



Detail

Complaint Number: 794

Immigration Judge: (b)(6)

Complaint Received Date: 09/03/13

Current ACIJ
Davis, John W.

Base City
(b)(6)

Status
CLOSED

Final Action
Complaint concluded --
intervening event made action
unnecessary

Final Action Date
09/03/13

Past ACIS:

A-Numbers(s)	Complaint Nature(s)	Complaint Source(s)
(b)(6)	Bias In-court conduct Out-of-court conduct	B/A

Complaint Narrative: (b)(6) R accused IJ of bias, ex parte communication with DHS and coercing R to accept voluntary departure.

Complaint History

09/03/13 Complaint concluded -- intervening event made action unnecessary IJ no longer with the agency
09/09/13 Database entry created

Sep 11, 2013

1 of 1

Moutinho, Deborah (EOIR)

From: Davis, John (EOIR)
Sent: Tuesday, September 03, 2013 5:25 PM
To: Moutinho, Deborah (EOIR)
Cc: Keller, Mary Beth (EOIR); Calderon, Rosario (EOIR)
Subject: RE: IJC Memo - Matter (b) (6)
Attachments: (b) (6) IJ Complaint Intake form.doc

Importance: High

Deborah,

Attached please find the completed complaint form in this matter. In addition to the intervening event – IJ (b) (6) there is no substantiation to respondents claim.

Thank You. Please let me know if you need anything further in this matter.

Regards,

John W. Davis
Assistant Chief Immigration Judge
Executive Office for Immigration Review
United States Immigration Court
(303) 739-5203
1961 Stout Street. Ste 3101
Denver, CO 80294-3003

From: Moutinho, Deborah (EOIR)
Sent: Tuesday, September 03, 2013 12:23 PM
To: Davis, John (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: FW: IJC Memo - Matter (b) (6)

Good Afternoon

Please see the attached case concerning IJ (b) (6) I understand that IJ (b) (6) is no longer with the agency. I can go ahead and close out the complaint on the same day it was received with dismissed with an intervening event, however I will still need a form completed so I can accurately add in the nature and the allegations.

Thank you
Deborah

From: Minton, Amy (EOIR)
Sent: Wednesday, August 28, 2013 12:34 PM
To: O'Leary, Brian (EOIR); Keller, Mary Beth (EOIR)
Cc: Minton, Amy (EOIR); Weil, Jack (EOIR); Moutinho, Deborah (EOIR); Henderson, Suzette M. (EOIR)
Subject: IJC Memo - Matter (b) (6)

Please see the attached IJC Memo from Chairman David L. Neal. Thank you.

Date Received at OCIJ: 28 August 2013

complaint source type	
<input type="checkbox"/> anonymous	<input checked="" type="checkbox"/> BIA
<input type="checkbox"/> respondent's attorney	<input type="checkbox"/> respondent
<input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.)	<input type="checkbox"/> other: _____
<input type="checkbox"/> Circuit	<input type="checkbox"/> EOIR
<input type="checkbox"/> OIL	<input type="checkbox"/> OPR
<input type="checkbox"/> DHS	<input type="checkbox"/> Main Justice
<input type="checkbox"/> OIG	<input type="checkbox"/> media
complaint receipt method	
<input type="checkbox"/> letter	<input checked="" type="checkbox"/> IJC memo (BIA)
<input type="checkbox"/> fax	<input type="checkbox"/> unknown
<input type="checkbox"/> email	<input type="checkbox"/> phone (incl. voicemail)
<input type="checkbox"/> other: _____	<input type="checkbox"/> in-person
date of complaint source	complaint source contact information
(i.e., date on letter, date of appellate body's decision) 28 August 2013	name: _____
additional complaint source details (i.e., DHS component, media outlet, third party details, A-number)	address: _____

