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)

U.S. DHS, Litigation Unit (b) (6)
(b) (6)

Name: (b) (6) A (b) (6)

**Date of this notice: 5/9/2008**

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:
GRANT, EDWARD R.

File: A(b) (6) [redacted] Date: MAY - 9 2008

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

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: (b) (6) [redacted] Esquire

ON BEHALF OF DHS: (b) (6) [redacted]
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has filed a motion requesting that we reopen the proceedings based on changed country conditions in his native Afghanistan. The motion will be denied.

We first note that the motion is untimely. A motion to reopen proceedings must be filed with the Board within 90 days of the date of a final administrative order and a motion for reconsideration within 30 days of the mailing of the Board's decision. 8 C.F.R. § 1003.2(a)(2) and (c)(2). The only aspect of the respondent's motion that might be considered timely is that portion based on changed country conditions in his native Afghanistan. Federal regulations provide that the time and number restrictions on motions to reopen do not govern motions:

> To apply or reapply for asylum, or withholding of deportation, based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing . . .

8 C.F.R. § 1003.2(c)(3)(ii).

The respondent argues, and we must agree, that the situation in Afghanistan has changed significantly since the time of the Immigration Judge's decision in 2002, and our final decision in this case on January 29, 2004. Further, it is not in dispute that Afghanistan remains a dangerous place. We note, however, that to require reopening at this late date it is incumbent upon the respondent to provide material evidence that he qualifies for protection under the Convention Against Torture based on changed circumstances in Afghanistan. Here, along with other support, he relies primarily on a report from an associate professor of Islamic Studies who has traveled extensively in Afghanistan. We first note that many of the professor's observations predate the prior hearing in this case and no reason has been provided as to why this report could not have been prepared earlier. To the extent the information is newer, and much of it is, it simply fails to adequately support a claim that the respondent qualifies for protection.

(b) (6)

In an application for withholding or deferral of removal under the Convention Against Torture, it is incumbent upon the applicant to demonstrate that it is more likely than not that he will be tortured if returned to his native country. 8 C.F.R. § 1208.16(c)(2). The general unrest in Afghanistan, even when considered with the respondent's family name and his association with the United States, fails to provide a prima facie case of eligibility for the requested relief. *See INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). In motions to remand or reopen proceedings, the respondent bears a "heavy burden" in showing such action is warranted. *INS v. Abudu, supra*; *Matter of Coelho, supra*. As the evidence of the increasing strength of the Taliban and the unrest in Afghanistan is insufficient to demonstrate that the situation has changed to such an extent that reopening of this case is warranted, the following order will be entered. 8 C.F.R. §§ 1208.16(c) and 1208.18(b)(2); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

ORDER: The motion is denied.

FOR THE BOARD

File: A[redacted] Date: JAN 2 9 2004

In re: [redacted]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: [redacted], Esquire

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility; Convention Against Torture

In a decision dated July 25, 2002, an Immigration Judge denied the respondent a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and protection under the Convention Against Torture (CAT), and ordered him removed to Afghanistan.[1] The respondent has filed this appeal. The Department of Homeland Security ("the DHS," formerly the Immigration and Naturalization Service) has not filed a reply. The appeal will be dismissed. The request for oral argument is denied.

The respondent is a native and citizen of Afghanistan who came to the United States as a refugee, and adjusted his status to that of a lawful permanent resident in 1991. On September 22, 1993, the respondent pled guilty in the [redacted] for criminal sale of a controlled substance in the second degree, to wit, heroin. He received a sentence of 3 years to life. He actually served 3 years. The respondent was issued an Order to Show Cause in 1994, and due to changes in the law and other factors, his case was last addressed by an Immigration Judge in July 2002.

The respondent challenges the Immigration Judge's decision to deny him a waiver of inadmissibility under section 212(c) of the Act. We agree with [redacted] determination that in the context of section 212(c), the respondent did not establish sufficient favorable equities which would

[1] On June 23, 2000, the Board remanded the record to the Immigration Judge. A more complete procedural history of this case is set out in that decision, and the decision of the Immigration Judge.

outweigh the adverse factors of record. We have considered this matter by applying the well-established standards for exercising discretion for section 212(c) of the Act. *See Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).

We summarize the facts as follows. The respondent is married to an Afghani, who also entered as a refugee in 1988. She became a United States citizen in 1997. The couple has three United States citizen children, who were born in 1990, 1992, and 1994. The respondent's wife was pregnant at the time of the 2002 hearing. She testified that the respondent is a loving father, and is the sole financial provider for the family. The record contains additional evidence which shows that the respondent's family is close. He also has a sister residing lawfully in this country. The respondent was employed before his arrest, and after his release from prison, in the fast food business. The record shows that the respondent was well-behaved in prison, and took various classes. He was on non-supervised parole at the time of the hearing. The respondent also cooperated with authorities after his arrest, and assisted in the related criminal investigation.

The respondent and his spouse both testified that they have no family remaining in Afghanistan with whom they remain in contact, and that it would be very difficult for the respondent to survive there, much less be able to support his family. The respondent's family would not accompany him. The record contains an abundance of documents about the difficult conditions in Afghanistan.

The serious nature of the respondent's conviction, which involved the sale of heroin, triggers the need for unusual and outstanding equities.[2] The respondent's immediate family ties in this country rise to that level. His length of residency, and employment history, are also very favorable factors. We also weigh in the very difficult conditions in Afghanistan, and the emotional and financial difficulties the respondent and his family will face upon deportation.[3] However, these factors do not outweigh the negative factors of record. In making this determination, we have considered that the respondent fully cooperated with authorities after his arrest. Further, he has a single conviction, served his time without any problems, and was released at the short end of his sentence. This evidence of rehabilitation is favorable. However, it is not enough to tip the balance of the equities in the respondent's favor, especially considering that the respondent's candor about his criminal involvement has been called into question.

The respondent originally testified that his role in the drug crime was to add strength for a drug dealer, and that no exact fee had been arranged (*see* Transcript of June 28, 1996 (hereinafter "1996

[2] The Immigration Judge found that these equities were undermined because at least two of the pregnancies occurred during the pendency of the proceedings. While equities acquired after the initiation of proceedings can be accorded less weight, we do not take this position with the birth of the respondent's children.

[3] In making this determination, we have considered the psychologist's report in the record which was compiled after a two hour interview with the respondent and his family (Exh. 11). The report concludes that the respondent is rehabilitated, and that his family will suffer psychological trauma if he is deported.

Tr.") at 57-58, 79-80, 87-88).[4] At his recent hearing, the respondent testified that he acted as the "go-between" for the drug transaction at issue, and was to receive $5,000 for his efforts (Transcript of July 25, 2002, at 32, 54-55, 60). Further, a friend asked him to arrange the buy because the respondent was from Kandahar, a city where a lot of heroin activity occurred (*Id.* at 58). We agree with the Immigration Judge that these accounts vary enough to indicate a lack of candor, and to also show that the respondent was more involved in the transaction then he originally indicated.[5] This situation amounts to an adverse factor against the respondent.

The most significant adverse factor is the respondent's conviction itself. It is a very serious conviction, as it involved the sale of large amount of heroin (*see* 1996 Tr. at 56 (respondent states that a kilogram of heroin involved)). He also received a significant sentence of 3 years to life. The respondent faces a difficult task in establishing that he merits discretionary relief. *See Matter of Burbano*, 20 I&N Dec. 872, 876-79 (BIA 1992). We conclude that upon consideration of all the relevant factors, the respondent's favorable factors in this country do not outweigh the negative, and that he did not meet his burden of showing that he deserves section 212(c) relief.

The respondent also challenges the denial of his request for protection under the CAT. The gist of his claim is that he will be subject to torture or death as he is a recognizable member of the (b) (6) family, which ruled Afghanistan for over 200 years and supported the monarchy in that country. We agree with the Immigration Judge that the respondent did not meet his burden of proof under CAT. *See* 8 C.F.R. § 208.16; *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). We accordingly adopt and affirm this portion of his decision. *See Matter of Burbano, supra*. Insofar as the respondent has submitted additional evidence on appeal, we do not consider this evidence except to find that it does not establish a basis for a remand. *See* 8 C.F.R. § 1003.2(c).

Finally, we address the respondent's argument that the proceedings must be terminated because he was admitted as a refugee. The Board has noted that once an alien admitted as a refugee adjusts his status, there is no basis for terminating the proceedings based on the DHS' failure to terminate the refugee status. *See Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000), at n. 2.

For the abovementioned reasons, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Neil P. Miller

FOR THE BOARD

[4] We note that the Pre-sentence Investigative Report in the record states that the respondent denied that he was involved in the crime for monetary gain (Exh. 8).

[5] In response to arguments raised on appeal, we find that it is not significant that the respondent was not specifically asked during the 1996 hearing whether he was a "go-between" in the transaction

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6)

In the Matter of

(b) (6) File No. A (b) (6)

Respondent in Removal Proceedings

## ORDER OF THE IMMIGRATION JUDGE

**This summary of the Oral Decision of the Immigration Judge is issued for the convenience of the parties. If the case is appealed the full oral decision will be transcribed as the official text of the Court's opinion.**

✓ Respondent was ordered removed from the United States to AFGHANISTAN or in the alternative to _____.

___ Respondent, an arriving alien, was ordered removed from the United States. The country of removal is determined by § 241(b)(1) of the I.N.A.

___ Respondent's application for voluntary departure was denied.

___ Respondent was granted voluntary departure until on or before _____. The grant of voluntary departure is conditioned upon
_____Respondent posting a voluntary departure bond of $ _____.
_____Respondent providing a travel document for inspection by I.N.S. by _____.
If and when Respondent fails to comply with either condition, or if Respondent fails to depart when and as required, the order would automatically become an order for his removal and deportation to _____. Respondent was advised of the limitation on discretionary relief for failure to comply with the voluntary departure order.

___ Respondent's application for asylum was [ ] granted [ ] denied [ ] other.

___ Respondent's application for withholding of removal as to _____ was [ ] granted [ ] denied [ ] other.

✓ Respondent's application for protection under the Convention Against Torture was [ ] granted [✓] denied [ ] other.

___ Proceedings were terminated.

✓ Other: APPLICATION FOR WAIVER UNDER § 212(c) WAS DENIED.

Date: 7-25-02.

(b) (6)
(b) (6) Immigration Judge

Appeal: [Reserved by ~~A E B~~ Due by 8-26-02] ~~[Waived Final]~~

019G

SA-7

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6)

File No.: A (b) (6) July 22, 2002

In the Matter of
(b) (6)
Respondent

IN REMANDED DEPORTATION PROCEEDINGS

CHARGE:

APPLICATIONS: Section 212(c) of the Immigration Act; Waiver of Excludability and Deportability; in the alternative, protection under the Convention against Torture.

ON BEHALF OF RESPONDENT:
(b) (6)

ON BEHALF OF SERVICE:
(b) (6)

ORAL DECISION OF THE IMMIGRATION JUDGE

The case before the Court was remanded by the Board of Immigration Appeals in its decision issued on June 23, 2000.

The Board's decision sets out the prior history of the case in summary fashion. The issues of the respondent being subject to deportation have already been resolved. The respondent's eligibility for relief has changed under the amendment to the Immigration law, and case law interpreting that, during the time that the case was pending before the Executive Office for

Immigration Review.

The Board of Immigration Appeals specifically remanded the case for a relief hearing under Section 212(c) of the Immigration Act. Further, since the case has been remanded, the respondent has made an application for relief under the Convention against Torture. Given that the respondent has been convicted of a drug trafficking, aggravated felony and received a sentence of three to life for that offense,

The respondent is not eligible for asylum or withholding of removal, but is potentially eligibility for deferral of removal under the Convention Against Torture.

