative duty to inform a client whether his pleas carries a risk of deportation), does not apply retroactively. The Immigration Judge also referenced *United States v. Hong*, 671 F.3d 1147 (10th Cir. 2011), in which the United States Court of Appeals for the Tenth Circuit, under whose jurisdiction this case arises, held prior to *Chaidez v. United States*, *supra*, that *Padilla v. Kentucky*, *supra*, did not apply retroactively to cases on collateral review (I.J. at 4). *United States v. Hong*, *supra*, at 1157-1159. Thus, the Immigration Judge found that because the respondent's state court vacatur was based on ineffective assistance of counsel and the respondent's conviction pre-dated *Padilla v. Kentucky*, *supra*, the respondent remained convicted for immigration purposes (I.J. at 3-4, 5).

We will reverse the Immigration Judge. *See* 8 C.F.R. § 1003.1(d)(3)(ii). Whether *Padilla v. Kentucky*, *supra*, applies is a matter for the pertinent state criminal court to determine. Once the court has made that determination and vacated a conviction based on ineffective assistance of counsel, neither the Immigration Judge nor the Board can look behind the determination. The record reflects that the state criminal court vacated the respondent's conviction on constitutional grounds based on a finding of ineffective assistance of counsel (Respondent's Br. at 1; Exh. 4). Whether or not that vacatur was in accordance with the law is not an issue that an Immigration Judge or the Board may independently review. What matters is that, by its terms, the vacatur was not for the sole purpose of ameliorating the immigration consequences of the conviction. *See Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that the vacatur of a conviction based solely on rehabilitation or immigration hardships, rather than on a procedural or substantive defect in the underlying criminal proceeding, does not eliminate the conviction for immigration purposes). Hence, we find that the respondent's conviction has been vacated on the merits such that the vacatur is binding for our purposes. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

On appeal, the respondent requests that he have the opportunity to apply for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (Respondent's Br. at 2). Inasmuch as the respondent no longer has a disqualifying conviction, we will remand the record for the respondent to apply for cancellation of removal, and any other form of relief for which he currently is eligible.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

File: (b) (6) – Oklahoma City, Oklahoma Date: AUG 14 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven Franklin Langer, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's December 11, 2013, decision denying her applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) and protection pursuant to the Convention Against Torture (CAT). The record will be remanded for further proceedings.

We review findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2014); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues, including issues of law, judgment or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii) (2014). Because the asylum application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act of 2005.

The Immigration Judge determined that the respondent was not credible as her testimony contradicted statements that she provided to immigration officials upon her attempted entry into the United States (I.J. at 6-9). Also, the Immigration Judge found that the respondent did not provide sufficient corroborating evidence to meet her burden of proof for withholding of removal (I.J. at 9).

We find that a remand is warranted in the present matter for further assessment of the respondent's withholding of removal claim. Considering the totality of circumstances, we do not find the reasons provided by the Immigration Judge for his adverse credibility finding sufficient to support his determination (I.J. at 5-8). The Immigration Judge's adverse credibility finding was predicated on the respondent's failure to inform immigration officials upon her initial encounter with immigration officials in the United States about the abusive relationship she endured in Guatemala (I.J. at 5-8). However, the record indicates that the respondent subsequently disclosed her abusive relation during her credible fear interview, on her asylum application, and during her merits hearing. Further, the Immigration Judge remarked in his decision that he also considered the respondent's lack of corroboration in his denial of the respondent's withholding of removal application. Yet, a review of the records show that on

November 15, 2013, the respondent provided some supporting documents which the Immigration Judge excluded from the record because the respondent had filed them in an untimely manner (Tr. at 12).

Based on our review of the record, we find it appropriate to remand the record to the Immigration Judge in order for him to reassess the respondent's credibility, consider and evaluate all evidence of record, and to further assess the respondent's withholding of removal claim based on current asylum case law. *See Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal). The parties will be allowed to provide country condition updates and given the opportunity to raise any other issues which are relevant in the instant case.

Accordingly, the following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: APR 15 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Robert Urenda, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Continuance; adjustment of status; remand

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's February 5, 2014, decision ordering him removed from the United States. The respondent has also filed a motion to remand during the pendency of this appeal. *See* 8 C.F.R. § 1003.2(c)(4). The Department of Homeland Security ("DHS") has not filed an opposition to either the appeal or the motion to remand. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). The appeal will be sustained, the motion to remand will be denied as moot, and the record will be remanded to the Immigration Court for further proceedings consistent with this opinion.

We review findings of fact for clear error, including credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review issues of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The proceedings were initiated through issuance of a Notice to Appear (Form I-862) dated March 28, 2013 (Exh. 1). The DHS alleged that the respondent last entered the United States on or about June 11, 1981, without being inspected and admitted or paroled by an immigration officer, rendering him inadmissible to the United States under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(6)(A)(i). At an initial master calendar hearing held on December 19, 2013, the respondent, through his former attorney, admitted the factual allegations and conceded the charge of removability (I.J. at 1-2; Tr. at 2). The respondent's attorney also requested a continuance for attorney preparation and the case was continued until February 5, 2014 (I.J. at 2; Tr. at 2-3).

At the next master calendar hearing, the respondent attorney's requested to withdraw the previously entered admissions and concessions (I.J. at 2-3; Tr. at 5). Specifically, counsel argued that the concessions were made in error, because the respondent is currently present in the United States pursuant to a lawful admission (I.J. at 3; Tr. at 5-7). Counsel offered to submit a

copy of the respondent's passport to verify this claim, but it does not appear the Immigration Judge made this evidence part of the record (Tr. at 7; *see also* Attach. A to Resp. Brief). The Immigration Judge denied the request to withdraw the pleadings in a decision dated February 5, 2014, holding that the respondent is bound by his attorney's admissions and is thus not permitted to re-litigate his manner of entry into the United States (I.J. at 2-3; Tr. at 5-7).

As the Immigration Judge properly recognized, an alien is generally bound by "a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity." *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986). This applies to any admission made as a "reasonable tactical decision" by an attorney, and we presume such pleadings to be reasonable tactical decisions absent evidence to the contrary. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984). Where an attorney's judicial admission is tactical, only egregious circumstances so unfair as to produce an unjust result will warrant setting aside its binding effect. *See Matter of Velasquez*, *supra*, at 382-83; *see also Zhong Qin Yang v. Holder*, 570 Fed.Appx. 381, 383 (5th Cir. 2014).

We agree with the respondent that his prior attorney's admissions here are not binding. The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has held that admissions by an attorney in the removal context are not strategic, and thus not binding, where they have the effect of rendering an alien ineligible for relief "without any apparent counter-advantage." *Mai v. Gonzales*, 473 F.3d 162, 166 (5th Cir. 2006). Significantly, the concessions made by the respondent's attorney in the present case render him ineligible for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a), which is only available to aliens who are present in the United States after having been "inspected and admitted or paroled" by an immigration officer.[1] Moreover, these concessions were made at the initial master calendar hearing, and there was no apparent benefit to the respondent resulting from the pleadings. *Cf. Matter of Velasquez*, *supra*, at 383 (finding an attorney's concession of removability to be binding where it was made as a "tactic designed to enhance the chances that [a] motion for change of venue would be granted"). We also note that the respondent has submitted evidence to support his assertion that he is present in the United States pursuant to a lawful admission, contrary to his attorney's concessions (Attach. A to Resp. Brief). *See id.* (explaining that an attorney's judicial admission will not be set aside absent some indication that it is "untrue or incorrect"); *see also supra* note 1. We therefore conclude that the respondent is permitted to withdraw his admissions to the factual allegations and his concession of the charge contained on the Notice to Appear.

[1] The respondent seeks to adjust his status through a Petition for Alien Relative (Form I-130) that was pending before United States Citizenship and Immigration Services (USCIS) during the proceedings below (Tr. at 7). The respondent has submitted evidence indicating that this visa petition was approved during the pendency of this appeal, which he provided in support of his motion to remand (Attach. A to Resp. Supp'l Brief). In light of our disposition of his appeal, however, we conclude that the respondent's arguments regarding the propriety of his continuance request for adjudication of this petition is now moot.

In reaching this conclusion, we express no opinion regarding whether the charge on the Notice to Appear can be properly sustained, as this raises factual issues that must be addressed by the Immigration Judge in the first instance. *See Matter of L-O-G-*, 21 I&N Dec. 413, 422 (BIA 1996). The parties may address the issues related to the respondent's inadmissibility as charged, or any other charge the DHS may lodge and wish to pursue in the course of remanded proceedings. If removability is established, the Immigration Judge should also consider the respondent's eligibility for relief from removal. On remand, the parties will also have the opportunity to submit additional evidence and arguments to assist the Immigration Judge in issuing a new decision. Accordingly, the following orders will be 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 and for the entry of a new decision.

FOR THE BOARD

File: (b) (6) Dallas, TX

Date: AUG 25 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jason Mills, Esquire

ON BEHALF OF DHS: D'Anna H. Freeman
Assistant Chief Counsel

APPLICATION: 237(a)(1)(H) waiver

The respondent, a native and citizen of Mexico, has appealed the Immigration Judge's decision dated February 10, 2014, denying his application for a waiver under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H), in the exercise of discretion. The appeal will be sustained and the record will be remanded.

An Immigration Judge's findings of fact, including on credibility, are reviewed to determine whether the findings are "clearly erroneous." 8 C.F.R. § 1003(d)(3)(I). The Board reviews all questions of law, discretion, judgment, and all other issues in appeals from the decisions of Immigration Judges on a de novo basis. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent submitted his application after May 11, 2005, and it is governed by the provisions of the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

On appeal the respondent argues that false testimony alone should not automatically preclude an alien from discretionary relief. The respondent acknowledges that it is undisputed that his testimony was inconsistent with the written pleadings, but he states that it is plausible that his testimony conflicted with the written pleadings due to confusion, nerves, miscommunication, or any number of factors.