	email: _____
	phone: _____
	fax: _____

IJ name	base city	ACIJ
(b) (6)	(b) (6)	John W. Davis
relevant A-number(s)	date of incident	
(b) (6)	18 July 2012n and 16 February 2012	
allegations		
<p>Respondent accused Judge (b) (6) of bias, ex parte communication with DHS and coercing respondent to accept voluntary departure; based on what respondent describes as a pattern of abuse by the IJ. Respondent notes, however that there was no bias or ex parte communication in the case at hand. Decision of the Immigration Affirmed.</p>		
nature of complaint		
<input checked="" type="checkbox"/> in-court conduct	<input checked="" type="checkbox"/> out-of-court conduct	<input type="checkbox"/> due process
<input type="checkbox"/> incapacity	<input type="checkbox"/> other: _____	<input checked="" type="checkbox"/> bias
		<input type="checkbox"/> legal
		<input type="checkbox"/> criminal



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

(b) (6)

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6) Esq.

DHS/ICE Office of Chief Counsel - (b)(6)&(b)(7)(C)

(b) (6)

(b)(6)&(b)(7)(C)

Name: (b) (6)

A (b) (6)

Date of this notice: 8/27/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Creppy, Michael J.

yungc
User team: Docket

100



U.S. Department of Justice

Executive Office for Immigration Review

***Board of Immigration Appeals
Office of the Clerk***

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

DHS/ICE Office of Chief Counsel - (b)(6)&(b)(7)(C)

(b)(6)&(b)(7)(C)

Name: (b) (6)

(b) (6)

Date of this notice: 8/27/2013

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Creppy, Michael J.

yungc
User team: Docket

Falls Church, Virginia 22041

File: (b) (6)

Date: AUG 27 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: (b) (6) Esquire

ON BEHALF OF DHS: (b) (6)
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: Reopening; remand

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge dated July 18, 2012, denying his motion to reopen the proceedings. He has also filed motions for remand and to stay his order of removal. The appeal will be dismissed and the motion to remand will be denied.¹

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).

On February 16, 2012, the respondent was granted pre-conclusion voluntary departure under section 240B(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a). The respondent subsequently filed a motion to reopen the proceedings, which the Immigration Judge denied. The Immigration Judge found that, even assuming that the respondent had complied with the requirements of a motion to reopen under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), due to his criminal conviction, the respondent was ineligible for any other relief. He therefore failed to demonstrate any prejudice from the actions of previous counsel (I.J. at 3).

On appeal, the respondent raises many arguments concerning the conduct of the proceedings, his removability and eligibility for relief from removal, and the actions of the Immigration Judge. We first address the nature of the respondent's conviction. On September 13, 2011, the respondent was convicted of failure to disclose the origin of a recording under (b) (6) (b) (6)¹ and received an indeterminate sentence not to exceed 5 years, suspended (Exh. 2). The

¹ As we are entering a final administrative decision in this case, the motion to stay the respondent's removal is moot.

Immigration Judge found this to be a crime involving moral turpitude, citing *Matter of Kochlani*, 24 I&N Dec. 128 (BIA-2007), and to be an aggravated felony under section 101(a)(43)(R) of the Act, 8 U.S.C. § 1101(a)(43)(R) (commercial bribery, counterfeiting, forgery) (I.J. at 7-14).

As the respondent is requesting relief from removal, it is his burden to show that his crime is not an aggravated felony such that he is eligible for relief. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009). The respondent argues that his crime is not an aggravated felony under section 101(a)(43)(R) of the Act as it does not involve counterfeiting.² Rather, he argues, it involves recordings without a true name or address of the manufacturer. Although the statute of conviction does not specifically use the term “counterfeiting,” the definition of aggravated felony at section 101(a)(43)(R) of the Act uses the broad phrase, “an offense relating to . . . counterfeiting, forgery . . .” *Id* (emphasis added). The phrase “relating to” is not defined in the Act, but it carries a broad ordinary meaning, i.e., “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with....” *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 383 (1992) (quoting Black’s Law Dictionary 1158 (5th ed. 1979)). Although neither the Board nor the United States Court of Appeals for the (b) (6) Circuit has ruled on the particular issue here, the Board and circuit courts, in general, have adopted a broad reading the phrase “relating to” in section 101(a)(43)(R) of the Act.³

