**U.S. Department of Justice**

Executive Office for Immigration Review

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

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**606 S. Olive Street, 8th Floor**
**Los Angeles, CA 90014**

**Name: DIAZ [redacted], J[redacted]**

**A092-814-193**

**Date of this notice: 7/28/2008**

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:
COLE, PATRICIA A.
FILPPU, LAURI S.
PAULEY, ROGER

File: A92 814 193 - Los Angeles, CA

Date: JUL 28 2008

In re: J[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jesse J. Banuelos, Esquire

CHARGE:

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

APPLICATION: Cancellation of removal under section 240A(a); remand

The respondent, a native and citizen of Mexico, was initially admitted to the United States as a temporary resident in 1988, and was subsequently admitted as a lawful permanent resident on or about May 30, 1990 (*see* I.J. at 1-2; Exh. 1 (Notice to Appear) at 1; Tr. at 23). The respondent has appealed the Immigration Judge's March 29, 2007, decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. §1229b(a). On appeal, the respondent essentially claims that the Immigration Judge erred in finding that he failed to establish the requisite 7 years of continuous residence under sections 240A(a)(2) and 240A(d)(1) of the Act, 8 U.S.C §§ 1229b(a)(2) and 1229b(d)(1), based on his 1993 conviction for attempted grand theft auto. The respondent also argues that the "significant gaps" in the transcript raise concerns about whether the hearings before the Immigration Judges were conducted in a "proper and fair manner" (Resp't's Br. at 7). The Board reviews questions of law *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). For the reasons set out below, the appeal will be sustained, in part; the Immigration Judge's March 29, 2007, decision will be vacated; and the case will be remanded to the Immigration Court to permit the respondent to seek cancellation of removal pursuant to section 240A(a) of the Act and other applicable forms of relief. Further, because we are remanding the case for further proceedings, we need not and will not address the respondent's arguments based on gaps in the transcript.

To be eligible for cancellation of removal under section 240A(a) of the Act, an alien must demonstrate, *inter alia*, that he "has resided in the United States continuously for 7 years after having been admitted in any status . . . . " Section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2). "Any status" includes temporary resident status. *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1197-1198 (9th Cir. 2006). For purposes of this requirement, the stop-time rule provides that "any period of continuous residence . . . shall be deemed to end . . . when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under

section 237(a)(2) . . . . " Section 240A(d)(1) of the Act; *see also Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004) (stating that the stop-time rule deems an alien's period of continuous presence to end when he or she commits certain offenses).

As an initial matter, we deem it appropriate to remand the record to the Immigration Court because the Immigration Judge did not meaningfully explain why the respondent's 1993 conviction for attempted grand theft auto constitutes a crime of moral turpitude. Instead, the Immigration Judge, without providing necessary findings of fact or legal analysis,[1] stated, "In the year 1993, he was convicted of attempted grand theft auto. The crime involving moral turpitude for which crime he received a sentence of eight months in prison" (I.J. at 2-3).[2] Given our limited fact-finding authority, we deem it appropriate to remand the record to the Immigration Judge to more fully develop the record and for further discussion and analysis of the respondent's 1993 conviction. *See Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) ("The Board is an appellate body whose function is to review, not create, a record"); 8 C.F.R.§ 1003.1(d)(3)(iv) (limiting the Board's fact-finding authority and stating that the Board may remand the proceeding to the Immigration Judge where further fact-finding is needed).

We also agree with the respondent that application of the stop-time rule to his 1993 attempted grand theft auto conviction was impermissibly retroactive in light of *Sinotes-Cruz, supra*, at 1197-1203 (9th Cir. 2006). In that case, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, held that the stop-time provision of section 240A(d)(1) of the Act "does not apply retroactively to the seven-year continuous residence requirement of § 1229b(a)(2) [, § 240A(a)(2) of the Act,] for an alien who *pled guilty before* the enactment of IIRIRA[3] and *was eligible* for discretionary relief *at the time IIRIRA became effective*." *Sinotes-Cruz, supra*, at 1202-03 (emphasis added).[4] In a similar manner to the alien in *Sinotes*, the respondent (a) pled guilty in 1993 before the enactment of IIRIRA (I.J. at 2; Tr. at 29-30), and (b) had accrued 7 years of continuous residency at the time IIRIRA became effective, on April 1, 1997, based on his

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[1] Significantly, the Immigration Judge did not refer to the state statutory sections under which the respondent was convicted or exhibits in the record (*see* I.J. at 2).

[2] It appears from our review of the record that the respondent's 1993 conviction documents were not marked as exhibits during the merits hearing.

[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. Enacted as part of IIRIRA, the stop-time rule took effect on April 1, 1997. *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1324 (9th Cir. 2006).

[4] In contrast, in *Valencia-Alvarez, supra*, at 1327-28, the Ninth Circuit did not find the application of the stop-time rule impermissibly retroactive because the alien merely committed an offense (as opposed to pleading guilty) prior to IIRIRA's effective date; and "he did not have ten or even seven years of continuous residency in the United States until well after IIRIRA's April 1, 1997, effective date.").

temporary resident status since 1988.[5] As a result, the respondent is not ineligible for cancellation of removal based on the stop-time rule and, upon remand, the Immigration Court shall determine if the respondent is otherwise eligible for cancellation of removal and warrants such relief as a matter of discretion.

Finally, it appears that entire sections of the transcript are missing (*see, e.g.*, Tr. at 1 (starting with the statement, "Back on the record.") and Tr. at 5 (referring to a previous hearing in San Pedro wherein an Immigration Judge considered certain exhibits). Upon remand, the Immigration Court shall take such steps as are necessary and appropriate to enable preparation of a complete transcript. The Immigration Court shall also provide the parties with the opportunity to submit further testimony and documentary evidence relevant to the respondent's application for cancellation of removal or other applicable forms of relief. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained, in part.

ORDER: The Immigration Judge's March 29, 2007, decision is vacated.

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

FOR THE BOARD

[5] When the respondent, a lawful permanent resident, was convicted in 1993, former section 212(c) of the Act allowed a lawful permanent resident with 7 years of consecutive residence in the United States to apply for a discretionary waiver of deportation. *Becker v Gonzales*, 473 F.3d 1000, 1003 (9th Cir. 2007) (citing *St. Cyr*, 533 U.S. 289, 295 (2001)).