The Immigration Judge found that the respondent is statutorily eligible for a 237(a)(1)(H) waiver (I.J. at 6). The Immigration Judge noted that the respondent filed written pleadings with the court on August 1, 2011, wherein he admitted allegations 1 through 6 on the Notice to Appear, and conceded the grounds of removability as charged (I.J. at 1-3). Furthermore, the Immigration Judge noted that in the written pleadings, the respondent admits "that the respondent procured his admission visa, adjustment or other documentation or benefit by fraud or by willfully misrepresenting a material fact to wit: he entered into a marriage with (b) (b) (6) also known as (b) (6) (b) (6) (b) (6) by fraud with the sole purpose of circumventing immigration laws to obtain an immigration benefit." *See Id.*; Respt's Joint Trial Brief/Written Pleadings and Relief, at 2. The Immigration Judge considered the testimony of the respondent and two witnesses, and the exhibits submitted by the respondent and the Department of Homeland Security (I.J. at 2-3; Exhs. 1-9). The Immigration Judge stated it was difficult to

reconcile the respondent's testimony in court with his written pleadings and the other evidence that appears in the record as part of Exhibits 6, 7, 8 and 9 (I.J. at 4; 7-11).

The Immigration Judge considered the positive equities and the issues of emotional and financial hardship to the respondent and his family. The Immigration Judge also considered the negative factors in this matter, specifically the respondent's material misrepresentations before the Immigration Court regarding his first marriage. The Immigration Judge found that the respondent's explanation of the events is implausible (I.J. at 9-11).

On de novo review, we conclude that the respondent has established that he merits a 237(a)(1)(H) waiver as a matter of discretion. We acknowledge the adverse factors in this case. However, we also consider the respondent's significant positive equities of 30 years residence in the United States, three United States citizen children (two adults, one minor), three grandchildren, a 20-year history of employment at the same job as a supervisor, a homeowner, payment of taxes, and lack of a criminal record. We find that, after considering all of the evidence presented and determining that the positive equities outweigh the negative factors, the respondent has demonstrated that his application for a 237(a)(1)(H) waiver should be granted in the exercise of discretion. *See Matter of Tijam*, 22 I&N Dec. 408, 412-13 (BIA 1998). Accordingly, the respondent's appeal will be sustained and the record will be remanded for the purpose of completing the requisite background checks.

ORDER: The appeal is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, for further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK

Date: FEB - 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Stewart Chih-Hao Lin, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a native and citizen of China, has timely filed an appeal of an Immigration Judge's decision dated January 30, 2014. The Immigration Judge found the respondent removable as charged, denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture and ordered the respondent removed from the United States to China. *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, respectively, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c)(2). On appeal, the respondent contests the denial of all three forms of relief. The record will be remanded.

The respondent claims he was persecuted in China on account of his political opinion (I.J. at 3; Tr. at 67). An applicant for asylum or withholding of removal must establish that the persecution he or she suffered, or fears, is on account of his or her race, nationality, religion, membership in a particular social group, or political opinion. The alien need not show conclusively what the motive for the persecution was, or may be. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000). However, the alien must provide some evidence, either direct or circumstantial, of those motives. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Further, in cases such as the respondent's case that the REAL ID Act of 2005 governs, the alien must show that a protected ground was or will be "at least one central reason" for the past or feared persecution. Section 208(b)(1)(B)(I) of the Act; *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

The respondent testified that beginning in 1986, he worked in the state-owned (b) (6) (b) (6) in Tian Jing City. In (b) (6) of 2009, he was notified that he would be among 800 workers to be laid off from work. The respondent asked the workshop chief about his severance package and was told that a final decision had not been made yet. When he didn't get a response from the workshop chief, on (b) (6) 2009, the respondent and two co-workers went to the (b) (6), the supervisor of the factory. They were told an inquiry would be made and they would receive information soon. They received no further information on their severance pay. On (b) (6), 2009, the respondent, his two co-workers, and about 1,000 other people, including some individuals that the respondent had solicited to attend, went

to the offices of the Hu Shi District Government and engaged in an unauthorized civil protest. The respondent carried an anti-corruption banner during the protest. Military police officers broke up the demonstration using batons to push back the protestors. The respondent was beaten with a baton and arrested. He was taken to the Hu Shi police station where he was interrogated and accused of unlawful assembly and attacking the government (I.J. at 4; Tr. at 69-74). During the interrogation, he was slapped twice in the face and kicked by a police officer. The respondent was placed in a small cell and detained for seven days. He was released from custody when he paid a fine of 5,000 Chinese dollars and wrote a letter promising not to demonstrate against the government again. The respondent was required to report to the local law enforcement once per week where he was made to do menial tasks. The respondent decided to flee to the United States in (b) of 2009 (I.J. at 5; Tr. at 77-82). He fears if he returns to China he will be harmed for not having reported to local law enforcement as required (I.J. at 6; Tr. at 87).

The Immigration Judge found that the respondent did not demonstrate that the incidents he experienced in China were on account of his political opinion (I.J. at 8). The Immigration Judge found the respondent did not establish he was persecuted on account of his political opinion because he testified that he has never been politically active in China (I.J. at 8; Tr. at 89). Additionally, the Immigration Judge found that the respondent's layoff from his job was not politically motivated. He was arrested because he took part in an unlawful protest, that he was subjected to prosecution not persecution (I.J. at 9). The respondent argues on appeal that he was asserting his political right and the persecution arose out of the police suppressing him from exercising that political right; therefore, a nexus to an enumerated ground was established. Respondent's brief at 4-5. He argues that he was persecuted because he organized a protest to raise awareness of the corruption of managers at the state-owned factory where he was previously employed. Respondent's brief at 1.

Opposition to state corruption may, in some circumstances, constitute the expression of political opinion. *See Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011). The respondent testified that he believed there was government corruption because the officials who ran the factory must have embezzled money, taken kickbacks or bribes since the company had made money for many years before the 2009 layoffs (I.J. at 6; Tr. at 91). The respondent sought to raise awareness of corruption in the government owned company, and the failure of other government offices to investigate. He joined with his two co-workers and he personally recruited other individuals to attend the 1,000 person rally at the government offices where he carried an anti-corruption banner (I.J. at 4, 6; Tr. at 73, 91). After being arrested, the police not only accused him of organizing the unlawful demonstration but also of attacking the government (I.J. at 4; Tr. at 73-74). The respondent was beaten, interrogated, and detained. He was released only after he agreed to not demonstrate against the government again (I.J. at 4-5; Tr. at 74-77). We find clear error in the Immigration Judge's factual finding that the respondent's arrest and subsequent treatment, was in response to the respondent participating in an unlawful assembly and was not politically motivated. *See Matter of N-M-*, *supra*. Considering the evidence of record as a whole, it supports that the respondent was persecuted by authorities of the Chinese Government for at least one central reason on account of his political opinion. *See Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1336 (10th Cir. 2008) (Threatened exposure of government corruption alone can support a claim of political persecution).

The Immigration Judge found that the respondent was charged with a crime, held in jail for seven days, slapped in the face twice, and kicked once. Considering these factors, the Immigration Judge concluded that the incidents the respondent experienced in China did not rise to the level of past persecution (I.J. at 10). The respondent argues on appeal that he was never charged with a crime and the Immigration Judge mischaracterized what the respondent experienced in China. Respondent's brief at 5. We agree that the evidence of record does not support that the respondent was charged with a crime, and the Immigration Judge erred in considering it as a basis for a finding that the respondent had not experienced past persecution.

In determining whether the respondent suffered past persecution we note that persecution has not been explicitly defined, but it requires the "infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive" and requires "more than just restrictions or threats to life and liberty." *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992). The respondent was beaten by police with a baton at an anti-government demonstration. He was arrested and interrogated. During his interrogation he was slapped in the face and kicked down to the ground. The respondent was held in a small single room for 7 days and fed a single meal per day. He was released from detention only when he agreed to sign a guarantee letter that he would no longer protest against the government and pay a fine of 5,000 Chinese dollars. The respondent was made to report to local law enforcement once per week and required to perform menial tasks (I.J. at 4-5; Tr. at 74-81). In order to determine whether the respondent suffered past persecution, each incident is not considered in isolation, "but instead consider[ed] . . . collectively, because the cumulative effects of multiple incidents may constitute persecution." *Karki v. Holder*, 715 F.3d 792, 805 (10th Cir. 2013). Considering the incidents the respondent experience in China cumulatively, we conclude that the respondent suffered past persecution, giving rise to a rebuttable presumption of a well-founded fear of future persecution

Because we find that the respondent was persecuted on account of a protected ground, a rebuttable presumption arises that the respondent's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. *See* 8 C.F.R. § 1208.16(b)(1); *Nazaraghaie v. INS*, 102 F.3d 460, 462 (10th Cir. 1996). To overcome this regulatory presumption the Department of Homeland Security (DHS) must demonstrate, by a preponderance of the evidence, that either (1) since the time the persecution occurred, conditions in the respondent's country have changed to such an extent that the respondent's life or freedom would no longer be threatened on account of a protected ground upon removal to that country or (2) the respondent could avoid future persecution by relocating to another part of the respondent's country of nationality. *Id.* Accordingly, we will remand the record to the Immigration Judge for a decision as to whether there has been a fundamental change in circumstances such that the respondent's life or freedom would no longer be threatened on account of a protected ground if removed to China, and for the Immigration Judge to address the issue of internal relocation in China. 8 C.F.R. §§ 1208.16(b)(1)(i)(A-B). The respondent and the DHS should be given the opportunity to present updated country condition materials. Finally, if applicable, the Immigration Judge shall address the Convention Against Torture. Accordingly, the following order will be entered.