The respondent’s conviction is under a statute that involves over 100 recordings that the respondent knew did not bear the true name and address of the manufacturer and was committed for commercial advantage or financial gain. (b) (6) This crime relates to counterfeiting and is an aggravated felony under section 101(a)(43)(R) of the Act. As the respondent has been convicted of an aggravated felony, he has not demonstrated eligibility for any relief from removal so reopening is not warranted. As we affirm the denial of the motion on this basis, we need not address whether or not his crime also constitutes one involving moral turpitude. The issue of the respondent’s removability as charged is not in contention.

² The respondent also argues that the Immigration Judge, rather than the Department of Homeland Security (“DHS”), raised this issue (Resp. Mot. to Remand at 4, 25). However, regardless who raised the issue, the respondent’s statutory eligibility for the requested relief must be considered by the Immigration Judge. See 8 C.F.R. §§ 1003.10 and 1240.1(a).

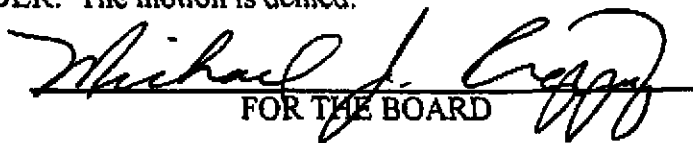
³ See *Park v. Attorney General*, 472 F.3d 66 (3d Cir. 2006) (holding that trafficking in counterfeit goods is an aggravated felony because it is related to the offense of counterfeiting); *Magasouba v. Mukasey*, 543 F.3d 13 (1st Cir. 2008) (convicted of selling goods with counterfeit identification mark for selling of pirated discs, court notes broad interpretation of “relating to”); *Desai v. Mukasey*, 520 F.3d 762, 764-66 (7th Cir. 2008) (the phrase “relating to” in the Act has a broadening effect, and does not require one-to-one correspondence); *Hung Lin Wui v. Mukasey*, 288 Fed. Appx. 428 (9th Cir. 2008) (knowingly trafficking in counterfeit labels is aggravated felony); *Yong Wong Park v. Attorney General of the United States*, *supra* (discussing broad reach of term “relating to counterfeiting”); *Kamagate v. Ashcroft*, 385 F.3d 144 (2nd Cir. 2004) (broad reading of “relating to” covering possession of counterfeit documents); *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992) (phrase “relating to” in aggravated felony context has long been construed to have broad coverage).

The respondent also raises serious charges against the Immigration Judge, accusing (b) (6) of bias, engaging in ex parte communication with the DHS, and coercing the respondent to accept voluntary departure. For the most part these claims are based on what the respondent describes as a pattern of abuse by the Immigration Judge. He states that the Immigration Judge did not demonstrate bias or engage in ex parte communication in the case at hand (Resp. Mot. to Remand at 5, 26-38). The respondent does complain that in this particular proceeding the Immigration Judge informed him that he would likely be taken into custody by DHS, if he did not accept voluntary departure (Resp. Br. at 45-55; Resp. Mot. to Remand at 3, 16-20). This is confirmed in the Immigration Judge's decision (I.J. at 6, n.1). Although the respondent argues there is a pattern of coercion on the part of the Immigration Judge, what appears to have occurred in this case is that the Immigration Judge informed the respondent of the situation before the court. The respondent was represented by counsel and, as the respondent has been convicted of an aggravated felony, the Immigration Judge accurately described the respondent's options at the time. Despite the urging of the respondent, we only address the issues currently before us. His appeal of the denial of a motion to reopen his specific case is not a proper arena to address alleged widespread misconduct being carried out in the (b) (6)

The respondent also alleges that in accepting voluntary departure he was ineffectively served by his former counsel. However, given the respondent's crime, acceptance of voluntary departure at that point in the proceedings appears to have been a logical choice. In any event, the respondent has not shown any eligibility for relief from removal, and therefore, has not shown any prejudice from the actions of his previous attorney. *See Matter of Lozada, supra*. Based on the foregoing, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion is denied.