As to the applications before the Court at the present time, the current version of the 212(c) application is Exhibit 9. This is a revised application and the written statement of the respondent's Torture Convention claim is Exhibit 10, the Form I-589, supported by an affidavit of the respondent.

The Court will first address the claim under the Convention Against Torture. It should be noted that this claim relates only to the prospect that the respondent might be subjected to torture in Afghanistan. First, the record today would indicate that the respondent's wife and children most likely would not accompany him if he is forced to return to Afghanistan, and the respondent has not in any way raised the prospect of harm to family members as a way in which he might be subjected to "torture," and the secondary evidence in general in the case does not suggest that

that would be a probability in this circumstance.

As far as the Torture Convention, it requires the respondent to establish a probability that he would, in fact, be tortured in his country. Further, he must establish that this torture would occur while he was held in custody, and that it would be either by the government or by other persons or groups acting with the acquiescence of the government. Acquiescence is not only defined by regulation but has been clarified to some extent in recent decisions by the Board of Immigration Appeals and the attorney general.

The respondent was granted asylum while his country, Afghanistan, was under a prior government or regime.

As far as the secondary evidence concerning the situation in Afghanistan at the present time, the Court will not discuss it at great detail. I think I might be able to take administrative notice of many of the basic points which are established by that secondary evidence.

Furthermore, at the insistence of respondent's counsel, I have reviewed the three-page report, which is included in the set of documents brought to court today, the first three pages, which are very recent, were admitted as Exhibit 15-A, but the rest of the documents have been excluded because the Court felt that the documents could have been provided much earlier. There was a deadline to do so, and it is not justified to reset the case so that the Court can study these documents at this time.

As far as Exhibit 15-A, it does make references to a dispute or difference of opinion between different agencies involved in assisting or trying to protect refugees. Specifically, it is a criticism by an organization known as Human Rights Watch, which certainly is a well-respected organization in the field, but a criticism of the policies or announcements of the Office of the U.N. High Commission for Refugees.

Human Rights Watch is indicating that, in its view, the situation in Afghanistan is still quite serious, that there are many dangers which make it inadvisable to encourage Afghan refugees to return to their country at this time.

This is worthy of consideration. The fact that there is a dispute in policy between two respected organizations would indicate that the view of Human Rights Watch, or their analysis of the situation, is hardly the only reasonable one that might be adopted. But even looking at the Human Rights Watch report, I would note there are several references to conditions in the northern part of Afghanistan. I do not believe that the respondent, in fact, would be likely to find himself there.

There are also references to problems of one ethnic group, mainly in the north, and then there are references to other problems that exist in the south and west of the country.

As far as the Court is concerned, these comments from Human Rights Watch, taken together, would suggest that there is factional rivalry going on and the report, in fact, makes

reference to "lawlessness and abuses." However, the Court believes that the ~~Court~~ picture given there and the picture given in the secondary evidence, in general, does not strongly support the respondent's claim under the Convention against Torture.

The Convention Against Torture does not cover what might be considered "random violence," such as spontaneous types of violence that occur on the street when a group of armed people, willing to take criminal measures, terrorize part of the civilian population. It does not include private actions by small groups who might kidnap a person, shoot them, steal property, et cetera. It covers either the government or some group operating with the acquiescence of the government, and it seems clear to the Court that there is a difference between acquiescence by the government and inability to prevent certain harm to a person, such as the respondent.

The current government in Afghanistan, to the extent it is possible to analyze it or pin down the nature of the government, appears to be a loose and probably evolving coalition of different forces, some of which have definitely been hostile to each other in the past and some of which probably remain either openly or secretly hostile to each other. The government, in other words, is a loose group accommodating various groups and tendencies, figures of people who are better known than others because of their actions in previous years, even previous decades, under one government or the other.

As far as the Court is concerned, it seems clear from the evidence about the respondent's background that his background would not be that different from the background of some of the people who are presently active in, taking part in, this loose coalition that is making up the national government.

As far as the Court is concerned, there is not a showing of a probability that the respondent would be taken into custody by the government under the present situation in Afghanistan and not a showing of a probability that if he were taken into custody by some other group, it would be with the acquiescence of the government. It might be impossible for the government to prevent such acts or to rescue the respondent, but this, as far as the Court is concerned, is not sufficient to make a showing under the Convention Against Torture.

Since the Court believes that the respondent has not established a probability of being tortured in Afghanistan, the fact that the respondent may be at risk of violence or might possibly be subjected to some kind of persecution is not, in fact, enough for him to qualify under the Convention Against Torture. Therefore, that application is denied.

Obviously, the respondent is not eligible for asylum, and therefore the lower burden of proof and the lesser degree of harm which might satisfy an asylum application, does not apply in this case.

As to the 212(c) application, the Court hereby incorporates

by reference the decision issued by the same Immigration Judge on June 28, 1996, for all purposes, except to the extent that the findings of fact or conclusions stated there are distinguished in this decision.

In the prior decision, the Court mentioned a number of factors which it believed made the respondent's claim for relief under Section 212(c) fairly ~~weak~~ weak. These include the fact that the respondent had been a lawful permanent resident for little more than the bare minimum required by statute for a 212(c) application, and although I believe it was not mentioned, I would add that the respondent was essentially an adult when he arrived in the United States.

Furthermore, the Court would note that the respondent was not, in fact, eligible for 212(c) relief at the time the crime was committed, the conviction occurred, or the deportation case began. He became eligible for such relief within a short time after the Court denied the case in 1995, due to the lack of the necessary seven-year period.

Furthermore, the Court made comments in the previous decision from June 1996, concerning the very serious negative factors attaching to a conviction for trafficking in heroin.

As far as the Court is concerned, the comments there should be clear enough. I would only say that I remain convinced that at that time and at the present time, there was no justifiable excuse for a person from the respondent's background or a person

who had lived for at least a few years in (b) (6) to engage in any activity concerning the sale of heroin without being fully aware of the very devastating effects that that drug had had on the community, in this country, and I believe in other countries, for many decades before the respondent engaged in this crime.

As far as the Court is concerned, it would still be possible to say that some people might take part in the sale of marijuana and state subjectively that they do not consider it to be harmful conduct for society. I do not know anyone who could make such a statement about heroin with a straight face.

The Court also ~~noticed~~ noted in the previous decision that the amount involved in the case was a kilogram as opposed to a small amount, and therefore involved a higher level of drug trafficking and greater economic considerations, and as far as the Court I believe made clear, indicated that persons involved in such transactions were more likely to be fully aware of the nature of the transaction and not mere accidental or bit players, so-to-speak, in the criminal offense.

In the prior decision, the Court also noted as a positive factor the suggestions that the respondent had cooperated with the authorities after he was arrested as reflected in part by Exhibit 6, and also noticed in the conviction record the recommendation by the sentencing court for an early release of the respondent, and the Court considered these as signs suggesting that these authorities, the criminal judge, et cetera,

had seen in the respondent a potential for rehabilitation, and the Court considered that to be, to some extent, a positive factor.

At the present time, the respondent has been out of criminal custody for over five years. He does not have any new arrests. He is apparently regularly employed. The Court would note that there is some confusion in the record as to whether the respondent is the owner of the business he works for or works for somebody else who owns the business, et cetera.

In respondent's application, it indicates he works for a person who is named in that application, at the same address he gave as his place of employment. In a letter from the respondent's tax preparer, there is an indication that the respondent is the employer of that person who is named in the I-191, and this may simply be confusion or lack of attention to detail in the preparation of this application or the tax letter.

In any event, the respondent has at least some showing of actual rehabilitation following his release from the state prison late in 1996. Furthermore, the respondent has been either discharged from parole or at least placed in inactive status. I believe that the respondent would still be considered to be on parole, but that he is apparently not required to report to a parole officer, fill out reports, et cetera. This is certainly some positive indication concerning an assessment of rehabilitation.

On the other hand, in terms of the respondent's rehabilitation, the respondent's testimony today raises very grave doubts as to whether the respondent gave truthful information to the authorities, the police and investigators, during the period between his arrest and sentencing, and the respondent had previously indicated in the 1996 hearings that he cooperated in part because he hoped that it would result in a lesser sentence for him.

Today the respondent has indicated that his conduct in the criminal offense was more central, at a higher level, and began much earlier in terms of the criminal scheme itself. To a certain extent, it might be said that the respondent was, in a way, present at the beginning of the criminal offense because he now says that one of his friends talked to him and said, "Why don't you look for somebody who could sell us heroin, because I can find somebody who would buy it?"

In the previous hearings in 1996, the respondent, in many ways, directly and indirectly, gave clear indications that he was acquainted with a person who he knew or suspected was involved with selling heroin, that he did not really know what was going on, he was not receiving any kind of financial reimbursement from this person, but rather he was spending time with him, going out with him, going to places in the evening, travelling around the city with him, and that he agreed to be present when the drugs were being turned over, but did so on short notice, I believe,

based on supposedly a phone call, the day when the drug deal was supposed to take place, and that his role in the transaction was minor, either to be present and look like somebody who might protect the sellers of the drugs in case anyone thought of robbing them or, alternatively, to help them transport or move around the drugs at a certain point, but the respondent certainly passed up many opportunities to indicate that he had, in fact, introduced the seller of the drugs to the buyer of the drugs, that he was friends with both of them, that he was expecting to receive $5,000 for arranging the sale of this heroin, et cetera.

In the Board of Immigration Appeals' decision, the Board indicated that this Court had found in the previous decision, from June 1996, that the case could be viewed as a "close call." The Court, in the 1996 oral decision, in fact, said that it was questionable whether the respondent had the unusual and outstanding equities, which is the term the Board uses to refer to the necessary level of positive equities for a person who has been convicted of a serious negative conviction, such as a drug trafficking offense.

The Board seems to suggest that it may be possible for the Court to see its way clear to grant relief as a matter of discretion at the present time because in the decision in 1996, the Court made some comments about the respondent's wife and children in terms of their weight or their worth as positive factors.

It is correct that the Court indicated that there was a difference between the respondent's situation and that of a person who has been married for many years to a U.S. citizen, who was born here in the United States, and it is true that the respondent's wife is now a U.S. citizen. She was not born here, she has not been a citizen for a very long period of time. The respondent's children are older than they were at the time the decision was issued in 1996, but as far as the Court is concerned, equities acquired after an order to show cause is issued, are clearly entitled to less weight in the case law than equities that exist at the time the deportation case begins, and certainly equities that exist at the time the criminal offense is committed.

In the present case, the respondent was arrested in April of 1993. He and his wife conceived the third child in August of 1993. The Court addressed this issue in the previous decision in 1996. I find it difficult to give a great deal of positive weight to a child who is not even in existence at the time the respondent begins fighting the deportation case.

Likewise, at the present time, the respondent's wife has indicated she is seven months pregnant. Her answers as to whether this was a planned pregnancy, unplanned pregnancy, et cetera, were slightly equivocal. I think they were unintentionally equivocal. It seems as though she was saying that at this time she be ready to have another child because the

other children are older and they are more able to take care of themselves.

On the other hand, she seemed to suggest that actually becoming pregnant in February of 2002 was not entire a conscious decision. Those answers are not really inconsistent. However, as the Court is concerned, there is some trouble issue about the fact that the respondent's wife became pregnant during the period when he was facing a criminal sentence on the arrest and indictment and again became pregnant as his Immigration case was, once again, drawing to some type of conclusion.

In the oral decision in 1996, the Court stated that even if the Court was incorrect, and even if the respondent presented what the Board calls unusual or outstanding equities, the Court "would be very hesitant, and I believe would not grant relief as a matter of discretion." The reason summarized just after that statement refer in particular to the seriousness of the criminal offense in the negative aspects of involvement in heroin which were referred to earlier.