(b) (6)

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JAN 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Cates, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Administrative closure

The respondent, a native and citizen of El Salvador, has appealed from the decision of the Immigration Judge dated March 6, 2014. In that decision, the Immigration Judge, noting his previous denial on February 27, 2014, of the motion for administrative closure filed jointly by the respondent and the Department of Homeland Security ("DHS"), entered an order of removal based on the respondent's concession of inadmissibility under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i). On appeal the respondent challenges the denial of the joint motion for administrative closure, and so, we will review both decisions in order to resolve the appeal. For the following reasons, the respondent's appeal will be sustained, and the record of proceeding will be remanded for further proceedings.

As reflected in the Immigration Judge's March 6, and February 27, 2014, decisions, the Immigration Judge denied the February 24, 2014, joint motion for administrative closure due to the parties' failure to "adequately or appropriately address the significant, negative discretionary issues present in this case" (I.J. at 2 (Mar. 6, 2014)). The salient negative discretionary factor in this case is the respondent's (b) (6), 2011, arrest for Injury to a Child, Elderly Individual, or Disabled Individual in violation of Texas Penal Code § 22.04, which culminated in a November 9, 2012, Class A misdemeanor conviction for Assault under Texas Penal Code § 22.01 (I.J. at 2 (Mar. 6, 2014); Exh. 2).

We agree with the Immigration Judge that the documentary evidence submitted in support of the joint motion does not adequately address the issue of discretion, in view of the respondent's criminal background. *See Elkins v. Moreno*, 435 U.S. 647, 667-68 (1978) (recognizing that criminal history constitutes an adverse discretionary factor weighing against adjustment of status); *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988) ("The admission into evidence of police reports concerning the circumstances of an alien's arrest is especially appropriate in cases involving discretionary relief from deportation, where all relevant factors regarding an alien's arrest and conviction should be considered."). Although the respondent included some character references in support of the joint motion, those references shed no light on the circumstances of the respondent's arrest and the reasons for the conviction.

However, the respondent appeared at the initial master calendar hearing on March 6, 2014, prepared not only to enter a concession of inadmissibility under the charge, but also to renew the joint motion for administrative closure by offering evidence probative of the facts underlying the arrest and conviction (Tr. at 2-9). The Immigration Judge refused to receive any further evidence in support of the joint motion for administrative closure, and after the respondent declined to apply for any other relief from removal, the Immigration Judge ordered him removed to El Salvador. The Immigration Judge was evidently of the view that, since he had already denied the joint motion on February 27, 2014, the parties were foreclosed from presenting additional evidence in support of the joint motion for administrative closure (Tr. at 3).

Under the circumstances of the case, the Immigration Judge should have received and considered the evidence that the respondent was prepared to present in support of the joint motion for administrative closure. In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), we laid out an array of factors that an Immigration Judge may consider in evaluating a request for administrative closure. The first two factors we identified are the underlying reason for which administrative closure is sought and the basis for any opposition to administrative closure. *Id.* at 696. Here, the request for administrative closure, far from being opposed, has been made jointly, and the relief that the respondent seeks, a provisional unlawful presence waiver under 8 C.F.R. § 212.7(e), may enable the respondent, who has a United States citizen spouse and two United States citizen children together with his spouse, to receive an immigrant visa abroad at a United States consulate.

A conviction under Texas Penal Code § 22.01(a)(1) can be, but is not necessarily, a conviction for a crime involving moral turpitude (I.J. at 2 (Mar. 6, 2014)). *See Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825 (5th Cir. 2012) ("The categorical approach, applied to this case, does not resolve the matter because a subsection of the Texas assault statute, § 22.01(a)(3), proscribes physical contact that is merely 'offensive or provocative,' conduct that the BIA has held does not qualify as morally turpitudinous."); *see also Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011). Thus, the conviction does not necessarily disqualify the respondent for the provisional unlawful presence waiver under 8 C.F.R. § 212.7(e)(4)(i). Further, the DHS' decision to join the motion constitutes a clear indication that it regards the respondent as eligible for the provisional waiver. *Cf. Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) ("Furthermore, . . . the primary purpose of the application form is to establish prima facie eligibility for such relief. If the opposing party joins the motion notwithstanding the lack of such a showing, the Board can reasonably conclude that this issue is not in controversy.").

Similar to an application for admission or discretionary relief from removal, a request for administrative closure in order to address the respondent's inadmissibility for lawful permanent residence, especially one jointly made, is not limited to a single request and may be regarded as on-going, as well as renewed at subsequent hearings. *Cf. See Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994); *Matter of Kazemi*, 19 I&N Dec. 49, 51 (BIA 1984); *see also Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005). In short, the respondent was prepared to present evidence relevant to his discretionary fitness, the DHS has not opposed the presentation of such evidence, and the proceedings were only at the stage of the initial master

calendar hearing (Tr. at 1).[1] Under these circumstances, consideration of the joint request for administrative closure was proper. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, and the record of proceeding is remanded for further proceedings.

FOR THE BOARD

[1] The Assistant Chief Counsel for the DHS initially indicated her opposition to administrative closure at the March 6, 2014, hearing, until it was pointed out to her that the Chief Counsel had entered into the joint motion on February 13, 2014 (Tr. at 8-9; Joint Motion at 4 (Feb. 24, 2014)). The DHS has not filed any opposing statement in response to the instant appeal.

File: (b) (6) – Dallas, TX

Date: OCT - 7 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Reopening

In a decision dated March 6, 2014, an Immigration Judge found the respondent removable as charged and denied her application for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). The respondent has appealed from the Immigration Judge's decision. The respondent's appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this order.

The respondent is a native and citizen of Iraq. On appeal, she claims that she has been the victim of ineffective assistance of counsel. In particular, she contends that the attorneys who represented her in her criminal proceedings did not advise her of the immigration consequences of her plea. Further, she argues that her immigration attorney did not make any effort in her case. She maintains that he was very careless and did not advise her to pursue reopening of her criminal proceedings. She also claims that he did not call attention to conditions in Iraq or the letter from a counselor stating that the respondent's daughter had admitted during therapy that the respondent had not abused her.

The respondent's claims on appeal suggest that she is seeking reopening on the basis of a claim of ineffective assistance of counsel. The respondent, however, must raise her claims regarding her criminal attorney before the state court in which she was convicted. We cannot look behind a record of conviction to reassess the guilt or innocence of an alien or to question the propriety of her criminal proceedings.[1] *See, e.g., Matter of Mendez-Morales*, 21 I&N Dec. 296,

[1] We do note, however, that the court records from the respondent's criminal case indicate that she was advised that "[i]f you are not a citizen of the United States of America, a plea of guilty or nolo contendere may result in deportation, exclusion from admission to this country, or the denial of naturalization under federal law." *See* Exh 5 (Court's Admonitions to Defendant, #4). Further, the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), was decided after her criminal proceedings and does not apply retroactively. *See Chaidez v. United States*, 133 S.Ct. 1103 (2013).

304 (BIA 1996) (noting that neither the Immigration Judge nor the Board may go beyond the judicial record to determine the guilt or innocence of an alien, the alien must be considered guilty of the crime for which he or she was convicted).

We can reopen proceedings based on a showing of ineffective assistance of counsel before the Immigration Judge, but an alien must meet certain procedural requirements before we will take this step. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (indicating that an alien must submit an affidavit setting forth her agreement with former counsel, must notify former counsel of the allegations against him or her and must file a complaint with the appropriate disciplinary authorities or explain why she has not filed a complaint). The alien also must establish that he or she has been prejudiced by the alleged errors of the former attorney. *Id.*

The respondent has not met the procedural requirements set forth in *Matter of Lozada, supra*. In addition, we cannot conclude that her former attorney erred by not calling the Immigration Judge's attention to the counselor's letter that suggests the respondent did not commit the crime for which she was convicted. As we noted above, neither we nor the Immigration Judge may look behind a record of conviction to reassess the guilt or innocence of an alien. *See Matter of Mendez-Morales, supra*. The respondent must present the counselor's letter and her claims of innocence to the criminal court in which she was convicted.

Despite these facts, however, we cannot uphold the Immigration Judge's decision without further proceedings addressing the issues of hardship and discretion as they relate to the respondent's eligibility for a waiver under section 212(h)(1)(B) of the Act. The Immigration Judge found the respondent's testimony regarding the events that led up to and resulted in her criminal conviction not credible (I.J. at 11-13). The Immigration Judge did not necessarily err in basing this adverse credibility finding on the discrepancies between the statements the respondent signed during her criminal proceeding and the testimony she gave before the Immigration Judge. *See* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C) (indicating that the consistency between an applicant's oral and written statements may be a factor in a credibility determination). Nevertheless, the Immigration Judge did not provide sufficient justification for his subsequent conclusion that the respondent had provided false testimony during her hearing. An adverse credibility finding is not equivalent to a finding that an alien has given false testimony, and the record in the present case is not sufficient to establish that the respondent has given false testimony.

Further, the adverse credibility finding, which related solely to the respondent's crime, does not provide a sufficient basis for finding the respondent ineligible for a section 212(h) waiver without further explanation. An adverse credibility finding might be one factor considered in determining whether an alien is entitled to the waiver in the exercise of discretion, but the Immigration Judge and this Board must weigh all the positive and negative factors relevant to a particular case before reaching a determination on the issue of discretion. *See Matter of Mendez-Morales, supra*, at 299-302. The Immigration Judge does not appear to have undertaken this type of analysis in the respondent's case. Moreover, because the Immigration Judge's decision does not contain sufficient factual findings to allow us to make our own, de novo, ruling on the issue, we must remand for further proceedings and the entry of a new decision. *See* 8 C.F.R. § 1003.1(d)(3) (discussing our scope of review and lack of ability to make factual findings).

In addition, the Immigration Judge does not appear to have analyzed the issue of extreme hardship from the perspective of the respondent's United States citizen children, and the respondent's former attorney did not present critical information regarding hardship, including evidence of current conditions in Iraq. *See* section 212(h)(1)(B) of the Act (stating that, to qualify for a waiver, an alien must show that the alien's denial of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse, parent son or daughter of the alien).

Given the above deficiencies in the record, we find that remand for a new hearing regarding the respondent's eligibility for a section 212(h) waiver, complete with an opportunity for both parties to supplement the record, and for the entry of a new decision is required. Accordingly, we sustain the respondent's appeal and we remand the record to the Immigration Judge for further proceedings consistent with this order.

ORDER: The respondent's appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this order.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK[1] Date: DEC 16 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eric Montierth, Esquire

The respondent, a native and citizen of Mexico, appeals from the March 11, 2014, decision of the Immigration Judge, ordering the respondent removed to Mexico. The record will be remanded.

We review the findings of fact, including any determination of credibility, made by the Immigration Judge under the "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). To avoid any issues regarding jurisdiction over the present appeal, we will take this matter on certification. 8 C.F.R. § 1003.1(c).

Based on the totality of the circumstances presented, and upon our review of the record, we find remand warranted to allow the respondent an opportunity to pursue any relief from removal for which he may be eligible, including withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture (CAT), 8 C.F.R. § 1208.16(c). We note that, through counsel, the respondent indicated at the last hearing that he feared returning to Mexico and wished to pursue withholding of removal (Tr. at 2). The record does not establish that the respondent was questioned further regarding this fear, or provided with an opportunity to elaborate on this fear. Nor was the respondent advised regarding his ability to apply for withholding of removal. *See Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (holding that, if an alien expresses a fear of persecution or harm in a country to which he might be removed, the regulations require the Immigration Judge to advise the alien of his ability to apply for asylum or withholding of removal and make the appropriate applications forms available); *see also Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) (holding that in the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief).

[1] Proceedings before the Immigration Judge in this matter were completed at Immigration Court in Oklahoma City, Oklahoma. The Immigration Judge conducted the hearing there remotely from Dallas, Texas, via video teleconference pursuant to section 240(b)(2)(A)(iii) of the Act.

We acknowledge that the respondent was represented by counsel below, and that counsel accepted an order of removal on the respondent's behalf. However, it is evident from the record that counsel had limited opportunity to establish the basis for the respondent's fear of return to Mexico, and the Immigration Judge did not inquire of the respondent on this matter. While we conclude that remanded proceedings are warranted, we express no opinion regarding the ultimate outcome of these proceedings at the present time.

Accordingly, the following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: OCT 22 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew M. Hanley, Esquire

APPLICATION: Waiver of inadmissibility

The respondent, a native and citizen of Nigeria, appeals the Immigration Judge's March 20, 2014, decision denying his application for a waiver of inadmissibility. *See* section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). We have not received a response from the Department of Homeland Security ("DHS"). The decision will be vacated and the record remanded.

This case was previously before us on appeal of the Immigration Judge's February 14, 2012, decision denying the waiver based on an adverse credibility finding and pretermitting the application without allowing for testimony by the respondent's witnesses. By order dated November 26, 2013, we upheld the Immigration Judge's adverse credibility finding regarding the respondent's testimony as to his criminal history. We remanded the record for a hearing on his application for relief to allow the respondent to present his claim that his qualifying relatives would suffer extreme hardship in the event of his removal, in particular, to permit the respondent's common-law wife to testify regarding their three young United States citizen children, one of whom has a documented serious respiratory condition including sleep apnea.

When the case was recalendared, the respondent had been detained by the DHS and the respondent was pro se at the time the second merits hearing was scheduled. Counsel filed a new notice of appearance and filed a late motion for a continuance because the respondent's common-law wife was in jail and the only other witness, his minor son, could not arrange transportation to the hearing in her absence. In the motion, counsel noted that the respondent was unable to prepare additional corroborating documentation because of his detention and his common-law wife's unavailability. *See* Respondent's Motion for Continuance, filed March 14, 2014. On the day of the merits hearing, counsel renewed his request, but noted that the respondent's common-law wife was there because she had just been released (Tr. at 23-28).

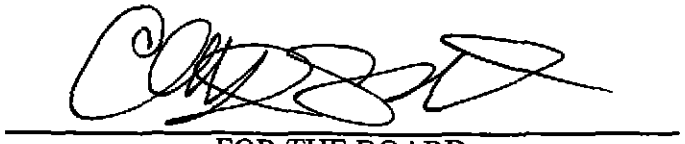
The Immigration Judge denied the continuance. The Immigration Judge interpreted the Board's affirmance of the adverse credibility determination to hold that "the Board determined that Mr. (b) (6) 's testimony is afforded no weight ....) (I.J. at 2, 5; Tr. at 22). The hearing proceeded and the respondent's common-law wife was permitted to testify. She testified that since the respondent's detention the family had lost their apartment and had been forced into a shelter for lack of funds to support the family (I.J. at 3; Tr. at 39-40). The respondent's common-law wife confirmed that the respondent had always been the primary caregiver and that he had been declared the custodial parent by court order on more than one occasion because of

her mental instability and alcohol problems (I.J. at 3-4; Tr. at 46). She testified that the children were emotionally upset, manifested by their waking in the night crying for their Daddy and bed wetting (Tr. at 42). The respondent's common-law wife testified her girls are presently in her mother's custody but that her mother is unwilling to continue caring for the children and that no one would help them (I.J. at 3-4; Tr. at 39, 48). The Immigration Judge again denied the waiver application finding, inter alia, that there was no updated documentation of the middle child's medical condition and drawing an inference that the child's medical problems "can't be that severe" and that she was only experiencing illnesses often attributed to children of a very young age (I.J. at 6; Tr. at 28). The Immigration Judge found that testimony by the mother of the respondent's young children simply amounted to the type of hardship to be expected any time a parent is separated (Tr. at 65).

We find that the tone of the Immigration Judge's decision, as well as comments made in the proceedings, made it unclear that the Immigration Judge was able to approach the 212(h) application in an unbiased manner (I.J. at 7-8; Tr. at 59-66). In the totality of the circumstances presented here, we will vacate the March 20, 2014, decision and remand the record for a new hearing before a different Immigration Judge. A new decision will make such findings of fact and conclusions of law as are necessary to adjudicate the case. The respondent shall be given the opportunity to present documentary evidence and testimony on the respondent's application for relief and consistent with applicable law. Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's March 20, 2014, decision is vacated.

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



FOR THE BOARD

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

Files: (b) (6) – Oklahoma City, OK
(b) (6)

Date: NOV - 6 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Paola Marie Alvarez de Bennett, Esquire

The transcript of the proceedings in this case ends with the Immigration Judge indicating that he would come back at the end of the calendar and enter an oral decision (Tr. at 61). However, for unknown reasons, there is no further transcript thereafter and the record does not include an oral decision by the Immigration Judge. Accordingly, the record must be returned to the Immigration Judge for preparation of a decision. *See Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). Upon preparation of the decision, the Immigration Judge shall issue an order administratively returning the record to the Board. The Immigration Judge shall serve the administrative return order on the respondent and the Department of Homeland Security (DHS). The Board will thereafter give the parties an opportunity to submit briefs in accordance with the regulations.

ORDER: The record is returned to the Immigration Court for further action as required above.

FOR THE BOARD

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

Files: (b) (6) – Oklahoma City, OK
(b) (6)

Date: NOV - 6 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Paola Marie Alvarez de Bennett, Esquire

The transcript of the proceedings in this case ends with the Immigration Judge indicating that he would come back at the end of the calendar and enter an oral decision (Tr. at 61). However, for unknown reasons, there is no further transcript thereafter and the record does not include an oral decision by the Immigration Judge. Accordingly, the record must be returned to the Immigration Judge for preparation of a decision. *See Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). Upon preparation of the decision, the Immigration Judge shall issue an order administratively returning the record to the Board. The Immigration Judge shall serve the administrative return order on the respondent and the Department of Homeland Security (DHS). The Board will thereafter give the parties an opportunity to submit briefs in accordance with the regulations.

ORDER: The record is returned to the Immigration Court for further action as required above.

FOR THE BOARD

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

Files: (b) (6) – Oklahoma City, OK
(b) (6)

Date: NOV - 6 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Paola Marie Alvarez de Bennett, Esquire

The transcript of the proceedings in this case ends with the Immigration Judge indicating that he would come back at the end of the calendar and enter an oral decision (Tr. at 61). However, for unknown reasons, there is no further transcript thereafter and the record does not include an oral decision by the Immigration Judge. Accordingly, the record must be returned to the Immigration Judge for preparation of a decision. *See Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). Upon preparation of the decision, the Immigration Judge shall issue an order administratively returning the record to the Board. The Immigration Judge shall serve the administrative return order on the respondent and the Department of Homeland Security (DHS). The Board will thereafter give the parties an opportunity to submit briefs in accordance with the regulations.

ORDER: The record is returned to the Immigration Court for further action as required above.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: OCT 03 2014

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arthur Campbell Cooke, Esquire

The respondent, a native and citizen of Pakistan, has appealed from the Immigration Judge's order of removal, dated May 20, 2014. The Immigration Judge granted a period of voluntary departure under section 240B(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a), and noted that the respondent had waived the right to appeal to the Board. The record will be remanded to the Immigration Court for further proceedings.

We review an Immigration Judge's findings of fact under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision, de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's first removal hearing took place on September 10, 2013 (Tr. at 1). She was granted a continuance until May 20, 2014, to seek counsel (Tr. at 15). At the May 20, 2014, hearing, the respondent told the Immigration Judge that she had hired an attorney, but he had "backed out" on her that day (Tr. at 24). The respondent said that she had not been able to talk to the attorney "too much", and needed additional time to prepare (Tr. at 25). The Immigration Judge asked the respondent if she was ready to proceed, and she said that she had medical conditions, including a hernia, and was pregnant (Tr. at 26). The Immigration Judge said that he would not further continue the case, and proceeded with the removal hearing (Tr. at 26).

The respondent acknowledged that she was subject to removal, based on failing to maintain the status under which she was admitted (Tr. at 28). Among other questions, the Immigration Judge asked the respondent about her purpose in coming to the United States (Tr. at 30). The respondent replied that she came to the United States to get a good education and a good life. *Id.* The respondent was not asked whether she feared returning to Pakistan. The Immigration Judge said that the respondent did not appear eligible for relief, including asylum and withholding of removal (Tr. at 31, 33). The respondent waived the right to appeal the Immigration Judge's decision, and the Immigration Judge granted 120 days' voluntary departure under section 240B(a) of the Act (Tr. at 37).

On appeal, the respondent argues that the Immigration Judge erred by not further continuing the proceedings for her to secure counsel. The respondent further says that she fears persecution if returned to Pakistan, based on religious beliefs. She says that she was confused by the proceedings, did not knowingly waive the right to appeal, and wishes to seek withholding of removal under section 241(b)(3) of the Act.

Respondents in immigration proceedings have the statutory and regulatory "privilege of being represented," at no expense to the government, by counsel of their choosing. *See* sections 240(b)(4)(A), 292 of the Act. *See also* 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.10(a), 1240.11(c)(1)(iii); *Matter of C-B-*, 25 I&N Dec. 888, 889-90 (BIA 2012). Where the statutory and and regulatory privilege of legal representation is not expressly waived, as is the case here, to meaningfully effectuate the privilege, the Immigration Judge must grant a reasonable time and provide a fair opportunity for a respondent to seek, speak with, and retain counsel.[1]

The amount of time that is reasonable and appropriate will depend on the specifics of the individual case. *See Matter of C-B-, supra.* Given the respondent's assertion that she had contracted with an attorney to represent her in removal proceedings who had "kind of backed out on me today" (Tr. at 24), the Immigration Judge should have, before denying the respondent's request for a further continuance, clarified this circumstance. *See* 8 C.F.R. §§ 1003.298, 1240.6. *Cf. Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

Had she appeared with counsel, the respondent may have told the Immigration Judge that she wished to seek withholding of removal, and may not have waived the right to appeal. Consequently, the appeal will be sustained, and the record will be remanded to the Immigration Judge for a new hearing. On remand, the respondent should be allowed to apply for withholding of removal, and any other relief for which she is statutorily eligible.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

[1] In order for a waiver of counsel to be valid, an Immigration Judge must generally (1) inquire specifically as to whether a respondent wishes to continue without a lawyer and (2) receive a knowing and voluntary affirmative response. *See Matter of C-B-, supra*, at 890 n. 1.

File: (b) (6) - Oklahoma City, OK

Date: DEC 3 1 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven F. Langer, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Guatemala, appeals an Immigration Judge's decision dated April 10, 2014, which denied her applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act (the"Act"), 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A), and for protection under the Convention Against Torture ("CAT") pursuant to 8 C.F.R. § 1208.16(c)(2). The Department of Homeland Security ("DHS") has not filed a brief in opposition to the appeal. The record will be remanded for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Since the asylum application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent claims that she was persecuted by members of her family based on her membership in the particular social groups of "young Guatemalan women in domestic relationships who are unable to leave" and "young Guatemalan women in domestic relationships without effective familial protection" (I.J. at 7-8; Tr. at 19-21). Although the Immigration Judge determined that the respondent's particular social groups did not constitute cognizable particular social groups, and that she had not demonstrated a nexus to her claimed particular social groups, we subsequently issued *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (discussing domestic violence in particular social group determinations), which may have an impact on the respondent's case.

If the respondent meets her burden of proof for showing past persecution, the Immigration Judge should determine whether the DHS met its burden to show that the respondent could avoid persecution by relocating and that it would be reasonable to expect her to do so. *See* 8 C.F.R. §§ 1208.13(b)(1)(i)(B), (ii). Since the respondent is claiming harm at the hands of private actors, the Immigration Judge should also consider whether the government will be unable or unwilling to control the private actors in question. *See Matter of E-A-G-*, 24 I&N Dec. 591, 598 (BIA 2008); *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005). On remand, the parties should have the opportunity to update the record, and to make any additional legal and factual

arguments regarding particular social group and nexus as they may apply to this case. The Board expresses no opinion regarding the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with this decision.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date:

In re: (b) (6) NOV 10 2015

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven F. Langer, Esquire

APPLICATION: Continuance

The respondent, a native and citizen of Guatemala, appeals the decision of the Immigration Judge dated June 10, 2014. The Department of Homeland Security ("DHS") has not filed a response to the appeal. The record will be remanded.

While on appeal, the respondent has filed documents showing that a Form I-360 was filed with the United States Citizenship and Immigration Services ("USCIS"). The USCIS case status website indicates that the respondent's visa petition for classification as a special immigrant juvenile (Form I-360) was approved on October 23, 2015. *See* 8 C.F.R. §§ 204.11(a), (d)(2)(i). As the facts underlying the respondent's eligibility for relief from removal have changed during the pendency of the respondent's appeal, we will remand the record for the Immigration Court to consider in the first instance the new evidence filed on appeal and any other applications for relief, and any response from the DHS.

Accordingly, the following orders will be issued:

ORDER: The Immigration Judge's June 10, 2014, decision and removal order are vacated.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JUL 28 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lorena N. Gutierrez, Esquire

ON BEHALF OF DHS: D'Anna H. Freeman
Assistant Chief Counsel

APPLICATION: Adjustment of status; continuance; remand

The respondent has appealed from the Immigration Judge's July 14, 2014, decision denying his application for adjustment of status as abandoned and ordering his removal. On appeal, the respondent has submitted new evidence, which we construe as a motion to remand. *See generally Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). We review findings of fact by the Immigration Judge for clear error, while all other issues, including whether the parties have met the relevant burden of proof, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). The record will be remanded for further proceedings.

We will remand the record for adjudication of the respondent's application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), in conjunction with his request for a waiver of inadmissibility. On appeal, the respondent has submitted a completed Form I-864, Affidavit of Support, as well as other documents in support of his application. We will remand the record for consideration of these documents by the Immigration Judge in the first instance; we express no opinion as to the outcome of proceedings on remand. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (noting that the Board may remand the record so that an Immigration Judge may weigh evidence in the first instance). As we grant the respondent's motion to remand, we do not otherwise reach the merits of the respondent's appeal.

ORDER: The respondent's motion to remand is granted.

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

FOR THE BOARD

File: (b) (6) - Dallas, TX

Date:

DEC 2 1 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Neraesha Joy Green, Esquire

ON BEHALF OF DHS: D'Anna H. Freeman
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; continuance

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's July 16, 2014, decision finding him inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), ineligible for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. 8 U.S.C. § 1229b(b), and denying his request for a continuance. The record will be remanded for further proceedings consistent with this decision.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application was filed after May 11, 2005, and therefore is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent argues on appeal that the Immigration Judge erred in denying his request for a continuance at the final removal hearing. At that hearing, the Department of Homeland Security (DHS) submitted conviction records showing the respondent was convicted of assault in 1999. The respondent argues that he sought a continuance to review the conviction record to determine whether he was convicted of a crime involving moral turpitude (CIMT) (Tr. at 43-44). *See* Respondent's Brief 3-5. The respondent also argues that the Immigration Judge did not make sufficient findings of fact and conclusions of law in determining that his conviction constituted a CIMT (I.J. at 3). *See* Respondent's Brief 5-7.

Upon review of the record, we find remand is warranted as there is insufficient fact-finding to allow us to review the Immigration Judge's determination that the respondent's assault conviction is a CIMT. The record reveals that the respondent's order of deferred adjudication identifies the offense for which he was convicted only as "Assault-Family Violence." However, neither the complaint, nor the information, nor the order of deferred adjudication identifies the section of law under which the respondent was convicted (Exh. 2). In determining whether a crime involves moral turpitude, the first step in the analysis is to look to the statute of conviction to determine whether the crime categorically involves moral turpitude. *See Nino v. Holder*, 690 F.3d 691, 694-95 (5th Cir. 2012). As the record does not establish under which statute the respondent was convicted, we find remand necessary for further fact finding.

Additionally, we note that the Immigration Judge appears to have relied on the Information included in the respondent's record of conviction in making his determination. Given recent Supreme Court, Fifth Circuit and Attorney General decisions raising questions about the application of the categorical analysis versus the modified categorical analysis, we find a more thorough articulation of the Immigration Judge's determination that the respondent is barred from relief is necessary on remand. *See generally Descamps v. Holder*, 133 S. Ct. 2276 (2013); *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Matter of Chairez and Sama*, 26 I&N Dec. 686 (A.G. 2015).

Under the circumstances, we find it appropriate to remand for further fact-finding and a more clear statement of the basis of the Immigration Judge's decision regarding the respondent's removability and eligibility for relief from removal. Given our decision, we need not address the remaining appellate arguments. The following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Dallas, TX Date: FEB - 3 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lance E. Caughfield, Esquire

ON BEHALF OF DHS: D'Anna H. Freeman
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's decision dated July 23, 2014, denying her applications for asylum pursuant to section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c)-.18. The Department of Homeland Security opposes the appeal. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent filed her asylum application after May 11, 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent seeks asylum based on her membership in a particular social group comprised of "Salvadoran women who are unable to leave their domestic relationship" and her membership in a group comprised of "Salvadoran women who are treated like property within a domestic relationship" (I.J. at 2). The Immigration Judge found the respondent testified credibly and concluded that she suffered harm rising to the level of persecution, but denied her application on the grounds that she did not demonstrate a nexus between the persecution she suffered and one of the grounds enumerated in section 208(b)(1)(B)(i) of the Act. Specifically, the Immigration Judge found that the respondent's proposed particular social groups were not cognizable under the Act.