FOR THE BOARD

(b) (6)

A(b) (6)

(b) (6)

(b) (6)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

(b) (6)

(b) (6)

IN THE MATTER OF

FILE (b) (6)

DATE: Jul 18, 2012

(b) (6)

UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

— ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT

(b) (6)

✓ OTHER: DE VIL

Chen
COURT CLERK
IMMIGRATION COURT

FF

CC:

UNITED STATE DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

(b) (6)

CASE NO: (b) (6)	IN REMOVAL PROCEEDINGS
IN THE MATTER OF: (b) (6) RESPONDENT	DATE: July 18, 2012 WRITTEN DECISION DENYING THE RESPONDENT'S MOTION TO REOPEN REMOVAL PROCEEDINGS

Application:	Motion to Reopen Removal Proceedings
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On Behalf of the Respondent:	On Behalf of DHS:
(b) (6)	(b)(6) & (b)(7)(C) Assistant Chief Counsel (b)(6) & (b)(7)(C)

I. INTRODUCTION

On February 16, 2012, the respondent, through former counsel, sought and obtained pre-conclusionary voluntary departure with a requirement that he depart the United States no later than April 16, 2012, which determination the Court made based on both positive and negative factors present in this case. On April 12, 2012, the respondent, through current counsel, filed a "Motion to Reopen Proceedings on the Basis of Coercion and Ineffective Assistance of Counsel" (Motion). At its core, the Motion seeks reopening such that the respondent may apply for cancellation of removal for non-lawful permanent residents under INA § 240A(b)(1).

On May 4, 2012, DHS filed an "Opposition to the Respondent's Motion to Reopen" (Opposition). The government argues the motion should be denied because the respondent has failed to show "prejudice" stemming from prior counsel's handling of this case.

II. APPLICABLE LAW

To successfully advance an argument for reopening based on ineffective assistance of counsel, the respondent must comply with criteria set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). This includes ensuring that (1) the motion is supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make in this regard, (2) counsel whose integrity or competence is being impugned was informed of the allegations leveled against him and was given an opportunity to respond; and (3) the motion reflects whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Id.* at 639.

The Board held that this "high standard is necessary" because "[w]here essential information is lacking, it is impossible to evaluate the substance of such claim." *Id.* For instance, absence clarity of the scope of the agreement between counsel and the alien, it cannot be determined whether any alleged failure was actually and specifically part of such agreement. *Id.* Further, unless former

counsel has awareness of the complaint and has an opportunity to respond, the "potential for abuse is apparent." *Id.* Finally, the bar complaint requirement "serves to deter meritless claims of ineffective representation" and "highlights the standards which should be expected of attorneys who represent persons in immigration proceedings." *Id.*

The claimant must also establish prejudice resulting from his attorney's ineffectiveness. *Id.* at 640. The term "prejudice" refers to actual prejudice. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). This means that it is likely that the alien would have prevailed at the hearing or on appeal had the negligent representation not occurred. *Id.*; see also (b) (6) [REDACTED] [REDACTED] holding the alien "must show counsel's ineffective assistance so prejudiced him that the proceeding was fundamentally unfair").

III. DISCUSSION

Based on the evidence and argument submitted by the respondent and the DHS the Court concludes that the respondent, even assuming compliance with *Matter of Lozada*, *supra*, has failed to establish prejudice. See, e.g., *Matter of Coehlo*, 20 I&N Dec. 464, 472 (BIA 1992) (holding motions to reopen with attendant delays have been historically disfavored and the alien must show that the new evidence would likely change the result in the case).

First, as is described in both the Motion and the Opposition, the respondent suffered a felony conviction for "Failure to Disclose the Origin of a Recording" on

September 13, 2011. (See Exh. 2.) The statute is found at (b) (6)

(b) (6) and states, in pertinent part, as follows:

(b) (6)

Id.

In order for an individual to be convicted of the felony offense, he must, for commercial advantage or private financial gain involving 100 or more recordings during a 180-day period offer a recording for sale, resale, or rent, sell, resell, rent, lease, or lend a recording, or possess a recording for any such purposes knowing that the recording does not contain the true name and address of the manufacturer in a prominent place on its cover, jacket, or label. *Id.*

To qualify as a crime involving moral turpitude it must involve both "reprehensible conduct" and "some degree of scienter." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1 (A.G. 2008). In such analysis, the Court must conduct a categorical inquiry whereby the statute of conviction is examined to ascertain whether moral turpitude inheres in all offenses that have a "realistic probability" of being prosecuted thereunder. *Id.* at 689-90, 696-98. However, where a statute is divisible, documents that are part of the record of conviction, such as the charging instrument, jury instructions, or, in the case of a plea, the plea transcript, can be considered in determining the particular type of violation under a modified categorical approach. See *Taylor v. United States*, 495 U.S. 575 (1990); see also *Shepard v. United States*, 544 U.S. 13 (2005).

In this case, as an alien seeking relief, the respondent must establish by a preponderance of the evidence that any mandatory bars to relief do not apply.

See 8 C.F.R. § 1240.8(d); see also (b) (6)

(b) (6)

The Court concludes that he has failed to do so.

In the course of the removal proceedings, the respondent, represented by former counsel, sought to file an application for cancellation of removal on the respondent's behalf. The issue arose as to whether the respondent's felony conviction constituted a crime involving moral turpitude that would bar that form of relief. The Court asked for, but former counsel never submitted, a brief on that issue. Ultimately, the Court concluded that the respondent had not shown by a preponderance of the evidence that the offense did not involve moral turpitude and that the mandatory bar to relief did not apply. See 8 C.F.R. § 1240.8(d). Furthermore, as the conviction was entered in the last five years, the respondent would be ineligible for conclusionary voluntary departure. INA §§ 240B(b)(1)(B), 101(f)(3).¹

¹Current counsel argues the Court was coercive in asking whether the respondent would be taken into custody if an order of removal was entered. Simply stated, it has been the Court's experience that in the non-detained context that DHS often does so and inquired as to whether that would happen in this case. The Court assumes that the alien and counsel would prefer to know such before determining how to proceed with the case.

In the Motion, current counsel argues that the respondent's conviction does not involve moral turpitude. The Court concludes that, notwithstanding his arguments, the respondent has not met his burden of proof as it relates to both moral turpitude and, as DHS has alleged in its Opposition, an aggravated felony.

First, moral turpitude. The Court concludes that the Board's decision in *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007), provides meaningful guidance. In that case, the Board held, in reversing a decision of an immigration judge, that a conviction under 18 U.S.C. § 2320 for intentionally trafficking or attempting to traffic goods with the knowing use of a spurious trademark likely to confuse or deceive others constituted a crime involving moral turpitude. *Id.* The Board reached this conclusion even though the statute did not require knowledge that trafficking in counterfeit goods was criminal or involved a specific intent to defraud the actual or potential purchaser. *Id.* at 130. Rather, the Board focused on the requirement that the offender's knowing expropriation and the use of the owner's trademark must be likely to confuse or deceive the public at large with significant adverse consequences for both potential consumers who are deceived and for the owner of the mark, who bears the cost associated with the dilution of the mark's value in the public's estimation. *Id.*; *cf. Matter of Sema*, 20 I&N Dec. 579 (BIA 1992) (possession of an altered immigration document with knowledge that it is altered, but without its use or proof of any intent to use it unlawfully, is not a conviction for a crime involving moral turpitude).

Based on the rationale of the Board, this Court continues to conclude that the respondent has failed to establish by a preponderance of the evidence that his conviction does not involve moral turpitude. The respondent's conviction requires knowledge that the recording does not contain the true name and address of the manufacturer in a prominent place on its cover, jacket, or label - in essence, its counterfeit nature. Second, the statute requires that it be done for "commercial advantage or private financial gain." It is not, therefore, the mere possession of a recording for personal use. *Matter of Serna, supra*. Third, it is significant that the offense in this case involved "100 or more recordings during a 180-day period" which gave rise to the felony penalty. Of course, "neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." *Id.* at 581. However, the Court concludes that the number of recordings required by the statute in order for the offense to become a felony underscores the harm that arises from such activity.

The Court acknowledges that the (b) (6) statute at issue in this case is distinguishable in some ways from the federal statute considered in *Kochlani*. It does not, for instance, contain any element of public deception which the Board found to be significant. But the Court concludes that the policy arguments made by the Board in *Kochlani* are applicable. The Board specifically reasoned that trafficking in counterfeit goods is "tantamount to commercial forgery and involves

the theft of someone else's property in the form of a trademark even if it does not involve deceiving the purchasers of the counterfeit goods and services."

Kochlani, supra, at 130-31. The Board compared trafficking in counterfeit goods to uttering or selling false or counterfeit alien registration cards and stated both types of offenses involve "significant societal harm." *Id.* at 131 (noting [f]irst, both crimes involve traffic in counterfeit or fraudulent items or objects[,] [s]econd, both crimes require proof of an intent to traffic and knowledge that the items or objects are counterfeit[,] [a]nd third, both crimes result in significant societal harm).

Similar to the federal statutes described in *Kochlani* and *Flores*, the respondent's felony conviction requires the traffic-related use (via various acts including offers a recording for sale, resale, or rent, sells, resells, rents, leases, or lends a recording or possesses a recording for any such purposes), with knowledge that the recordings do not contain the true name and address of the manufacturer in a prominent place on its cover, jacket, or label. This results in the same type of "societal harm" described by the Board because the use of such recordings under any of the proscribed actions for commercial advantage or private financial gain likewise deprives the true manufacturer of the recognition and profit it deserves for its property.

Neither the Court nor counsel for the respondent or the government have identified any case directly on point, but there are some unpublished Board decisions which of course are not binding, that likewise lead the Court to

conclude the respondent has not met his burden. For instance, *In re: Sylla*, 2008 WL 4222204 (BIA August 29, 2008) (attached). In that case, the Board found that a violation of New York's trademark statute constituted a crime involving moral turpitude even though the statute did not require a specific intent to defraud the purchaser. *Id.* Similar to *Kochlani*, the Board, in this unpublished decision, found that an individual who deliberately trafficks in goods knowing that such goods bear a counterfeit trademark has engaged in inherently dishonest conduct and such conduct is not "morally neutral." *Id.* It reasoned that trademark counterfeiting is to confuse the buying public, even if the purchaser knows the goods are counterfeit, and to exploit the reputations, development costs, and advertising efforts of honest mark holders who must bear the costs associated with the dilution of the goods' market value. *Id.*; see also *In re: Maldonado*, 2006 WL 1455307 (BIA April 24, 2006) (attached) (citing identical policy arguments to find the sale, offer to sell, or knowing possession of counterfeit trademark with the intent to evade lawful restriction on the sale of such goods involves moral turpitude). And, of course, it is well-established that although moral turpitude inheres in conduct that is fraudulent in nature, crimes can involve moral turpitude even without a specific intent to defraud. *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980).

Current counsel argues that the respondent "engage[d] in the age old American free enterprise [sic] of selling merchandise for commercial gain."

(Motion at 11.) Continuing, "the crime, if any, was committed against the (b) (6) government, and not any other entity, and it does not involve any wilful intent to defraud." (*Id.*) The respondent argues that because his offense does not involve fraud or deceit, it does not involve moral turpitude. (*Id.* at 12-18.) However, the respondent has not addressed the policy reasons described by the Board in *Matter of Kochlani* that this type of offense causes significant societal harm and is tantamount to commercial forgery or theft. In addition, this was not a single recording. Rather, as the felony conviction requires, it was more than 100 which, the Court concludes, is also significant. Based on the foregoing, this Court is not persuaded that, even considering the least culpable conduct required for the conviction under the statute, the respondent's conviction does not involve moral turpitude.² The respondent has, therefore, failed to show prejudice stemming

²Assuming, arguendo, the statute is divisible in that, for instance, possession for sale, rent, lease, or lend does not involve moral turpitude, under a modified record of conviction, including an examination of the charging document, the "Affidavit of Probable Cause" included in that document reflects (1) "no fewer than 1,000 pirated/counterfeit CDs and DVDs" were discovered (2) "[a]gents had previously observed the defendants handle, distribute, and sell boxes containing CDs and DVDs," and (3) "the defendants admitted knowing the CDs and DVDs were pirated and/or counterfeit" and "they admitted to participating in the distribution and sale of pirated/counterfeit CDs and DVDs." (Exh. 2.) Therefore, the offense did not, for instance, involve possession alone. Also, again, the respondent bears the burden of proof to establish, even assuming divisibility, that his conviction falls under elements that do not involve moral turpitude and any ambiguity in such does not aid him in that burden. 8 C.F.R. § 1240.8(d); see also (b) (6)

(b) (6)

from prior counsel's inaction to brief the issue. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003).

The Court also concludes that the respondent has not established by a preponderance of the evidence - and indeed has not argued despite the service of the government's Opposition more than 2 months ago - that his offense is not an aggravated felony under INA § 101(a)(43)(R), including offenses related to counterfeiting for which the term of imprisonment is at least one year. To be sure, this was an argument made by DHS for the first time in the Opposition to the Motion. However, there has been ample time since the government took this position for the respondent to reply to the same if he so desired. To date, he has not. The Court agrees with DHS that this poses an additional hurdle for the respondent in that the "relating to" language of INA § 101(a)(43)(R) has been interpreted to be broad in its application and, further, that the respondent's offense may relate to counterfeiting such that this mandatory bar may apply. See, e.g., *Matter of Gruenangerl*, 25 I&N Dec. 351, 356 (BIA 2010) (noting that the Board "has consistently ruled that the phrase 'relating to' has an expansive meaning, particularly when it is used with a general term like "counterfeiting" and concluding that "the phrase 'relating to,' as it is used in section 101(a)(43)(R) of the Act, encompasses a broad range of conduct"); *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992) (holding the phrase "relating to" in aggravated felony context has long been construed to have broad coverage). The respondent must carry the

burden that it does not and, as stated above, has filed no supplemental brief to contest the issue raised by the government. See (b) (6)

(b) (6) offense of selling, offering to sell, or possessing with the intent to sell goods which contain a counterfeit trademark

held an "offense relating to ... counterfeiting" under section 101(a)(43)(R)); (b) (6)

(b) (6)

(Conviction for trafficking in goods or services using a counterfeit trademark under 18 U.S.C. § 2320 held an "offense relating to ... counterfeiting" under section 101(a)(43)(R)). Therefore, the Court concludes that this issue also demonstrates that the respondent has failed to show prejudice stemming from former counsel's inaction. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003).

The Court notes that the respondent, through current counsel, alleges that the Court accepted the application for relief from his uncle who was convicted of the same crime and has unfairly rejected his. However, the state of that case is as follows: On March 1, 2012, the respondent appeared with counsel (b) (6) (b) (6) who indicated he was appearing on behalf of (b) (6) and submitted an application for relief. On that same day, the Court permitted former counsel (b) (6) (b) (6) to withdraw. As it was (b) (6) first appearance, he was afforded an additional opportunity to submit a brief on the issue of statutory eligibility and the Court ordered briefing from (b) (6) by April 2, 2012, with the government's response being due May 2, 2012. The Court also set the case for a trial for

September 25, 2013, in the event the respondent could meet his burden of proof, but specifically requested the respondent file his brief to address the issue. The Court indicated at that time that it was inclined to conclude that the offense involved moral turpitude. Further, the Court indicated that the trial would take place if DHS did not file any motion to pretermitt. As the government notes, the alien in that case has not filed the brief that was ordered. The government indicates that it intends to file a motion to pretermitt the application but, to date, has not done so. If and when the government makes that motion, the Court will consider it.

Finally, the Court concludes that the respondent has failed to present *prima facie* evidence of statutory eligibility, even assuming the conviction does not pose any bar. See, e.g., *INS v. Doherty*, 502 U.S. 314, 323 (1992); *INS v. Abudu*, 485 U.S. 94, 106 (1988); *Matter of Rajah*, 25 I&N Dec. 127, 138 (BIA 2009). *Prima facie* eligibility requires an alien shows a reasonable likelihood that the statutory requirements for relief have been satisfied and that there is a reasonable likelihood that relief will be granted in the exercise of discretion. *Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996). In other words, the applicant bears the burden to prove that he or she satisfies the applicable eligibility requirements and merits a favorable exercise of discretion under INA § 240(c)(4)(A) and must provide corroborating evidence (documentary or otherwise) requested by the Immigration Judge pursuant to INA § 240(c)(4)(B), unless it cannot be reasonably obtained.

See Matter of Almanza-Arenas, 24 I&N Dec. 771 (BIA 2009).

Among other things, the respondent must present evidence of 10 years of continuous physical presence in the United States. INA § 240A(b)(1)(A). Under the heading "Exhibits in Support of 42B Relief Application" the respondent lists "continuous physical presence" evidence in the form of tax returns from 2000 to 2011. (Motion, Tab L (attached to application as Tab A).) However, the Court notes that the tax returns for years 2011 and 2010 were completed by a preparer on January 27, 2012, and the other years' returns were prepared on February 15, 2012. (Motion, Tab L (attachment A, pgs. 3 (tax year 2011), 14 (tax year 2010), 25 (tax year 2009), 32 (tax year 2008), 39 (tax year 2007), 46 (tax year 2006), 53 (tax year 2005), 59 (tax year 2004), 65 (tax year 2003), 71 (tax year 2002), 77 (tax year 2001), 83 (tax year 2000).)

The Court concludes that these returns are entitled to minimal weight as they were only recently prepared, there is no evidence that any of the returns have been filed with the IRS, and there is no independent corroborative evidence attached to the returns such as earning or wage statements that show physical presence. In addition, the tax returns themselves list business income and describe business expenses (which would presumably be calculated according to at least some records) but none of those independent records have been attached. (See, e.g., Motion, Tab L, Attachment A, pgs. 5, 16, 27, 34, 41, 48, 55, 61, 67, 73, 79, 85).

In addition, it is significant that the respondent claims, according to his affidavit (Motion, Tab A) that he entered the United States in 1999. His girlfriend goes into further detail and states that she, the respondent, and their oldest child entered the United States in 1999 and they "were given a place to live" by the respondent's parents. (Motion, Tab D.) However, in support of the application, the respondent has submitted no affidavit from his parents or any other similar evidence corroborating his claim of physical presence in the United States. It is true that the respondent has presented copies of birth certificates for his 3 United States citizen children (Motion, Tab B) but the earliest birth is October 12, 2005, which is not outside the 10-year period which is relevant for purposes of this case. (See Exh. 1, reflecting service of the NTA on September 15, 2011). INA § 240A(d)(1) (continuous residence ends when the alien is served a notice to appear).

In short, the respondent and other witnesses could testify at any reopening proceeding but, at this point, the Court concludes that based on the submission of the respondent, considering both what it includes and what it does not, the respondent has failed to establish *prima facie* eligibility in terms of physical presence. See 8 C.F.R. § 1003.23(b)(3) (requiring a motion to reopen must be accompanied by "all supporting documents"). In light of this, the Court need not address if the claims of exceptional and extremely unusual hardship merit reopening.

IV. CONCLUSION

For the reasons described above, the
hereby denied.

(b) (6)

Immigration Judge