As far as the Court is concerned, this is a fair indication of the view of the Court that some criminal conduct is almost always too serious a negative factor to be offset by positive factors, especially positive factors which accrue as the case goes along through a rather slow process of litigation in the Immigration Court system.

It is not the fault of the respondent that the situation as

to eligibility for 212(c) relief has been up in the air for quite a few years. The respondent, in fact, had a full hearing on the merits of his 212(c) claim at a time when the Immigration Service was trying to take the position that the respondent and people in this situation were not eligible for such relief as a matter of law.

In that full hearing on the merits, the respondent was unsuccessful. He was not denied relief because Congress had passed a law restricting 212(c) relief. He was denied relief because the Court felt he did not deserve it as a matter of discretion. As far as the Court is concerned, the fact that the case has taken some years to resolve because of the rather slow nature of the process, both before the Board of Immigration Appeals, the federal courts, and this ~~own~~ same court since the remand in 2000, does not really mean that the respondent has a better right to be in the United States or expect to stay in the United States, then he did at the conclusion of the hearing in June 1996.

Furthermore, the respondent today has, in the view of the Court, greatly damaged his case on the issue of discretion by his testimony about his conduct in the criminal offense. As mentioned earlier, he testified today that he set up the deal in the sense that a potential buyer approached him and asked him to find a potential seller, and the respondent had the good fortune not only to know somebody who wanted to buy heroin, but he knew

someone who could sell it. He was supposed to get $5,000 for doing so. The respondent certainly had the chance to disclose this information during his hearing in 1996. He may not have actually, specifically, disclaimed doing anything to set up the transaction, but in fact he offered explanations for his involvement in the criminal offense, which very strongly indicated that, in fact, he had no such role. He answered no to a serious of questions about whether he was going to get a certain amount of money or whether he had received money from the seller in the past.

He indicated that he was there on short notice. He indicated he was there to look impressive, to look like a person who could help to prevent a robbery, to make his side of the transaction look stronger, in other words.

On page 57 of the transcript, he testified that he was called that day, and he was basically going to help transport or move the drugs, and on page 80 he testified that when he arrived at the scene of the transaction, he was told by the seller, "You stand here and look," which is certainly a great minimization of the respondent's role in that offense.

Furthermore, in 1996, the respondent indicated that he knew very little about heroin and picked up what he did know from a few months association with the seller, (b) (6), on a causal basis. Today, the respondent indicated that the potential buyer of the drugs, (b) (6), in fact, raised the question with

the respondent of finding someone who would sell heroin, because the respondent was from the area of the City of Kandahar, and this was known as a center for drug trafficking.

Given the fact that the respondent lied in 1996, in testifying under oath as a way of creating a favorable showing on his potential for rehabilitation and minimizing the negative weight of the criminal conduct and conviction, the Court would note first that the knowledge that the respondent lied in the previous hearings is a new negative discretionary factor, militating against the grant of relief under Section 212(c).

Furthermore, the fact that the respondent, apparently inadvertently, without remembering what he had said in 1996, chose to tell a much more damaging story today is, in the Court's view, conduct that undermines the weight that was given to the respondent's testimony on any number of points in the previous hearing, because if the respondent lied about his criminal conduct that led to the criminal conviction, it certainly is possible that he lied about other things during that hearing.

The Court, therefore, concludes that the prior evidence of rehabilitation, which the Court commented on in 1996, is no longer deserving of very serious weight. A comparison of the respondent's testimony today and the contents of Exhibit 6, which is the only evidence in the record of what the respondent did to cooperate with the authorities, would indicate that the respondent probably misled the authorities in 1996 and minimized

to the police and investigators his actual role in the conduct. There is nothing to show that the police or investigators actually knew, at the time respondent was convicted and sentenced, his true role in the offense.

For all of these reasons, the Court believes that the respondent at the present time has not established "unusual or outstanding equities," because the positive weight of some of the evidence presented in the previous hearings has been undermined by the knowledge that the respondent was willing to lie in those hearings.

Furthermore, the Court believes that the drug conviction, the conduct it represents, the lies in the previous hearing are all very serious negative factors, and the Court believes it is impossible to justify granting this application as a matter of discretion.

The Court, therefore, orders that all of the relief applications are hereby denied;

Further orders that the respondent be deported from the United States to Afghanistan on both charges in the Order to Show Cause.

(b) (6)

U.S. Immigration Judge

U.S. Department of Justice

Executive Office for Immigration Review

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

*5201 Leesburg Pike, Suite 1300*
*Falls Church, Virginia 22041*

(b) (6) (b) (6)

Name: (b) (6) A(b) (6)

**Date of this notice: 06/23/2000**

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

Very Truly Yours,

Paul W. Schmidt

Paul W. Schmidt
Chairman

Enclosure

Panel Members:
DUNNE, MARY M.
GUENDELSBERGER, JOHN
HOLMES, DAVID B.

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A(b) (6) Date: JUN 23 2000

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL/MOTION

ON BEHALF OF RESPONDENT: (b) (6)

ON BEHALF OF SERVICE: (b) (6)
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility; remand; Convention Against Torture relief

This appeal and motion to remand the record now comes before the Board after a lengthy procedural history. The proceeding was first before us on appeal from a September 21, 1995, decision of an Immigration Judge finding the respondent deportable under sections 241(a)(2)(A)(iii) and (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(2)(A)(iii) and (B)(i), and finding him ineligible for relief from deportation in the form of a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c). [1] On October 10, 1995, finding that the respondent had acquired the requisite 7 years of lawful domicile, we remanded the record for consideration of this application. On June 28, 1996, the Immigration Judge found that the respondent had not demonstrated sufficient equities in this country to be granted this relief and the respondent appealed. We dismissed this appeal on March 26, 1997, as the respondent was then ineligible for the relief due to changes in the law. Based on more recent changes, the United States District Court for the

[1] Since amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), are not currently applicable to the case before us, references herein are made to the Immigration and Nationality Act as it existed prior to IIRIRA's enactment.

(b) (6) vacated the order of deportation and remanded the case. (b) (6) *INS*, No. (b) (6). The respondent is now eligible for the requested relief and the record is before us once more. We will now remand the record to the Immigration Judge for further proceedings.

Despite this proceeding's torturous history, we once again remand the record to the Immigration Judge to consider the respondent's application for relief under section 212(c) of the Act. We note that in his 1996 decision the Immigration Judge found the case a rather close one, noting in particular that the decision may turn out differently if the three United States children of the respondent were slightly older. Not only have these three children grown older and presumably been attending school in the United States, in the intervening years, the respondent's wife has also become a United States citizen. While the Immigration and Naturalization Service opposes the respondent's appeal, they do not mention the request that the record be remanded for further proceedings.

We now remand the record for the Immigration Judge to reconsider his previous decision in light of any additional evidence supplied by the respondent or the Service and to consider any other relief available to the respondent. Based on the foregoing the following order will be entered.

ORDER: The motion is granted and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision.

FOR THE BOARD

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6)

In re: (b) (6)

Date: MAR 26 1997

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: (b) (6)

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); Matter of Soriano, Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:

(b) (6)

RESPONDENT

Case No.: A (b) (6)

Docket: (b) (6)

IN DEPORTATION PROCEEDINGS

## ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JUNE 28, 1996.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☒ The respondent was ordered deported to AFGHANISTAN.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

☐ Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to _____ or _____.

☐ Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

☐ Respondent's application for withholding of deportation was ( )granted ( )denied ( )withdrawn ( )other.

☐ Respondent's application for suspension of deportation was ( )granted ( )denied ( )withdrawn ( )other.

☒ Respondent's application for waiver under Section 212c of the Immigration and Nationality Act was ( )granted ☒ denied ( )withdrawn ( )other.

☐ Respondent's application for _____ was ( )granted ( )denied ( )withdrawn ( )other.

☐ Proceedings were terminated.

☐ The application for adjustment of status under Section (216) (216A) (245) (249) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

☐ Respondent's status was rescinded under Section 246.

☐ Other _____

☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

(b) (6)

Immigration Judge

Date: 6-28-96

Appeal: RESERVED ~~WAIVED~~ ( A ~~#~~ DUE BY 7-8-96

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

File No.: A (b) (6) June 28, 1996

In the Matter of

(b) (6)

Respondent

IN DEPORTATION PROCEEDINGS

CHARGES: Section 241(a)(2)(B)(i) of the Immigration and Nationality Act -- convicted of a crime involving a controlled substance; and

Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act -- conviction of an aggravated felony.

APPLICATION: Section 212(c) of the Immigration and Nationality Act -- waiver of excludability and deportability.

ON BEHALF OF RESPONDENT:

(b) (6) Esquire

ON BEHALF OF SERVICE:

(b) (6)

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case was placed in deportation proceedings through the Order to Show Cause (Exhibit 1) which was issued on October 3rd 1994, filed with the Immigration Court on December 13th, 1994 and scheduled for hearings. This Immigration Judge did previously order the respondent's deportation finding at that time that he was not eligible for any form of relief from deportation.

The Board of Immigration Appeals did grant the

respondent's Motion to Remand the proceedings based upon the accrual of seven years of lawful domicile in the United States after the Court's decision was issued, this being a request which the Board noted and the Service did not oppose in the appellate process. The case was then recalendared for additional hearing. The respondent eventually filed an application for relief under Section 212(c) of the Immigration Act since the issue of deportability has been resolved in the original proceedings. The application, I note for the record, was filed on April 4th, 1996 before the signing and enactment of the amendments which have restricted eligibility for 212(c) relief for at least some persons.

As to the issue of deportability, this is not contested. It is established through the admissions of counsel of record at the earlier hearing and also by the documentary evidence, the record of admission for lawful residence is Exhibit 2 and the conviction record for the crime mentioned in the Order to Show Cause as Exhibit 3. So, there is clear, convincing and unequivocal evidence of deportability on both charges. The conviction being a conviction for sale is by its nature an aggravated felony as well as controlled substance offense.

As far as the question of relief from deportation, the Court considers that at the present time, there is only the single application for relief under Section 212(c) before the Court. However, the respondent has indicated in earlier hearings

before the first decision was issued and again today, that the respondent would apply for asylum and withholding of deportation if allowed to do so and has discussed to some extent the basis that such an application would have.

On this point, the Court will note that in two separate written orders, the first of which may not have been received because it was sent to the original address of respondent's counsel as opposed to the current address, but November 3rd, 1995, the Court issued a written order directing that any relief application should be filed with the Court by January 3rd, 1996 and does refer, in fact, to the necessity to file an asylum application if that form of relief would be pursued. There was a question as to whether this order was received because it did not bring any response that the Court could discern. So, on March 20th, 1996, the Court issued another order to respondent's counsel at the new address in (b) (6) and paragraph 2 of that Order also states that an asylum application should be filed by the date set there if the respondent wishes to pursue an application for asylum. Now, no asylum application has been filed in this deportation case at any point. However, the Court has also indicated in the earlier hearings and today has the same opinion, that the respondent is not actually eligible for asylum under the statute. The respondent's counsel has differed with that interpretation in the past and to some extent, it might be considered an exercise of futility to have prepared and filed an

asylum application when the Immigration Judge has indicated that he does not believe it could be granted. However, I do note that the deadline was set twice and for whatever reason, the application was not actually filed.

As far as the question of statutory eligibility for asylum, it was discussed on the record and also addressed in the Court's previous oral decision. I don't believe there is anything new the Court can add to that discussion and the order I issued previously. As far as the lack of a current application for asylum, there are two respects in which it poses some problem for the record. First, the Court does not have a current statement in writing or in detail of the problems that respondent believes he might have in Afghanistan if returned there now and the basis for such problems, if any. Furthermore, the previous asylum application that must have been presented to the Immigration Court during the exclusion proceedings that began when the applicant arrived in the United States about eight years ago is not part of the record in this case. I have never seen it. I have no idea what basis was stated there except for some reference to that application in the testimony today. So, I do not really have a detailed statement of why the applicant applied for asylum or was granted asylum at that time.

As far as the question of asylum, I frankly think that the statute is dispositive when it says that a person with such a conviction for an aggravated felony may not qualify for asylum

and withholding of deportation. As far as I am concerned, that ban must apply even to a person who sought asylum previously in exclusion proceedings because otherwise an entire class of previous asylum applicants would be exempted from the ban on applying for asylum at any time in the future and that frankly does not make sense to the Court.

As far as the question of relief under Section 212(c), the statutory requirements are well known. The respondent obviously is a legal permanent resident as shown by Exhibit 2. He has at this time acquired the necessary lawful domicile, minimum seven years lawful domicile, to apply for relief under Section 212(c) and this point, in fact, is established by the Board's decision in this case. As far as the third point, that the respondent show that he deserves the exercise of discretion, in this case, as in most, that seems to be the contested issue.

In various Board of Immigration Appeals decisions including the 1978 precedent Matter of Marin and the 1988 precedent Matter of Busami as well as subsequent decisions such as Matter of Edwards, the Board has held that certain respondents seeking such relief must show "unusual and outstanding equities" based upon the severity of a or some negative factors in their case. I do believe that the respondent's conviction for sale of a controlled substance in this case is sufficiently serious under the Board's decisions to require unusual and outstanding equities. In particular, in the Marin case, the criminal record

I would say was not any more serious than it is in this case and the Board did require unusual and outstanding equities in that decision as well. There may be some transactions which may technically be considered drug trafficking which are so minor in scope and so isolated, of so little value in terms of the drugs involved, that perhaps they don't require usual and outstanding equities, but I certainly don't believe that this case involving trafficking in heroin is such a case. So, this requirement must be met.

A separate point which has arisen during the course of the proceedings is whether the amendments under the Anti-Terrorism and Effective Death Penalty Act would take away this respondent's right to seek relief under Section 212(c). I believe that under the decision I have been advised of, Matter of Soriano, I discussed at the beginning of this hearing, that this respondent would be eligible to seek such relief and, therefore, I assume he is and I make this decision on the merits of the case without any reference to that statute.

As far as the negative discretionary factors, the respondent has a single arrest and single conviction for the case mentioned in the Order to Show Cause. We have the conviction record, the pre-sentence investigation and we also have Exhibit 6, a memorandum prepared on behalf of the office of the Special Narcotics prosecutor for (b) (6) in reference to this case describing efforts made by the respondent to be helpful to the

authorities in giving other information about the offense. So, we have a fair amount of information about the offense which was a transfer of about a kilogram of heroin in (b) (6). It seems clear and undisputed that the respondent was not the moving factor in this deal. Exactly what his role was is not as clear from the record. The respondent indicates that he was simply called at the last moment to be present to sort of beef-up the presence of the sellers, people with whom he had associated over a period of months, people whose activities he realized included trafficking in controlled substances, but that he was just there basically to be an extra body, to give an appearance of strength or protection.

The Court does not actually have clear information from prosecution sources, police reports, pre-sentence investigation, etc., to show that this is in fact the limited nature of the respondent's activity. It is possible that it was, but it is not clear actually from anything except his own testimony. Now, the respondent testified that he had several months associating with the person referred to as (b) (6). That he knew that (b) (6) was dealing drugs, that he heard other people refer to (b) (6) in this context and that (b) (6) discussed with him over a period of months how he had helped other people make money in the drug business, how he could help the respondent to do so, sometimes, apparently paid for food, took him around town, went to clubs and parties, etcetera, and the respondent indicates in this testimony that he

was essentially drawn in and attracted to the glamour or the prospect of easy money and spent time associating with (b) (6) for this reason, but he insists that he never actually saw drugs even on the occasion of the sale. That he never handled money or received any monetary compensation directly for being involved in any type of drug deal and had not, in fact, been involved in any drug deal with (b) (6) until the day of his arrest. Now, this is also theoretically true. It is not reflected by independent corroborating evidence such as, an investigator reflected in the investigative report, for example. It is certainly as possible that the respondent had been involved in other deals, had been paid money, had carried out errands, etcetera, etcetera, on behalf of (b) (6) in some time during the previous months, not established either way.

As far as the respondent's opinion about drug dealing or what may be considered the dangerous of drugs for society, the respondent has testified that he was not really conscious or aware of these matters until after his arrest and that when he came to prison and was enrolled in some substance abuse-type programs, that he learned more about the dangers of drugs and the affects they may have on the community. Frankly, the Court finds it somewhat difficult to credit this part of the testimony for two different reasons. Exhibit 6, which is the investigative report, does refer in the last paragraph on page 1 to the person (b) (6) being part of a distribution network that was smuggling

large amounts of heroin into this country and although the language is not clear, it seems either the drugs are coming from Pakistan by way of Afghanistan or directly from Pakistan having first come from Afghanistan. In any event, from the region of the world in which the respondent was well familiar with. Now, I also believe I can take administrative notice that some, certainly not all, but some of the heroin coming to the United States comes from this area of the world. And, frankly, I do not believe it is very credible for the respondent to state that he did not really understand the nature of the drug or the possible dangers of it. Heroin is not a drug which it seems to me would be dangerous just in one country or another. I consider it to be well known around the world through various organizations, including the World Health Organization, Interpol and so on to be a dangerous drug and the subject of really a worldwide effort to reduce or eliminate trafficking in heroin. And so I think it is difficult to believe that the respondent came from a country where the material is produced and then came to (b) (6) and lived and worked in areas where heroin abuse and drug abuse in general has been considered to be a serious problem for many years, yet did not really recognize the danger of the drug or the effect it might have on society until after he got to prison and listened to someone explain it in a class. I think this is not convincing testimony.

As far as the seriousness of the violation, the arrest

and conviction, which is the respondent's only known established violation of the law and certainly his only conviction, I consider it to be a very serious offense much for many of the same reasons that were just mentioned. I consider that heroin is a drug which for decades has been considered to be an extremely dangerous drug and one that has been certainly devoid of any implication of glamour or recreational use or non-addictive nature for many years. There may be people who would excuse the use of marijuana and consider that it is not physically addictive, etcetera, etcetera. And even in the 1980's, there are people who would make similar arguments for the use of cocaine and consider it to be a glamorous drug, one that is not particularly damaging, one that is not particularly dangerous to the user, but I do not think that anyone, certainly anyone who lived in (b) (6) for a few years, could really make this assumption about heroin anytime since perhaps the 1930's. It has always been considered to be a very serious drug. So, I do consider that it is a very dangerous drug. I do consider that the sale in this occasion which led to the conviction, is not the sale on a street corner of a small quantity by a person unfortunately addicted to heroin who is trying to support his own habit by selling it to someone else, but it was a large scale transfer of a sizable quantity of drugs, presumably for a fairly significant amount of money. And Exhibit 6 and common sense would indicate that this was not merely an isolated process on

the part of the person known as David, but was in fact, part of a large distribution network as the memo, Exhibit 6, would indicate. And I would also note that Exhibit 6 indicates that the respondent gave the authorities a great deal of information and it states in the last paragraph that the respondent has "displayed an eagerness to cooperate with this investigation and possible future investigations planned by this unit." The respondent gave the authorities specific information about various places where (b) (6) kept heroin, places where it could be bought, but also places where wholesale quantities were stored. So, as far as I'm concerned, the idea that the respondent had a very peripheral involvement and simply happened to be present a few times, associated with or used to hang out with somebody who was trafficking in heroin, but really had no particular knowledge about it himself, does not seem credible to me although the respondent insists that his involvement was very peripheral. As far as I am concerned, no matter what the respondent may say about the lack of common sense or education on the part of (b) (6) the major distributor, it is simply close to incredible that a person involved in the distribution of a very valuable, dangerous drug would let a casual acquaintance know where he keeps wholesale quantities of drugs and leave himself open to police arrest and investigation if this person gives the wrong information to somebody else, much less if this person gives it directly to the police. So, I do not really consider that this

part of the testimony can be considered very credible and I do think that the respondent was more involved in the heroin trafficking than he is willing to admit in his testimony today.

As far as the positive factors in the case, the respondent has the time he has spent in the United States, now going on about eight years. This is not a particularly long period of time. Where the statute requires a minimum of seven years of lawful domicile and the respondent is just barely over the minimum. The respondent does have relatives in the United States. He has his wife, a lawful permanent resident, who arrived with him who apparently became a legal resident as a beneficiary of the respondent's grant of asylum as far as I understand who is at the present time receiving public assistance, although in the past she has at times had some employment. The respondent and his wife have three children, all young in age, only one attends school at all. So, it certainly would be very difficult for the respondent's wife to engage in employment at this time without her husband around the house and I do not in any way blame her for being on public assistance, but there isn't much more in the nature of positive relationship through the wife than there is for the respondent in his own right. In other words, he is not married to a U.S. citizen who was born here. He's not married to a woman who has lived in the country for 20 years. She has not accomplished other things in the United States in terms of employment or whatever that would

add more to his as a positive factor. Obviously, I think the strongest positive factor in this case are the three U.S. citizen children that the respondent and his wife have and these children are all young, only one has started school. Their health apparently is good all having been born in this country and being young in age, I certainly consider this as a very strong positive factor. In my opinion, this is by far the most important positive factor that the respondent has.

The respondent has also testified about employment in the United States. He indicated that he attempted to and thought he was in fact contributing taxes to the government, although it is not clear whether he was or whether his employer was taking the tax money for his own purposes, but at least there is some testimony that the respondent sought to pay taxes and there is some indication of a recent refund from the government to the respondent and his wife indicating that the IRS apparently considered that the tax liabilities were at least current for one year and presumably for all. The respondent has his sister, who testified in the hearing. She is a young adult presently engaged to a man who lives in another country and whom she hopes to help immigrate to the United States. She has steady employment, presumably could support herself economically, might well be emotionally affected if her brother were deported from the United States, but I do not think in the near future is likely to depend on him for support. More likely, she would look to her own

resources and presumably her husband if he is able to join here in the United States.

As far as the question of rehabilitation, I do recognize that rehabilitation is not a requisite for relief under Section 212(c) and in fact in this case, I would consider it somewhat less important than in a case, for example, where there was a conviction for a crime of robbery or aggravated assault or some crime which has a direct affect on other people through violence. On the other hand, I think it is fair to say that trafficking in heroin is a crime which any adult in the United States should understand may well lead to crimes of violence by people who use the drug and who commit crimes in order to get money to buy more of the drug they're addicted to. That certainly is a key factor in the bad reputation that heroin has, the effect it has on its users, often turning them into people who commit violent crimes. So, the question of rehabilitation is of some significance to the Court, the fact that the respondent has a single conviction makes it perhaps less pressing. He does not have a long history of committing crimes one after the other despite being incarcerated or in other way sanctioned.

As far as the prospects for rehabilitation, there are several positive factors. First of all, there is a reference in the conviction record to a recommendation by the sentencing court that the respondent be considered for early release. This is obviously a favorable comment. It might be due to the

respondent's attempts to cooperate with the authorities which are also reflected in the Exhibit 6 or it might be due to a favorable assessment by the Court about the respondent's potential for rehabilitation, but I do want to indicate that I notice that comment by the sentencing court and try to give it some weight, although it is not too clear the motivation for it. Also, the respondent seems to have done well in prison. There is no indication that he has had any disciplinary violation and usually, the Immigration Service would have some indication if there was a disciplinary problem. So, I'll assume that his behavior in prison has been excellent. As far as the counseling in prison, he has described this. I am sure it may be of some value. Frankly, I cannot credit the respondent's assertion that he really did not understand the dangers of the drug before he got sent to prison. But perhaps the drug education courses may have some bearing on future rehabilitation.

As far as what might be considered negative indications for rehabilitation, it seems to me the seriousness of the offense, the quantity of heroin involved and so on indicates to me that more likely than not the respondent had been involved in such offenses on some occasions before and he's denied that in his testimony today. Certainly, I do not have any direct testimony to show that he did commit other offenses related to heroin, but I think it is likely that he did commit some. So, his denial of that indicates to the Court probably a lack of

truthfulness on this point and that certainly has a bearing on his prospects for rehabilitation. As far as the help that he has given to the authorities or tried to give to the authorities as reflected principally in Exhibit 6, the difficulty I have with this is that it was given at a time when the respondent had a very great self-interest, as he frankly admitted on questioning from the Court. That is to say, if he could produce the apparent ringleader of the group and give the authorities the chance to arrest this person (b) (6) then he himself believed that he would receive probation and I suppose it is possible that he would have. So, he was motivated by self-interest. On the other hand, he may have perhaps exposed himself to some danger by giving any information or cooperation to the authorities. So, that is a somewhat mixed picture there.

To summarize the factors in this case, I do not believe that there is a published decision in which the factual points on the positive side or the discretionary factor or all that similar to the factors in this case. The respondent has been a resident for a short time. He does not have very many close relatives in the United States except for his two witnesses and his three U.S. citizen children. There have been cases in which the respondent had several U.S. citizen children dependent upon him for support. Matter of Edwards is one example. That respondent had a very long and violent criminal record and had also lived in the United States for a much longer period of time. In the Busami case, the

respondent had never been married. He had no children. Likewise, in Marin, the respondent was unmarried and had no children. So, the presence of three quite young U.S. citizen children, but without a long period of time as a legal resident in the United States is a fact pattern that really is not presented in any decision that I am aware of. So, it is somewhat more difficult for the Court to assess this in terms that the Board might agree with.

I frankly think that it is a judgment call, a questionable matter, as to whether the respondent has what the Board would call unusual and outstanding equities. The short period of residence certainly would not be considered an unusual and outstanding equity. A few years of employment with a somewhat questionable situation about the taxes, I do not think adds very much to the case and I frankly do not feel that the respondent's wife situation adds very much to his in terms of discretionary factors because frankly, as far as I am concerned, she still does not have a realistic understanding of his participation in the offense and the picture he gives of associating for several months with this person David, going out to clubs and parties, driving around the city meeting people involved in selling heroin, is somewhat inconsistent with the picture of a very close marriage in which the parties are well aware of each other's activities. I assume that the respondent's wife, in fact, did not understand that he was in any way

associating with a major heroin dealer, but that certainly casts some doubt on the closeness of their marital relationship despite all the testimony about it. I frankly do not think that the three U.S. citizen children are enough to make this a case of unusual and outstanding equities. If these children were older, let's say, ten and twelve and had lived in the United States longer, attended school here longer and so on, then frankly, I would consider that to be a much closer case and probably would be unusual and outstanding equities. The youngest of these three children was conceived after the respondent had been arrested and after he had several months trying to produce this person (b) (6) for the authorities without success. It is somewhat difficult to give as much positive weight to a child who was born while the respondent was in prison and conceived when the respondent probably could have predicated that he was going to go to prison. But as far as the children as a whole, the three children, I recognize there may, in fact, be a hardship to them if they are removed from the United States because of the parent situation and returned to a country such as Afghanistan with their parents, assuming that the wife left the country with the respondent. But I frankly do not think that the children are enough as a positive factor, given their young age, their lack of years living in the United States, to count for unusual and outstanding equities.

If that evaluation is correct then the respondent, under the Board's decisions, would not qualify for relief in any

event. If the Court is wrong, if the respondent does have unusual and outstanding equities, then as far as this Court is concerned, I still would be very hesitant and I believe would not grant relief as a matter of discretion in this case. And the reason for that is simply the matters already discussed. The very serious nature of trafficking in heroin, the seriousness of this offense, and the question about the respondent's sincerity when he testifies that he did not realize the seriousness of drug abuse for the community and the question of whether he is really being truthful when he claims that he had never actually been involved in a drug deal until the date when he was arrested and convicted. As a matter of plausibility, I frankly doubt that most people involved in major drug deals are arrested the very first time they commit such a crime. I am not satisfied by that explanation and given my doubts about the respondent's sincerity in his testimony, I am frankly very worried as a matter of discretion about whether he can be trusted to obey the law in the future.

The last consideration I would mention very briefly is the question of the respondent's situation in Afghanistan if he is deported. As far as the Court is concerned, I do not have a reliable record to actually convince me what this respondent's situation would be if he is deported to Afghanistan. I am well aware that there has been decades of violent civil war in that country and I am well aware that many people in many parts of the

country live in desperate circumstances. I am not satisfied on certain points about the credibility of the respondent and for that reason, frankly, I am not satisfied that his situation in Afghanistan would be as desperate as he and his witnesses have indicated.

For this reason, I do order that the application for relief is hereby denied and I do order that the respondent be deported from the United States to Afghanistan based on the charges in the Order to Show Cause.

(b) (6)

Immigration Judge

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

Chairman

[redacted]

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

MYD

OCT 27 1995

[redacted]

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

Very Truly Yours,

Paul W. Schmidt
Chairman

Enclosure

Panel Members:

Mary Maguire Dunne

Patricia A. Cole

John Guendelsberger

File: A(b) (6) Date: OCT 27 1995

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: (b) (6)

ON BEHALF OF SERVICE: (b) (6)
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility; asylum; withholding of deportation

In a decision dated July 21, 1995, an Immigration Judge found the respondent deportable on the above-noted charges, determined he was statutorily ineligible for relief under section 212(c) of the Act, 8 U.S.C. § 1182, and ineligible as a matter of law for both asylum and withholding of deportation, and ordered him deported to Afghanistan, his country of citizenship. The respondent has appealed. The appeal will be sustained in part and the record will be remanded for further proceedings.

On appeal, the respondent first claims that he now has the necessary 7 years of lawful unrelinquished domicile to preliminarily qualify for a waiver of inadmissibility under section 212(c) of the Act. 1/ He also points out that at the hearing, the attorney for

---

1/ The record reflects that the respondent adjusted his status to that of lawful permanent resident on October 1, 1991, after having been paroled into the United States on or about August 4, 1988, as an applicant for asylum. The United States Court of Appeals for the (b) (6) Circuit held in (b) (6) (b) (6) that it is possible under certain circumstances for an alien to accumulate lawful domicile time in this country prior to his admission as a lawful permanent resident.

SA-51

the Immigration and Naturalization Service conceded that the respondent would satisfy the lawful domicile requirement of section 212(c) on August 4, 1995 (Tr. at 10, 14-15). In light of these circumstances, the respondent asks that the record be remanded to allow him the opportunity to apply for such relief.

Although the Service has filed a brief on appeal, it has voiced no opposition to the respondent's request to remand so that he may apply for a waiver of inadmissibility under section 212(c) of the Act. Accordingly, we will grant the respondent's request in this regard. On remand, the respondent will, of course, retain his burden of proving both his statutory eligibility for section 212(c) relief and that he merits such relief as a matter of discretion.

In light of this disposition, we need not address at this time the other issues raised on appeal. Accordingly, the record is remanded to enable the respondent to apply for a waiver of inadmissibility under section 212(c) of the Act.

ORDER: The appeal is sustained in part.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

File No.: A (b) (6) July 21, 1995

In the Matter of

(b) (6)

Respondent

IN DEPORTATION PROCEEDINGS

CHARGES: Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act -- convicted of an aggravated felony; and

Section 241(a)(2)(B)(i) of the Immigration and Nationality Act -- convicted of a controlled substance offense.

APPLICATION: Waive of excludability under Section 212(c) of the Act;

Asylum under Section 208(a) of the Act; and, in the alternative, withholding of exclusion and deportation.

ON BEHALF OF RESPONDENT:

(b) (6)

ON BEHALF OF SERVICE:

(b) (6)

ORAL DECISION OF THE IMMIGRATION JUDGE

The Immigration Service has charged in the Order to Show Cause issued in October of 1994, which Order to Show Cause was admitted as Exhibit 1. That the respondent is a native and citizen of Afghanistan who arrived in the United Statse seeking political asylum and he received permanent resident status under Section 209(b) of the Act in October 1991. The Order to Show

(R) THIS IS THE TEXT OF THE DECISION BEFORE FIRST APPEAL AND REMAND.

SA-53

SA-53

Cause also alleges a conviction under (b) (6) law in September 1993 for sale of heroin in the second degree.

In the hearing today on the record, counsel for the respondent has admitted the truth of the factual allegations and the record also includes Exhibit 2, the record of grant of lawful permanent resident status and Exhibit 3, the conviction record. It does seem to the Court that all this evidence together, and even the documentary evidence alone, constitutes clear and convincing evidence the respondent is subject to deportation as charged.

Since the respondent is deportable, the next question is whether he is eligible for any form of relief from deportation. The respondent has declined to name any country as a place of deportation and the Court has designated Afghanistan, his country of citizenship as the location. This raises the issue as to whether the respondent is eligible to seek asylum or in the alternative withholding.

Under regulations which took effect in the fall of 1990, a person who has been convicted of an aggravated felony such as the respondent would not be eligible to apply for asylum or withholding of deportation. There is a question as to whether this regulatory bar, which is also reflected in the statue, Section 208, applies to this respondent. Normally, it would appear clear that it does. However, this respondent did seek admission to the United States in 1988 as an applicant for asylum

and, eventually, was granted asylum by the Immigration Court in (b) (6). That application was filed before the cut-off date or the effective date of the statute and regulation. Therefore, there is a question whether the applicant's case can be considered under the previous version of the law and regulations.

I do not believe that it is so. There is a published decision from the Board of Immigration Appeals which states that when an asylum application is filed first with the District Director and then transferred to the Immigration Court for consideration, the date of the transfer or the date the asylum application is filed with the Immigration Court is the controlling date as to whether the new statute and regulations apply to that asylum claim. In this case, the applicant's new asylum application or request for asylum application in this deportation case clearly would be long after the effective date of the statute and regulations. The previous asylum application is a matter which as far as I am concerned has been completed, is no longer pending before the Court, served its purpose and is no longer vital or active. The respondent has since become a lawful permanent resident based on the past grant of asylum and I do not believe that he has a vested right to continue claiming asylum based on that same application which was made before the new regulations occurred. Presumably, if that were true, then 30 years from now, the applicant would be able to exercise his right

to seek asylum again in the United States under the version of the regulations which existed when he first arrived in this country and I do not believe that makes sense.

Here, in fact, a period of at least six years and probably seven have gone by since the original asylum application was prepared and filed. During that time, I think it is safe to take limited administrative notice. There have been some significant changes in Afghanistan. The withdrawal of Soviet troops from Afghanistan occurred in approximately 1989. There have since been various other developments in the country and there have been major developments in the surrounding region. And as far as I'm concerned, the asylum application that this Court would receive in this deportation case would be in every real sense of the word a new application, not simply a revived version of the old application. So, I do not feel that the respondent is eligible for asylum and withholding of deportation at this time under what I consider to be the plain meaning of the regulations, the Board decision which I mentioned earlier and the intent of Congress.

As far as the question of eligibility for relief under Section 212(c) of the Immigration Act, the record shows and the parties have essentially stipulated that the respondent would be eligible in every way to seek that relief except for one problem. The respondent first arrived in the United States in early August 1988. Therefore, he is approximately two weeks short at this

time of having seven years of domicile in the United States. I will assume and I believe that it is clear that his domicile in the United States has been lawful throughout since he arrived here in August 1988. So, the question is whether the Court should reset this case to allow him a hearing on 212(c) when today on the date of this hearing he is not eligible for that relief.

As far as this point is concerned, I think there is somewhat clear authority from the Board of Immigration Appeals. The Board has held in two decisions. Again, unfortunately, I do not have these decisions available at the prison today to cite, but I think they are easily located. As held in at least two decisions, that an Immigration Judge should not reset a deportation proceeding so that the respondent can become eligible for a form of relief which he does not have on the date of the hearing. As far as I am concerned, the respondent came much closer to his eligibility date for 212(c) because his case was reset more than three months based on the request for a continuance of his attorneys and he was entitled to that continuance because April 3rd was his first hearing. But today, I think the issues are clear and, in fact, the issues of deportability in this case are very simple. The only question that has arisen is whether there is eligibility for relief. At this time, I think, it's clear the respondent is not eligible for a 212(c) claim. It is true that it seems plain, he will be

eligible in two weeks. I do not believe that I have been given the authority by regulation or the Board's published decisions to put this case off even the two week period. And I will state for the record that, in fact, if this case was continued for some purpose, the earliest available date on this Court's calendar, in other words, the next time I would be available at this hearing location, would be at least August 7th when I will return here for a week and that docket is really already full. Even if I put the case on to my earliest possible date, it would be past the seven year anniversary of the arrival in the United States. So, if there was any continuance granted, the respondent by that time would be eligible for relief. Perhaps it would be simpler to reset the case for one reason or another and avoid the problem that may arise when the respondent makes an appeal of a decision. But I do not believe I should make the decision based on the question of whether or not one party will appeal it, but instead make the decision based upon whether or not I am entitled to take a certain action under the precedent decisions and the regulations. I do not think I am entitled or empowered to reset this case even two weeks so that the respondent becomes eligible for 212(c) relief.

For these reasons, it does seem to me that today the respondent is not eligible for any form of relief that has been mentioned and I can think of no other form of relief that he might be eligible for.

dmh

I therefore order that the respondent be deported from the United States to Afghanistan based on the charges in the Order to Show Cause.

(b) (6)
Immigration Judge

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) (b) (6)

**Name:** (b) (6) **A** (b) (6)

**Date of this notice: 11/9/2009**

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

NOV 12 2009

Panel Members:
Hess, Fred

File: A(b) (6) Date: NOV 0 9 2009

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: (b) (6)

ON BEHALF OF DHS: (b) (6)
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has filed an untimely motion to reopen based on a claim of changed country conditions arising in his native Afghanistan. The Department of Homeland Security opposes the motion. The motion will be granted.

In his motion, the respondent has not clearly identified the form of relief he wishes to pursue. To the extent he seeks to excuse the untimely filing of his motion in order to apply for asylum and withholding of deportation, he has failed to make a prima facie showing that he qualifies for such relief as a matter of law in light of his 1993 conviction for criminal sale of a controlled substance (heroin) in the second degree, for which he was sentenced to an indeterminate term of imprisonment, with a minimum term of 3 years and a maximum term of life. *See* Exh. 3 (record of conviction); sections 208(b)(2)(A)(ii) and (B) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B) (asylum); section 241(b)(3) of the Act (withholding of deportation).

The respondent has, however, explicitly expressed his belief that he will be tortured and killed upon returning to Afghanistan given the current conditions in that country, and he has identified his reasons why he believes this to be the case. *See* Motion to Reopen ("Motion"), attached declaration by the respondent. In light of these contentions, it appears that he wishes to apply for protection under the United Nations Convention Against Torture (CAT). In order to qualify for such relief, he must demonstrate that it is more likely than not he will be tortured by *government officials* or with their consent or acquiescence upon returning to his homeland. *See* 8 C.F.R. § 1208.16(c) (CAT standard of proof); 8 C.F.R. § 1208.18(a) (defining "torture"); *Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)(b) (6)
(b) (6)
(b) (6)

Included in the respondent's submissions are recent reports citing instances of arbitrary or unlawful killings by the Afghan government or its agents, as well as torture and abuse of civilians by government officials. *See e.g.*, Motion, Exh. C (2008 Country Reports on Human Rights Practices, issued February 25, 2009, by the United States Department of State, at sections 1a and c; Human Rights Watch Report reporting on events in 2008) and Motion at #14 and #15.

Based on the claims advanced and the evidence submitted, we believe that a sufficient showing has been made to exempt the respondent's motion to reopen from the filing deadline requirements, and to warrant reopening of his proceedings so that he may present his application for CAT protection given the current conditions in Afghanistan. On remand, the burden rests with the respondent to demonstrate eligibility for the relief he seeks. *See* 8 C.F.R. § 1240.8(d).

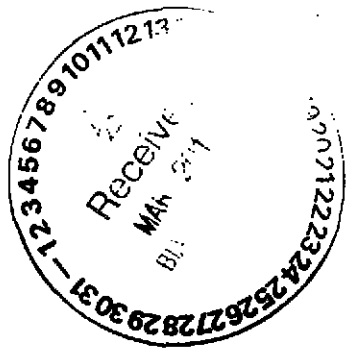
Accordingly, the motion to reopen is granted and the record is remanded for further proceedings.

ORDER: The motion to reopen is granted.

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

Frederick D. Hess

FOR THE BOARD



**U.S. District Court**
**United States District Court for the (b) (6)**
**CIVIL DOCKET FOR CASE #: (b) (6)**

(b) (6)
Demand: $0
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 11/08/1996
Date Terminated: 02/27/1997
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: U.S. Government Defendant

**Petitioner**

(b) (6)

represented by (b) (6)
*LEAD ATTORNEY*

V.

**Respondent**

**Janet Reno**
*ATTORNEY GENERAL*

represented by (b) (6)
*LEAD ATTORNEY*

**Respondent**

**Doris Meissner**
*COMMISSIONER OF THE IMMIGRATION & NATURALIZATION SERVICE*

represented by (b) (6)
(See above for address)
*LEAD ATTORNEY*

**Respondent**

**Immigration and Naturalization Service**

represented by (b) (6)
(See above for address)
*LEAD ATTORNEY*

**Respondent**

(b) (6)
*DISTRICT DIRECTOR*

represented by (b) (6)
(See above for address)

*LEAD ATTORNEY*

**Respondent**

(b) (6)

*OFFICER IN CHARGE*

represented by (b) (6)

*LEAD ATTORNEY*

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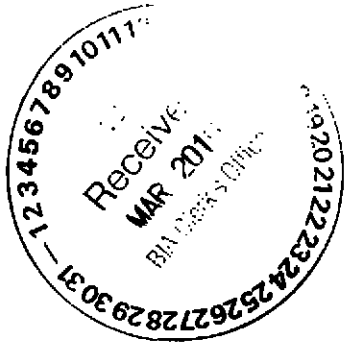
| **Billable Pages:** | 5 | **Cost:** | |



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)

U.S. DHS, Litigation Uni (b) (6)
(b) (6)

Name: (b) (6)

A (b) (6)

**Date of this notice: 10/30/2009**

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:
Holmes, David B.



14565

File: A(b) (6) Date:

OCT 3 0 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

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

ON BEHALF OF DHS: (b) (6)
Senior Attorney

APPLICATION: Reopening

Due to the circumstances presented in this case, and to resolve any issue regarding jurisdiction in this case, we will adjudicate the instant motion in the exercise of our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a). On September 1, 2009, the respondent, a native and citizen of Belarus, filed a motion to reopen these removal proceedings to afford him the opportunity to apply for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. §1255(i). The respondent's motion is supported by evidence that he is the beneficiary of an approved employment based visa petition (Form I-140). The burden is on the respondent to establish, *inter alia*, that his first labor certification was approvable when filed (Group Exh. 5). *See* 8 C.F.R. § 1245.10(a). Given the totality of the evidence now before us, we find reopening is warranted to afford the respondent the opportunity to apply for adjustment of status. The Department of Homeland Security will have the opportunity to challenge the respondent's eligibility for relief in remanded proceedings. The appropriate orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

14566

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

File A (b) (6) January 26, 2007

In the Matter of

(b) (6) ) IN REMOVAL PROCEEDINGS
Respondent )

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act, an alien who has remained longer than permitted after being admitted to the United States as a non-immigrant.

APPLICATION: Section 208(a) of the Immigration and Nationality Act, asylum. In the alternative, withholding of removal as to Belarus under Section 241(b)(3) of the Immigration and Nationality Act. In the alternative, protection under the Convention Against Torture.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is an adult man who is a native of the former Soviet Union and a citizen of Belarus. The respondent was placed in removal proceedings through the Notice to Appear, Exhibit 1 in this proceeding.

That states the charge referenced above based on allegations that the respondent last arrived in the United States as a H-1 non-immigrant, temporary worker in August 2000, and that his permission to remain in the United States expired no later than February 20, 2003.

believes looking at the case from the respondent's point of view, in other words, from the situation he has described in his testimony as his reasons to seek asylum, the respondent did in fact have good reason to apply for asylum under this theory of the case by at least his last arrival in the United States following a trip which he made out of the United States in the year 2000, with the intention of returning to his home country, Belarus, to obtain a passport stamp reflecting his new non-immigrant status as an H-1 worker.

During the course of that trip in the year 2000, the respondent traveled through Poland intending to go from there into his country. He indicates he was stopped and held on a warrant issued through the Interpol country from the country of Belarus describing criminal charges against the respondent and that he was in fact detained in Poland for at least 30 days for proceeding relating to that warrant before the warrant was dismissed by the Polish Court based on a finding that Belarus had not presented sufficient supporting evidence to justify honoring the warrant within the time allowed.

The respondent portrays this detention on a warrant in the year 2000 as being politically motivated or at least motivated by the same factors that underlie his current claim that he fears persecution or torture in Belarus.

The respondent in fact testified that after the warrant was dismissed by the Polish authorities and he was released from

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He further testified that during his brief stay in Belarus, while waiting to apply for the non-immigrant visa at the U.S. consulate there, he basically kept out of sight or "laid low" to avoid apprehension by the authorities.

Although the respondent describes himself acting in a way consistent with a "well-founded fear" of some problems that would occur in Belarus and although the respondent describes these problems as being of the nature of persecution which would justify an application for asylum, the respondent upon his return to the United States, having successfully obtained the non-immigrant visa at the consulate in Belarus, did not apply for asylum, not at that time, nor in the following year, nor when his non-immigrant visa status expired in 2003.

Respondent's attorney has made some explanations as to why the respondent did not do so and the respondent has also testified on this point.

Considering these explanations together, the Court would note the following. First, the fact that a new Interpol warrant was issued in 2005 is not a "new problem" or new evidence of a new wish to persecute the respondent that would give the respondent a new fear of persecution in his country. The respondent never thought and I believe it's never indicated that he did think that he was somehow out of danger in Belarus looking at the situation from his point of view.

The respondent's counsel indicated that the respondent

regulations, but also would essentially open to anyone with a plausible explanation of how they somehow thought they were going to become legal sometime in the future, the opportunity to avoid the filing deadline entirely, this is clearly not what Congress intended.

Furthermore, the Court would note that the respondent's testimony that he thought that the last presidential election in Belarus might lead to an improvement in conditions in the country seems a bit on the pollyanna side to the Court, but if the respondent did in fact think that in his own mind that the political situation in Belarus would improve greatly from his point of view through the defeat of the incumbent president of Belarus, that expectation certainly was dashed more than two years before the respondent actually did file his application for asylum and it did not continue as any bonafide excuse for not making such a timely application, assuming that it would be in the first place.

The Court likewise does not believe that there has been a dramatic change in quality in the country situation in Belarus which would make the respondent's asylum application timely at this time for reasons that did not essentially exist for years before this.

It is true that in every country, including in Belarus over the last few years, events occur which may make certain people have a slightly greater risk of being persecuted or which

United States since at least early 1999. So for the respondent not to be able to apply for an asylum due to some type of educational problem, language disability, lack of funds, et cetera simply does not apply in this case.

For all these reasons, the Court does not find that there is any timely application for asylum under Section 208 of the Immigration and Nationality Act before the Court in this case.

The result of this finding is, first, that the Court could not grant the application for asylum and, second, that as a result, the respondent needs to meet a higher level of proof or a higher degree of probability or a greater chance of suffering some dangerous consequence in his country in order to qualify for relief.

Specifically, the respondent's applications are now limited to withholding of removal under Section 241 of the Immigration and Nationality Act which requires a showing of a probability of persecution upon his return to Belarus or, alternatively, the respondent could show a probability that he would be subjected to torture within the terms of the Convention Against Torture and the implementing regulations in U.S. law which are also found at 8 C.F.R. 208.

The difference of these two applications from asylum is chiefly, in the Court's view, the difference concerning the degree of chance that a person may be subjected to torture or

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under the Convention Against Torture requires more than a 50 percent chance of torture.

This is not the only distinction. Torture is conduct more severe than many things that would qualify as persecution. So in reference to the Convention Against Torture, the regulations define this term to mean essentially what people mean when they use this term in everyday conversation, of the severe infliction of physical distress and pain or something very comparable to that. It does not include harassment. It doesn't include minor problems. It doesn't include minor physical pain. It doesn't include detention that doesn't include torture and it doesn't include many things that would be counted as "persecution".

However, as far as the withholding under Section 241, there the requirement is a showing of a probability of persecution, so that application under 241 is in some respects more lenient or easier to prove than an application under the Convention Against Torture.

As far as the question of the Convention Against Torture, it requires a showing that the torture would occur while the respondent, the applicant for relief, was held in custody and it has to be either inflicted by the government or with the acquiescence of the government and I would specifically note that this includes, under the (b) (6) Circuit's interpretation, what might be called "willful blindness." See (b) (6) a

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believe that the respondent has established that he himself has been subject to past persecution in Belarus. The Court believes that the only actual harm of the respondent was the detention in Poland on a warrant which was not pursued at that time. I understand that being held in reference to criminal allegations for 30 days or more can be unpleasant. The respondent has not described his treatment in Poland as constituting actual persecution by the government there. In fact, the respondent suggests that the government officials in Poland were sympathetic or believed his account of the reasons why this warrant was not well laid.

So the Court does not believe that that period of being held in custody in Poland constitutes persecution. From the point of view of the Polish government, it was trying to fulfill its obligations under Interpol agreements, et cetera.

Furthermore, the Court doesn't believe that any other conduct that's occurred to the respondent constitutes past persecution of the respondent.

As far as the present risk of the respondent if he were returned to Belarus at the present time or in the foreseeable future, I understand the respondent to argue the following factors.

First, to some extent just because the respondent is an educated person, just because the respondent has been in some ways oriented towards Western ideas, has spent time in the United

existed under the former Soviet Union, has combined this with government corruption at highest levels to use business models that are not standard Communist business models in order to enrich private leaders, including the president of the country, by large sums of money, and, as a part of that, to try to control, have leverage over or put out of competition other private businesses that might compete with the government. So I do agree that the secondary evidence establishes these types of tendencies in Belarus in terms of the government's view of people who have been involved in private, economic dealings, capitalism, et cetera.

Given that background in the secondary evidence which is somewhat consistent with the respondent's presentation of his case, is the respondent's explanation of why he would be in trouble in Belarus, actually a credible explanation.

First of all, the respondent was held once in Poland on a warrant and that warrant apparently was renewed as it seems recently in 2005, and it appears that the renewal of the warrant or the recirculation of the warrant through Interpol lead to the respondent's detention as I understand it, I'm not sure that this is established as cause and effect, but it appears likely, lead to the respondent's detention in the United States.

The respondent says that this warrant relates to mistaken incorrect allegations of financial fraud in the activities that he was the president of and owner of before his

that such conduct has not occurred.

In fact, the Court believes the secondary evidence would reflect and respondent's expert witness seemed to agree to some extent, that there were in fact widespread examples of financial fraud during the breakup of the former Soviet Union in the early 1990's and newspapers stories, et cetera, have described people who became suddenly very rich in a very short period of time by abusing the relatively undeveloped systems of the government to deal with the sudden advent of capitalism or something like it.

The respondent himself claims that there was no fraud involved in this company. The respondent has not actually established that. I do recognize that it can be difficult to establish a negative point. The Court does believe the financial arrangements that the respondent has documented and described in reference to that company can be considered somewhat out of the ordinary, somewhat unnatural, et cetera. The Court notes again that there was a new arrangement made concerning guarantees for the old loan during the period while the respondent was being detained in Poland. This looks, given the period of time that went by, as though it was very much an emergency arrangement and it does open the question why such an arrangement was never made before or why it was actually necessary. The respondent's explanation about his business dealings and the company he had in Belarus before he left that country are not actually clearly

part business deal.

The respondent's description of all these events indicates that he was acting in good faith and being honest, but in fact there is no particular clarity about this and the idea that a person whose company had just become inactive and which was close to actually failing as a company taking a vacation to the United States, leaving behind his new bride, frankly, is not, in the Court's view, plausible or credible.

Furthermore, the Court notes that after the respondent decided it would make sense to look for a job offer in the United States, he encountered a problem, as he described it, with the first job offer, the first employer who offered to help him obtain Immigration status. He says he eventually realized that they didn't really intend to have him as a regular employee, but instead were just thinking that he would help them out from time to time.

The respondent then indicates that he went to the trouble of finding a second petitioner to help him obtain Immigration status in the United States and he says that he thought of that petitioner as one where he could obtain legal status as a non-immigrant, yet at the same time he was thinking that he would continue to work for the first petitioner on a contractual basis from time to time. And the Court would note, according to my understanding of non-immigrant status for an H-1 employee, that person is limited to working for one employer in

assume that the respondent arrived in the United States in 1998 intending to just vacation here for a brief time, in my view is the implausible explanation of this chain of events.

The respondent's expert witness assumes, as I understand his testimony, assumes that the respondent is credible in describing the business problems that the respondent has had in Belarus and, likewise, accepts as credible the respondent's explanation that there was no fraud involved, there was no financial irregularity, et cetera, and that the charges against the respondent are ill-founded. However, the Court does not believe that the expert has explained in any way how the expert knows this is true or why the expert should necessarily accept the respondent's credibility on these points.

I would say that despite the expert's agreed expertise on many points about the breakup of the former Soviet Union, the character of the governments which have resulted from the independent countries, et cetera, that the expert has in his testimony tended to be rather prone to exaggeration and innuendo. One example is that the expert several times in his testimony referred to the recent poisoning of a former KGB agent in London. The Court would note, first, this is unsolved; that, second, it involves someone from Russia as opposed to Belarus; and, third, the people involved in that case are much more prominent and potentially might pose much more threat to somebody in the former Soviet Union than the respondent's case which is not of such a

government of Belarus assumes that anyone who is sent back to Belarus after not winning asylum in the United States must therefore be a spy.

The Court would note that in terms of the secondary evidence about problems in Belarus in terms of human rights relations of the practice of the government, the violations in human rights by the government in Belarus, they tend to focus around two issues. First, they focus around political opponents who have taken political stands, been involved in campaigns of opposition groups, or some type of human rights group in Belarus. Second, they tend to focus on people who are journalists or members of the media and the respondent is not either.

As far as the Court is concerned, the elements of innuendo or speculation in the respondent's claim include the comments concerning the death of his business partner who was involved in the business dealings with the company before the respondent left Belarus. The Court doesn't believe there's much more than speculation about the theory that the death of this business partner in his own apartment at a relatively young age in his thirties must be a politically motivated murder by the agents of the government of Belarus. In fact, men in the their thirties do sometimes die under such circumstances and it's not unknown that people say, "But he looked so health. He seemed so young and vital, et cetera. I can't believe he had a heart attack." That does occur.

be suspicious and evidence that he might be persecuted in Belarus. He took steps to try to avoid going to Belarus. Those were unsuccessful. He entered Belarus by a roundabout way through a third country to avoid arriving in the way that might be logically expected and he says that while he was in Belarus, he stayed for only a short time and did not go out in public except to try to get his visa.

All the same, the respondent did in fact return to the country where he claims he fears persecution and he did so immediately after being detained on a criminal charge and held in custody in Poland for at least 30 days.

This conduct by the respondent is one indication that the respondent's current fear of being persecuted in Belarus is not actually well-founded fear as a factual matter.

The Court's conclusion would be as follows: the respondent's description of his travel, basic events in the past, the existence of a company that he owned in Belarus, et cetera, I believe he's credible on those basic points. As far as the elements of what the Court considers to be speculation, innuendo, or unjustified, unsupported fear of persecution in Belarus, the Court doesn't believe that the respondent is necessarily credible for all the conclusions that he reaches on those issues.

The Court thinks that it is still unclear whether the respondent engaged in some type of improper financial dealings in Belarus, further unclear whether those dealings amounted to

mlk

to torture in order to extract money or force the respondent to do something in business or science that it wants him to do, the respondent would not need to prove that this was because the respondent has an unpopular political opinion, belongs to a disfavored particular social group such as capitalist, et cetera. However, the element in the Convention Against Torture that requires actual torture while held in custody as opposed to persecution does tend to counterbalance this difference in the relief applications.

The Court may agree that the respondent has a well-founded fear of suffering some harm in Belarus. However, the Court in conclusion does not believe that the evidence in this case is clear enough or compelling enough to establish a probability greater than 50 percent that the respondent will be persecuted or will suffer torture in Belarus.

In this regard, I would return to the point made before that unless the probability of such harm is shown to be greater than 50 percent, the respondent has not prevailed in such relief applications. Harsh as it may seem, even a showing of a 49 percent chance that the respondent would be tortured in Belarus is not enough under the terms of the regulations to justify a grant of such relief.

For this reason, the Court is denying the relief that has been sought for the reasons stated.

**U.S. District Court**
**United States District Court for the (b) (6)**
**CIVIL DOCKET FOR CASE #: (b) (6)**

(b) (6)
Demand: $0
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 11/08/1996
Date Terminated: 02/27/1997
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: U.S. Government Defendant

**Petitioner**

(b) (6)

represented by (b) (6)
*LEAD ATTORNEY*

V.

**Respondent**

**Janet Reno**
*ATTORNEY GENERAL*

represented by (b) (6)
*LEAD ATTORNEY*

**Respondent**

**Doris Meissner**
*COMMISSIONER OF THE IMMIGRATION & NATURALIZATION SERVICE*

represented by (b) (6)
(See above for address)
*LEAD ATTORNEY*

**Respondent**

**Immigration and Naturalization Service**

represented by (b) (6)
(See above for address)
*LEAD ATTORNEY*

**Respondent**

(b) (6)
*DISTRICT DIRECTOR*

represented by (b) (6)
(See above for address)

14581

| | | |
|---|---|---|
| 01/30/1997 | 10 | (b) (6) |
| 02/10/1997 | 11 | |
| 02/10/1997 | 12 | |
| 02/10/1997 | 13 | |
| 02/12/1997 | 14 | |
| 02/14/1997 | 15 | |
| 02/18/1997 | 16 | |
| 02/26/1997 | 17 | |
| 02/27/1997 | 18 | |
| 02/27/1997 | | |
| 03/10/1997 | 19 | |
| 03/10/1997 | 20 | |
| 04/03/1997 | 21 | |

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|---|---|---|
| 12/02/1997 | 31 | (b) (6) |
| 09/28/1998 | 32 | |
| 01/14/1999 | 33 | |
| 05/20/1999 | 34 | |
| 06/29/1999 | | |
| 12/02/1999 | 35 | |
| 03/03/2000 | 36 | |

14583

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|---|---|---|
| 06/04/2001 | 48 | (b) (6) |
| 07/11/2001 | | |
| 07/13/2001 | 49 | |
| 08/30/2001 | 50 | |

| PACER Service Center | | | |
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| Transaction Receipt | | | |
| 02/02/2010 10:17:40 | | | |
| PACER Login: (b) (6) | | Client Code: | (b) (6) |
| Description: | Docket Report | Search Criteria: | |
| Billable Pages: | 5 | Cost: | 0.40 |

14584

**To:** Keller, Mary Beth (EOIR)
**Subject:** Upcoming (b) (6) Visit

Hi MaryBeth,

It was good to see you again at the AILA-EOIR Liaison meeting and AILA Spring CLE last week. To follow up on our discussion about your upcoming trip to (b) (6) on May 7, 2009, I have spoken with several (b) (6) AILA attorneys and we would like to schedule the time to meet with you as the ACIJ for the (b) (6) Immigration Court.

In addition to concerns we discussed involving IJ (b) (6), AILA attorneys have reported concerns involving IJ (b) (6) including threats to report two attorneys to the DOJ involving motions to withdraw as counsel of record. The detained docket also remains a concern.

Please advise regarding what time(s) would work for you and, if possible, Juan Osuna. Once I know your availability, I'll contact the Chicago Bar Association to request a meeting room.

Thanks very much, and I hope that you have a great weekend!

Sincerely,

(b) (6)
AILA-EOIR Liaison Committee Vice-Chair

(b) (6)

**EOIR FOIA Processing (EOIR)**

**From:** (b) (6)
**Sent:** Tuesday, March 16, 2010 10:43 AM
**To:** Keller, Mary Beth (EOIR)
**Subject:** Re:(b) (6)
**Attachments:** Motion to Withdraw and IJ decision 03 10 2010.pdf

Dera Mary Beth,

Thank you for your email. I am available this morning from 10 am to 1 pm (EST)/9 am to 12:30 pm (CST), today after 4:30 (EST)/3:30 (CST) or Thursday 12 noon to 2 pm (EST)/11 am to 1 pm (CST).

Non-Responsive
Non-Responsive I could possibly speak with you and Judge Dufresne on Friday afternoon, although I will not have my client file with me then.

Attached is a scanned copy of the motion to withdraw that I filed with the Immigration Court regarding (b) (6) (b) (6) It will contain the A# and basis for withdrawal, which was the absolute lack of communication/response/cooperation from the respondent from March 20, 2009 until I saw him outside the courtroom last Thursday afternoon, March 11, 2010. A copy of the certified return receipt card signed by the respondent in October 2009 from the letter I sent him then is included with the motion as Exhibit A. A copy of the order signed by Judge (b) (6) during the hearing on March 11, 2010 in which (b) (6) denied my motion to withdraw is also attached.

I look forward to hearing from you. Thank you again for your time and attention to this issue.

Sincerely,

(b) (6)

On Mon, Mar 15, 2010 at 4:12 PM, Keller, Mary Beth (EOIR) <(b) (6) wrote:

(b) (6)

I will be happy to talk with you this week regarding the incident you called about on Friday with Judge Zerbe. Let me know a convenient time for you. I would also be happy to get the A# from you, and pass it on to ACIJ Jill Dufresne, who is

## EOIR FOIA Processing (EOIR)

**From:** DuFresne, Jill (EOIR)
**Sent:** Monday, August 30, 2010 12:55 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: (b) (6)

Non-Responsive

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Monday, August 30, 2010 11:18 AM
**To:** DuFresne, Jill (EOIR)
**Subject:** Re: (b) (6)

Non-Responsive

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Sent from my BlackBerry Wireless Device

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**From:** DuFresne, Jill (EOIR)
**To:** Keller, Mary Beth (EOIR)
**Sent:** Mon Aug 30 08:12:58 2010
**Subject:** RE: (b) (6)
Thanks and good idea about a prompt for (b) (6) ..Hope you are having a good time!!

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Thursday, August 26, 2010 6:02 PM
**To:** DuFresne, Jill (EOIR)
**Cc:** Schroeder, Nicole (EOIR); Moutinho, Deborah (EOIR)
**Subject:** (b) (6)

Jill,
My mistake, Nicole has not yet started to review Judge (b) (6) cases. I told her she can go ahead and start to do that; we want to know what a random review would turn up any way you cut this. Maybe you can talk to her next week if you have any specific ideas or thoughts about how she should randomly select what to listen to. Meanwhile, Deborah can run her the databases, and also let her take a look at my files, both in my office and in central filing, so she can get a feel for where we've had problems in the past. If (b) (6) comes through, she can listen to that a number specifically. Might be worth one last prompt to her to send us the info?!
Thanks all –
mtk

*MaryBeth Keller*
Assistant Chief Immigration Judge
EOIR/OCIJ
703/305-1247
mary.beth.keller@usdoj.gov

## Moutinho, Deborah (EOIR)

**From:** Smith, Gary (EOIR)
**Sent:** Wednesday, June 02, 2010 5:20 PM
**To:** Keller, Mary Beth (EOIR)
**Cc:** Moutinho, Deborah (EOIR)
**Subject:** FW: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)
**Attachments:** (b) (6) Remand to Another Immigration Judge.pdf; Fwd IJ ComplaintFrom (b) (6) and (b) (6) (4).htm; FW IJC Memo - Matter of (b) (6) (BIA September 30 2009).htm; (b) (6) pdf; (b) (6) pdf

This pertains to **Complaint Number 157** (Matter o(b) (6) IJ (b) (6) IC) and **Complaint Number 89** (three matters raised by (b) (6) ).

First, in regard to **Complaint Number 157**, I obtained the complete transcript of the original hearing (91 pages) and read it, I reviewed and printed out the pages from the CASE database regarding the case, read the (b) (6) Circuit decision, and sent the complete referral packet to Judge (b) (6) and gave (b) (6) a date by which to respond back to me. I am convinced that (b) (6) took this seriously and introspectively looked at (b) (6) own handling of the case. (b) (6) recognized the Court's criticism of (b) (6) as "prosecutorial" and that (b) (6) decision could have been much better. From my reading of the transcript, (b) (6) did give the respondent and his counsel a full opportunity to present their case. In sum, I believe that (b) (6) recognizes the issues raised by the Circuit Court and that no further action on this is required. I think this would likely fit in the "Other" block.

Second, in regard to **Complaint Number 89**, (b) (6) complaints, his first complaint pertained to a case that was in the process of appeal to the BIA. On October 5, 2009I reviewed that case in our database and was convinced that it would be inappropriate to intercede in that process. The BIA issued its decision (fourth attachment) and did not conclude that Judge (b) (6) was biased during the proceedings and dismissed the appeal. That aspect of his complaint was merits based. His second complaint was that (b) (6) had not given adequate attention to a motion to reopen that he had filed. The BIA had at the time of his complaint already decided that issue and dismissed the appeal (fifth attachment). Judge (b) (6) also addressed this in (b) (6) response and I am convinced this complaint is unsubstantiated and decided so on October 30, 2009. The third complaint pertained to an adjustment of status application. I directed the case be set back in earlier and it was completed on September 11, 2009. Judge (b) (6) also addressed this in (b) (6) response. (b) (6) raised the issue of the contentiousness between Judge (b) (6) and (b) (6) I have addressed that before with the Chief Counsel and the Chief Counsel removed (b) (6) from courtroom duties for six months because he was causing issues in cases. I believe that the three issues (b) (6) raised were all addressed—the first and second were decided by the BIA and the third case was moved up to an earlier date and completed. Judge (b) (6) is well aware from the Board referral and the complaint I referred to (b) (6) to address that (b) (6) conduct is carefully scrutinized.

Unless you see something further that needs to be done, I believe both complaints have been resolved.

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**From:** Smith, Gary (EOIR)
**Sent:** Friday, October 30, 2009 11:10 AM
**To:** (b) (6) (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)

Judge (b) (6) Thank you for carefully reviewing these. I will go over what you have submitted.

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**From:** (b) (6) (EOIR)
**Sent:** Thursday, October 29, 2009 8:45 PM
**To:** Smith, Gary (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)



14726; 14830

Dear Judge Smith:

Thank you for allowing me to comment and for the extension.

After reviewing the subject through the ROP which included transcript, tapes, and evidence, it remains unclear to me the meaning of the (b) (6) Circuit's conclusion that my inquiry was prosecutorial and inquisitorial and ,therefore, led to a faulty credibility finding, in light of me giving Respondent's counsel a full opportunity to conduct his direct examination, and even offering to keep the record open at the end of the hearing for more evidence -- specifically on the nature of the scars, which could have been supported through medical examination. .

The hearing began almost an hour late; it was in the afternoon after a 45-case morning master, and there was not just the issue of persecution, but the issues of Respondent's identity, and the timeliness of his filing – not shown in the ROP documents (no passport, no birth certificate), and not shown after the sole testimony of Respondent presented at the hearing. With this backdrop, and an unfamiliar Respondent counsel (only time in my six years that he has appeared before me), I can only surmise that for the sake of expediency I began the questioning which would also let parties know where the gaps in the evidence lie.

However, after my inquiry, Respondent counsel was always given the opportunity to question Respondent further, usually expressly by the Court. And at the conclusion of the hearing, I stated that the record would be closed unless there was additional evidence to be offered – a statement made after I had discussed with Respondent counsel the need for medical documentation to show that Respondent's head scars were not inconsistent with the manner in which he claimed that they had been inflicted – by sticks or tree branches; and for rebuttal of DHS evidence which disputed Respondent's claim about the time of his arrival in the US by cargo ship. Respondent counsel declined and decided to rest on the record.

The governing regulations expressly allow the IJ to "receive and *adduce* material and relevant evidence." 8 C..F.R. 1240.33 (b) (2005), 1240.32 (b) (2008). Respondent's head scars were demonstrative evidence, relevant and material to his claim of a persecutory beating, which could have influenced a favorable outcome if accompanied by medical documentation showing the scarring was consistent with cuts from tree branches or wood sticks from trees, as Respondent had described the weapons. I disagree with the (b) (6) Circuit finding that I focused too much on the head wounds and scarring –to the contrary it was the best evidence that Respondent put forth, in light of the absence of reliable identity documents showing his relationship to alleged family members forming the basis for social group based persecution. My continued questioning was to illicit some detail to support his case as opposed to undermine his credibility as found by the (b) (6) Circuit (p.5); for I could have just left the lack of evidence as it was and found that Respondent did not corroborate his claim. From the transcript, it appears that Respondent, without much detail, described a serious wound, but his head showed faint signs of scarring.

Since it is possible that tree branch cuts to the head may leave a particular type scarring, especially if there were no stitches, an adequate detailing by Respondent of his medical treatment was material, because Respondent had provided no expert medical documentation and apparently did not intend to offer such. This is where I was going with my inquiry on Respondent's head wounds and the treatment. The (b) (6) Circuit discourse on the scarring, I believe, lends support to the proper focus of my inquiry, when it engages in speculation about head wounds not being a fleshy part of the body. (fn 1, p.5) and that stitches are not always appropriate. The resolution of these issues were best left for a medical expert, but absent such documentation, it was appropriate for the Court to attempt to elicit such details from Respondent about his wounds the treatment when he showed a resultant scar on his head. