**U.S. Department of Justice**

Executive Office for Immigration Review

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

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**Name: HERNANDEZ AVILA, NOE CESAR** **A 079-531-484**

**Date of this notice: 1/18/2013**

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:
Cole, Patricia A.

Userteam: Docket





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File: A079 531 484 - Los Angeles, CA Date: JAN 18 2013

In re: NOE CESAR HERNANDEZ-AVILA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Hector R. Ortega, Esquire

ON BEHALF OF DHS: Elena Kusky
Assistant Chief Counsel

APPLICATION: Reconsideration

The Department of Homeland Security ("DHS") moves for reconsideration of our August 30, 2012, decision dismissing its appeal of the Immigration Judge's May 27, 2011, decision terminating removal proceedings. The motion will be denied.

At issue in this case was whether the respondent's conviction in violation of California Penal Code § 653w(a) (failure to disclose origin of a recording or audiovisual work) renders him removable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude ("CIMT") within 5 years after admission for which a sentence of 1 year or longer may be imposed. In her May 27, 2011, decision, the Immigration Judge terminated proceedings, finding that the DHS did not sustain its burden of proof. The DHS appealed, arguing that it submitted sufficient evidence (i.e. a police report, including arrest records, Exhibit 7) to support a removability finding under the third step of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). On August 30, 2012, we dismissed the DHS's appeal.

In its motion for reconsideration, the DHS alleges that we erred in finding that the police report was "inherently unreliable" because it was not incorporated into the guilty plea, was not substantiated by the respondent's admissions, and was not corroborated by independent witness testimony.

We will deny the DHS's motion, as we find no errors of fact or law in our prior decision. Section 240(c)(6)(C) of the Act, 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2(b)(1); *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (the movant must specify the factual and legal issues raised on appeal that were erroneously decided or overlooked in our initial decision, or show how a change in the law materially affects the prior decision). We continue to agree with the Immigration Judge that without other indicia of reliability, the police report was insufficient to sustain the DHS's burden of proof standing alone. As noted by the Immigration Judge, "arrest reports are one-sided recitations of events aimed at establishing probable cause or reasonable suspicion in criminal proceedings" (05/27/11 I.J. Dec. at 6). While evidence outside of the

record of conviction is appropriate to consider under the *Silva-Trevino* step 3, we continue to conclude that in this case, the police record was not sufficiently reliable to sustain the DHS's burden. Accordingly, the following order is entered.

ORDER: The DHS' motion is denied.

FOR THE BOARD