Subsequent to the Immigration Judge's decision, we issued *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), in which we found that, depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group under the Act. Because the Immigration Judge did not have the benefit of our decision in *Matter of A-R-C-G-*, *supra*, we will remand the record to the Immigration Judge to further consider whether the respondent's proposed social groups meet the requirements outlined in that decision. The Immigration Judge should also consider

any other relevant issues, including the possibility of relocation within El Salvador and whether the government is unwilling or unable to protect the respondent. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 252 (BIA 2014); *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012) (discussing the burden of proof with respect to internal relocation); *Matter of C-A-L-*, 21 I&N Dec. 754, 757 (BIA 1997).

On remand, the parties should be given the opportunity to update the record and present additional legal arguments. In remanding, we express no opinion on the ultimate outcome of these proceedings. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). The following order will be entered.

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

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: JAN 13 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michelle Edstrom Long, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The respondent appeals the Immigration Judge's April 15, 2014, decision denying his applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and for voluntary departure.[1] The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

In his decision, the Immigration Judge found the respondent ineligible for cancellation of removal under section 240A(b) of the Act due to his (b) (6), 2007, conviction for domestic abuse, assault and battery, in violation of 21 O.S. § 664 (I.J. at 3-4; Exh. 3). In particular, the Immigration Judge found that, because the maximum sentence for such a conviction is a year in jail, the respondent is ineligible for cancellation of removal under the Board's decision in *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) (I.J. at 3-4).

However, as argued by the respondent on appeal, the Immigration Judge did not engage in any legal and/or factual analysis in determining that his conviction for domestic abuse, assault and battery under the Oklahoma statute is in fact a crime involving moral turpitude (I.J. at 3-4). *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Descamps v. United States*, 133 S.Ct. 2276 (2013). Under these circumstances, we find it necessary to remand the record to the Immigration Judge in order to properly determine whether the respondent's offense renders him ineligible for cancellation of removal under section 240A(b) of the Act and to consider any other relief for which the respondent may be eligible. *See id.*

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

[1] We accept the respondent's late-filed appeal upon certification. *See* 8 C.F.R. § 1003.1 (2014).

(b) (6)

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

FOR THE BOARD

File: (b) (6) – Dallas, TX Date: MAY 29 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gerardo Villegas, Esquire

ON BEHALF OF DHS: D'Anna H. Freeman
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

The respondent, a (b)-year-old native and citizen of Guatemala, has appealed an Immigration Judge's decision of December 9, 2014, denying her applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A). The Department of Homeland Security ("DHS") opposes the appeal. The record will be remanded.

There is evidence in the record indicating that the respondent was, at one point, determined to be an "unaccompanied alien child" ("UAC") (printout of screenshot from www.uacportal.org, submitted August 25, 2014). As such, we find that there is a threshold issue to be addressed regarding initial jurisdiction over the respondent's application for asylum in light of the provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. No. 110-457, 122 Stat. 5044, and the procedures set forth by the United States Citizenship and Immigration Services ("USCIS") relating to the adjudication of asylum applications filed by UACs.

Section 235(d)(7)(B) of TVPRA, codified at section 208(b)(3)(C) of the Act, provides that "[a]n asylum officer ... shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child ...." The term "unaccompanied alien child" is defined in the Act by reference to "section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. § 279(g))," which in turn defines the term as "a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody."

The USCIS subsequently issued a memorandum regarding updated procedures for determining initial jurisdiction over asylum applications filed by UACs. Memorandum from Ted Kim, USCIS Acting Chief, Asylum Division (May 28, 2013), *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, HQRAIO 120/12a ("USCIS memo"). This memorandum states that, effective June 10, 2013, in cases in which the Customs and Border Protection ("CBP") or Immigration and Customs Enforcement ("ICE") has already made a determination that an applicant is a UAC,

"and that status determination was still in place on the date the asylum application was filed, Asylum Offices will adopt that determination without another factual inquiry." *Id.* at 1-2. The memo goes on to state that "[u]nless there was an *affirmative act* by [Health and Human Services], ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS determination that the applicant was a UAC" and "will take jurisdiction over the case." *Id.* at 2 (emphasis supplied). The memo further explains that in such cases, where there is a prior UAC determination which is still in place at the time the asylum application is filed, USCIS will take initial jurisdiction over the case "even if there appears to be evidence that the applicant may have turned 18 years of age or may have reunited with a parent or legal guardian" since the UAC determination was made. *Id.*

Neither Immigration Judges nor this Board are bound by the USCIS memo cited above. *See, e.g., Matter of C. Valdez*, 25 I&N Dec. 824, 826 n.1 (BIA 2012) (noting that a USCIS policy memorandum was persuasive, but not binding). However, as USCIS is the agency vested with initial jurisdiction over UAC asylum applications, we would defer to USCIS's determination of whether it retains jurisdiction over the initial adjudication of a minor's asylum application.

On the record before us, we conclude that a remand is necessary for a determination whether this is a case in which the USCIS would take initial jurisdiction over this respondent's application for asylum. In this regard, further fact-finding is needed as to 1) whether the respondent was determined to be a UAC prior to the initial filing of her asylum application; 2) if so, whether that status has been terminated by an "affirmative act" within the contemplation of the USCIS memo; and 3) whether the announced position of the USCIS as set forth in the USCIS memo has been withdrawn or superseded.

If this respondent comes within the scope of the USCIS memo, the respondent shall be provided the opportunity to pursue an application for asylum before the USCIS. If, after additional fact-finding, it is determined that the respondent does not fall within the provisions of this policy memo, the Immigration Judge may certify the case back to the Board. 8 C.F.R. § 1003.7.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion.

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JUN 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bilal A. Khaleeq, Esquire

ON BEHALF OF DHS: D'Anna H. Freeman
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture ("CAT")

The respondent, a (b)-year-old native and citizen of Guatemala, appeals from the Immigration Judge's decision dated December 9, 2014, denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208(b) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b), 1231(b)(3); 8 C.F.R. § 1208.16(c). The Department of Homeland Security ("DHS") has filed a brief on appeal. The record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of law and issues of discretion, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Before the Immigration Judge, the respondent argued that United States Citizenship and Immigration Services ("USCIS"), rather than the Immigration Judge, has initial jurisdiction over his asylum application (Tr. at 20), pursuant to the provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. No. 110-457, 122 Stat. 5044.

Section 235(d)(7)(B) of TVPRA, codified at section 208(b)(3)(C) of the Act, provides that "[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . ." The term "unaccompanied alien child" (UAC) is defined in the Act by reference to "section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. § 279(g))," which in turn defines the term as "a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody."

The USCIS subsequently issued a memorandum regarding updated procedures for determining initial jurisdiction over asylum applications filed by UACs. Memorandum from Ted Kim, USCIS Acting Chief, Asylum Division (May 28, 2013), *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien*

Children, HQRAIO 120/12a ("USCIS memo"). This memorandum states that, effective June 10, 2013, in cases in which the Customs and Border Protection ("CBP") or Immigration and Customs Enforcement ("ICE") has already made a determination that an applicant is a UAC, "and that status determination was still in place on the date the asylum application was filed, Asylum Offices will adopt that determination without another factual inquiry." *Id.* at 1-2. The memo goes on to state that "[u]nless there was an *affirmative act* by [Health and Human Services], ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS determination that the applicant was a UAC" and "will take jurisdiction over the case." *Id.* at 2 (emphasis supplied). The memo further explains that in such cases, where there is a prior UAC determination which is still in place at the time the asylum application is filed, USCIS will take initial jurisdiction over the case "even if there appears to be evidence that the applicant may have turned 18 years of age or may have reunited with a parent or legal guardian" since the UAC determination was made. *Id.*

In the instant case, the Immigration Judge concluded that the respondent was no longer a UAC because he had been released into his mother's custody prior to the filing of his application for asylum (Tr. at 20-21). Accordingly, the Immigration Judge assumed jurisdiction over and adjudicated the respondent's application for asylum.

However, to the extent the Immigration Judge may have concluded that HHS's release of the respondent from custody constituted a "termination" of his UAC status, we note that while the USCIS memo specifically references the HHS's Office of Refugee Resettlement ("ORR") Verification of Release Form, it solely does so as evidence that a UAC determination has been made. And, this memo states that the reunification of a child with a parent is not in itself determinative that UAC status is no longer in place. Further, DHS did not argue before the Immigration Judge, nor before the Board, that there has been an "affirmative act" by HHS, ICE, or CBP to terminate the determination that the respondent was a UAC. Nor has the DHS explained what constitutes such an act within the contemplation of the USCIS memo or argued that the memo no longer represents the position of the Government. [1]

Neither Immigration Judges nor this Board are bound by the USCIS memo cited above. *See, e.g., Matter of C. Valdez*, 25 I&N Dec. 824, 826 n.1 (BIA 2012) (noting that a USCIS policy memorandum was persuasive, but not binding). However, as USCIS is the agency vested with initial jurisdiction over UAC asylum applications, we would defer to USCIS's determination of whether it retains jurisdiction over the initial adjudication of the respondent's application.

On the record before us, we conclude that a remand is necessary for a determination whether this is a case in which the USCIS would take initial jurisdiction over this respondent's

[1] Although the Immigration Judge also found that the TVPRA was not applicable to the respondent because he is not an arriving alien (Tr. at 20), section 235(d)(7)(B) of TVPRA expressly states that "[a]n asylum officer ... shall have initial jurisdiction over *any* asylum application filed by an unaccompanied alien child ...." (emphasis supplied), and it makes no distinction regarding whether or not the child is an arriving alien.

application for asylum. In this regard, further fact-finding is needed as to 1) whether the respondent was determined to be a UAC prior to the initial filing of his asylum application; 2) if so, whether that status has been terminated by an "affirmative act" within the contemplation of the USCIS memo; and 3) whether the announced position of the USCIS as set forth in the USCIS memo has been withdrawn or superseded.

If this respondent comes within the scope of the USCIS memo, and that memo reflects current USCIS policy, the respondent shall be provided the opportunity to pursue an application for asylum before the USCIS. If after additional fact-finding, it is determined that the respondent does not fall within the provisions of this policy memo or an updated policy, the Immigration Judge may certify the case back to the Board. 8 C.F.R. § 1003.7.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion.

FOR THE BOARD

File: (b) (6) – Dallas, TX

Date: JUN 19 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Juan David Rosales, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Continuance

The respondent, an (b) year-old native and citizen of El Salvador, appeals from the Immigration Judge's decision dated December 18, 2014, denying his request for a continuance to obtain counsel. The record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of law and issues of discretion, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On November 6, 2014, at the respondent's initial group master calendar hearing, the Immigration Judge granted the respondent a brief continuance to attempt to retain counsel, stating that there would be no additional continuances (I.J. at 1-2; Tr. at 5, 16). At his next hearing on December 18, 2014, the respondent appeared with his mother, who indicated that she was attempting to retain an attorney, and again requested a continuance to seek counsel (I.J. at 2; Tr. at 45, 52, 54). She also indicated that the whereabouts of the respondent's father were unknown (Tr. at 49). The Department of Homeland Security was not asked its position on the continuance, and the Immigration Judge denied the respondent any further continuance, ordering him removed to El Salvador.

On appeal, the respondent is now represented by counsel, and states that he has filed a petition in state court that could serve as the basis for a petition with U.S. Citizenship and Immigration Services for special immigrant juvenile ("SIJ") status. *See* section 101(a)(27)(J) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J). Given the totality of the circumstances presented in this case, including the asserted filing of the petition in state court, and the mother's apparent concerted attempts, despite just having given birth to a new baby, to find counsel, we will remand the record for further proceedings. On remand, the respondent will provide the Immigration Judge with updated information regarding the status of his state court petition for the purposes of seeking SIJ status. We note that, absent evidence of an alien's ineligibility for SIJ status, an Immigration Judge should, as a general practice, continue or

administratively close proceedings to await adjudication of a pending state proceeding that could serve as a predicate order for SIJ status.[1]

Accordingly, the record will be remanded as set forth below.

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

FOR THE BOARD

[1] We separately note that guidance provided to Immigration Judges by the Chief Immigration Judge states that if an unaccompanied child is seeking SIJ status, "the case must be administratively closed or reset for that process to occur in state or juvenile court." Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges (Mar. 24, 2015) (Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities).

File: (b) (6) - Oklahoma City, OK Date: MAR - 3 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ORDER:

On June 4, 2014, the Immigration Judge issued a decision ordering the respondent removed after the respondent failed to appear at a scheduled hearing. The respondent seeks to challenge the Immigration Judge's decision, but has done so by filing an appeal with the Board, rather than by filing a motion to reopen with the Immigration Judge in accordance with section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C). Under these circumstances, the record would ordinarily be returned to the Immigration Court without further Board action as we are precluded by the Act from considering such an appeal. *See Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999).

However, in reviewing the record, we note that the cover letter transmitting the Immigration Judge's decision erroneously instructs the respondent to file an appeal with the Board of Immigration Appeals, rather than a motion to reopen with the Immigration Judge. In light of these facts and that the respondent has mentioned a reason for failing to appear at the scheduled hearing, we find that the appeal in the instant case should be construed as a timely filed motion to reopen pursuant to section 240(b)(5)(C) of the Act.

Accordingly, the record will be returned to the Immigration Court for further action as appropriate.

FOR THE BOARD

File: (b) (6) – Oklahoma City, OK Date: JAN - 8 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arthur Campbell Cooke, Esquire

ON BEHALF OF DHS: Lynn G. Javier
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A of the Act

The respondent, a native and citizen of Mexico, has timely appealed from the Immigration Judge's January 29, 2015, decision which found him removable and denied his application for cancellation of removal for certain nonpermanent residents. The Department of Homeland Security opposes the appeal. The record will be remanded.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

At the January 11, 2011, master calendar hearing the Immigration Judge set the merits hearing for January 11, 2012, and set a filing deadline of December 1, 2010 (Tr. at 6-7).[1] On December 5, 2011, the Immigration Court sent a notice of hearing ("NOH") with a rescheduled hearing date of May 6, 2013. In a March 28, 2013, NOH [served March 29, 2013] the Immigration Court sent the respondent notice of a rescheduled hearing date of January 31, 2014. On January 3, 2014, the respondent submitted documentary evidence and a motion to accept the late filed evidence, which included documentation material to his oldest U.S. citizen child's special needs in school (Exh. A). The Immigration Judge excluded the evidence because it was filed after the deadline (Tr. at 10-11).

An Immigration Judge may set time limits for the filing of documents. If a document is not filed within the time set by the Immigration Judge, the opportunity to file that document shall be deemed waived. 8 C.F.R. § 1003.31(c). On the other hand, an alien in removal proceedings has the statutory right to a reasonable opportunity to present evidence on his or her own behalf. Section 240(b)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4). In this case the original filing deadline was meant to be December 1, 2011, with a hearing date of January 11, 2012. However, the hearing was first reset

[1] At the January 31, 2014, hearing the Immigration Judge stated that he meant to set the filing deadline for December 1, 2011 (Tr. at 10-11).

to May 6, 2013, and then later reset to January 31, 2014. The filing deadline, however, was not reset. As a result, the respondent had to proceed on his application at the January 31, 2014, hearing with documentary evidence which had to be filed by December 1, 2011. This resulted in evidence from 2013 which was material to the respondent's claim being excluded and not considered by the Immigration Judge. We conclude that it is appropriate to remand the record to the Immigration Judge to have him consider the evidence which was excluded [except for the May 11, 2011, evaluation and the June 2, 2011, award, which should have been submitted by December 1, 2011]. Because we so hold, we need not discuss the Immigration Judge's discretionary denial. On remand, both parties may submit evidence on the issues of exceptional and extremely unusual hardship and whether the respondent merits a favorable exercise of discretion.

Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.[2]

FOR THE BOARD

[2] On remand, the respondent should present evidence of his progress subsequent to his January 31, 2014, hearing in paying his debt to the Internal Revenue Service.

File: (b) (6) – Dallas, TX

Date: JAN 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Paul Steven Zoltan, Esquire

CHARGE:

Notice: 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (conceded)

APPLICATION: Continuance; remand

The respondent, a native and citizen of Honduras, appeals from the Immigration Judge's decision dated February 3, 2015, ordering him removed from the United States. The Department of Homeland Security (DHS) has not responded to the appeal. The respondent has also filed a motion to remand. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent first appeared before the Immigration Judge on December 18, 2014, on a juvenile calendar, accompanied by his mother (I.J. at 1; Tr. at 47-50). On that date, the Immigration Judge granted the respondent a 2-month continuance and recommended that he retain counsel (I.J. at 1-2; Tr. at 47-50). At the following hearing on February 3, 2015, the respondent indicated through counsel that his family law attorney intended to file a petition in state court within a week and requested a continuance for this purpose (I.J. at 2; Tr. at 53).[1] The Immigration Judge denied the request, concluding that the respondent had not established good cause because the state court petition had not been filed (I.J. at 2-3; Tr. at 53). The Immigration Judge then ordered the respondent removed to Honduras (I.J. at 3).

On appeal, the respondent has submitted evidence showing that a "Petition in Suit Affecting Parent-Child Relationship" was filed on his behalf in state court on February 11, 2015 (Resp. Motion to Remand at Tab A). He contends that if the state court petition is granted, he intends to

[1] According to the Notice to Appear, the respondent was born on (b) (6), 1997, such that he was (b) years old when he appeared before the Immigration Judge (Tr. at 47; Exh. 1).

file an application for Special Immigrant Juvenile (SIJ) status with United States Citizenship and Immigration Services (USCIS). The respondent requests that the case be remanded based on this proffered evidence.

Considering the new evidence of the state court petition filing, we will remand these proceedings to allow the respondent to request a continuance or administrative closure while the state court process occurs and his potential SIJ status application is pending. *See Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) ("As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time.") (internal citation omitted); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (discussing the standards for administratively closing proceedings); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (setting forth a framework to analyze whether good cause exists to continue proceedings to await adjudication by USCIS of a pending family-based visa petition).

When considering whether good cause exists to continue a matter, we may also consider the DHS's position, the reason for the continuance, and other procedural concerns. *See Matter of Hashmi, supra*. The Immigration Judge did not identify or rely on the DHS's position, the procedural history, or the respondent's potential eligibility for relief in declining to continue the matter (I.J. at 2-3). Absent compelling reasons, an Immigration Judge should continue proceedings to await adjudication of a pending state dependency petition in cases such as the one before us.[2]

Accordingly, the following order will be entered.

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

FOR THE BOARD

[2] We separately note that guidance provided to Immigration Judges by the Chief Immigration Judge states that if an unaccompanied child is seeking SIJ status, "the case must be administratively closed or reset for that process to occur in state or juvenile court." *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges (Sept. 10, 2014) (Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities).

File: (b) (6) - Haskell, TX

Date: DEC - 3 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Danielle A.N. Jones, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

On August 19, 2015, an Immigration Judge deemed the respondent's asylum application to be abandoned because the respondent did not file the application by the deadline set by the Immigration Judge. The respondent, a native and citizen of El Salvador, now appeals. The respondent's request for a waiver of the appellate filing fee is granted. *See* 8 C.F.R. § 1003.8(a)(3). The appeal will be sustained, and the record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge indicated on July 1, 2015, that any application for relief must be filed by August 5 or the application will be deemed abandoned. Counsel for the respondent acknowledged the advisal (I.J. at 2; Tr. at 23). The respondent did not file the application by the deadline and the Immigration Judge found that the respondent abandoned her application (I.J. at 2).

On appeal, the respondent asserts that the Immigration Judge did not comply with the Immigration Court Practice Manual, which states that a defensive asylum application is filed in open court in a master calendar hearing. *Immigration Court Practice Manual*, § 3.1(b)(iii)(A) at 36. According to the respondent, the Immigration Judge should have scheduled a master calendar hearing and instructed her to submit her application at that hearing instead of instructing her to file the application in an unspecified manner by a date that did not correspond to a master calendar hearing (Respondent's Br. at 6).

Additionally, the respondent asserts that due to the confusion that the Immigration Judge's filing deadline created, she sought advice from the Department of Homeland Security, which

informed her to file the application via email (Respondent's Br. at 8). She states that the emailed application complied with the Immigration Judge's submission deadline, but was rejected due to improper proof of service (Respondent's Br. at 7-8).

The Immigration Court Practice Manual indicates that the Immigration Court accepts electronic submission of the Form EOIR-28 (Notice of Entry of Appearance as an Attorney or Representative before the Immigration Court), but all other filings must be submitted as paper submissions to the Immigration Court. *Immigration Court Practice Manual* § 3.1(a)(viii) at 34. Thus, we are not persuaded that the emailed asylum application complied with the Immigration Judge's submission deadline.

The Immigration Judge has authority to set filing deadlines for applications and related documents. *See* 8 C.F.R. § 1003.31(c); *see also Immigration Court Practice Manual*, § 3.1(b) at 34. The regulations also provide that an application or document not filed within the time set by the Immigration Judge will be deemed abandoned. 8 C.F.R. § 1003.31(c); *Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992). We are persuaded, however, that a remand is warranted because the Immigration Judge did not comply with the Immigration Court Practice Manual's guideline regarding the filing of a defensive asylum application in open court at a master calendar hearing. *Immigration Court Practice Manual* § § 3.1(b)(iii)(A) at 36. "The requirements set forth in [the] manual are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case." *Immigration Court Practice Manual* § 1.1(b) at 1. In the respondent's case, the Immigration Judge did not direct the respondent to file her defensive asylum application in a manner different from that described in section 3.1(b)(iii)(A) of the manual. Our review reflects that on July 1, 2015, the Immigration Judge did not direct where or how the respondent should file her asylum application by the August 5, 2015, deadline, and scheduled the next hearing for August 19, 2015, as an individual hearing (Tr. at 23).

On remand, the respondent should be given the opportunity to submit her asylum application. She also should have the opportunity to apply for any other relief for which she currently is eligible.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

File: (b) (6) - Haskell, TX

Date: DEC - 3 2015

In re: (b) (6)

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent.

The majority's reliance on the Immigration Court Practice Manuel (ICPM) is not only misguided but is also contrary to the regulations and established legal precedent of this Board.

8 C.F.R. § 1003.31(c) provides that where an Immigration Judge has set a deadline for filing an application for relief and where that application is not filed within the time set by the Court, the opportunity shall be deemed waived. This is the controlling regulation irrespective of the majority's interpretation of the guidelines in the ICPM. As the Immigration Judge held, this Board has consistently held that applications for benefits under the Immigration and Nationality Act are properly denied as abandoned when the alien fails to timely file them. *See Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992); *Matter of Jean*, 17 I&N Dec. 100 (BIA 1979) (asylum); *Matter of Jaliawala*, 14 I&N Dec. 664 (BIA 1974 (adjustment of status); *Matter of Pearson*, 13 I&N Dec. 152 (BIA 1969) (visa petition); *Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987) (exclusion proceedings).

Patricia A. Cole
Board Member

Files: (b) (6) – Dallas, TX
(b) (6)

Date: MAR 2 [illegible]

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Emmanuel Ncube Socks, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (both respondents)

APPLICATION: Continuance

The respondents,[1] natives and citizens of El Salvador, appeal from the Immigration Judge's decision dated September 29, 2015, denying their request for a continuance and ordering them removed from the United States. The Department of Homeland Security (DHS) has not filed an opposition to the appeal. The appeal will be sustained.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

On September 14, 2015, the Immigration Judge continued proceedings, in part, because of a defect in the service of one of the Notices to Appear (NTAs) (Tr. at 2-4). On September 29, 2015, the respondents, through counsel, admitted the factual allegations in their respective NTAs and conceded the charges of removability (Tr. at 7). The respondents indicated that they intended to seek Special Immigrant Juvenile (SIJ) status and requested a continuance (Tr. at 7-8). The DHS did not express an opposition to the respondents' request. The Immigration Judge concluded that the respondents did not establish good cause for a continuance, declined to further continue proceedings, and ordered the respondents removed to El Salvador. Upon review of the record and consideration of the totality of the circumstances, we conclude that the respondents have established good cause for a continuance and that the request should have been granted. Accordingly, the respondents' appeal will be sustained and the record will be remanded for further proceedings. The following orders will be entered.

[1] The respondents, who are both minors, are brother ((b) (6)) and sister ((b) (6)).

ORDER: The respondents' appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings and the entry of a new decision.

FOR THE BOARD

Files: (b) (6) – Dallas, TX
(b) (6)

Date: MAR 2 [illegible]

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Emmanuel Ncube Socks, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (both respondents)

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FOR THE BOARD

File: (b) (6) – Dallas, TX

Date:

FEB - 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Levi Thomas
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Honduras, has appealed the Immigration Judge's November 3, 2015, decision denying her applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and for protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18. The Department of Homeland Security opposes the appeal. The appeal will be sustained, and the record will be remanded.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application for relief, which was filed after May 11, 2005, is governed by the Amendments made to the Act by the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent's request for relief is based upon her fear of abuse by her former domestic partner. The respondent testified that her former partner repeatedly abused her during the 10-month period that they lived together (I.J. at 3; Tr. at 28-30). She further testified that in (b) (6) 2014, her former partner fired a gun at her and a bullet struck her arm (I.J. at 3; Tr. at 30). The respondent attempted to end her relationship with her former partner by moving out of the home that they shared (I.J. at 3; Tr. at 30-31). She testified that after she relocated to another area in Honduras her former partner continued to threaten her by telephone (Tr. at 31-32, 34, 44-46).

We find clear error in the Immigration Judge's adverse credibility determination. Under the REAL ID Act, an Immigration Judge may base a credibility determination on any inaccuracies or falsehoods in the applicant's statements without regard to whether they go to the heart of the applicant's claim. *See* section 208(b)(1)(B)(iii) of the Act. However, an adverse credibility determination still "must be supported by specific and cogent reasons derived from the record." *See Zhang v. Gonzales*, 432 F.3d 339, 344 (5th Cir.2005).

In finding the respondent to be not credible, the Immigration Judge noted an internal inconsistency within her testimony regarding whether she had previously worked in Honduras

(I.J. at 7; *compare* Tr. at 27, lines 12-13 *with* Tr. at 27 lines 15-17). While the record does reflect that the respondent initially testified that she did not work in Honduras, she immediately went on to explain that she did help her sister with domestic work (Tr. at 27, lines 11- 13 and 17-21). We find the respondent's clarification regarding her work history in Honduras to be a reasonable and plausible explanation for the perceived inconsistency.

The Immigration Judge also noted the inconsistencies between the respondent's oral testimony and the information that she provided to an Asylum Officer regarding the statutory grounds on which she bases her application for relief (I.J. at 7; *compare* Tr. at 35-39 *with* Credible Fear Interview Questions and Answers, dated September 4, 2015, pages 9-10). However, we note that the respondent possesses a sixth grade education; testified at her removal hearing without the benefit of counsel; and indicated that she did not understand the Immigration Judge's line of questioning regarding her grounds for seeking relief (Tr. at 42, lines 4-8; Tr. at 43, lines 20-24, Tr. at 44, lines 1-3). Thus, we do not find such inconsistencies noted by the Immigration Judge sufficient to support an adverse credibility determination. Further, while the Immigration Judge also noted the non-responsive nature of the respondent's testimony, he did not cite to any specific examples within her testimony (I.J. at 7-8). Thus, because the Immigration Judge's adverse credibility determination is not supported by specific or cogent reasons derived from the record, we conclude that it is clearly erroneous. *See Zhang v. Gonzales*, *supra* at 344.

We also find clear error in the Immigration Judge's factual finding that after leaving her former partner, the respondent did not have any further contact with him (I.J. at 9). Although the respondent testified that she has not seen her former partner since she moved out of their shared home, the record reflects that she clarified that, after she left him, he called and threatened to harm her (Tr. at 31-32, 34, 44-46).

Based on the foregoing, we conclude that remanded proceedings are warranted for further consideration of the respondent's application for relief. On remand, the Immigration Judge shall reassess whether the respondent has established her membership in a cognizable particular social group under the Act. *See Matter of A-R-C-G-*, 26 I&N Dec. 388, 394-95 (BIA 2014) (holding that whether a particular social group based on a fear of domestic violence is cognizable under the Act depends on the facts and evidence in each individual case). The Immigration Judge shall also address the issue of whether the government of Honduras is "unwilling or unable" to control the respondent's former partner. On remand, the parties may submit additional testimonial and documentary evidence on these issues. We note that in remanding this application for further consideration, we are making no suggestion as to the respondent's ultimate eligibility for relief

In view of the foregoing, the following order will be entered.

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

FOR THE BOARD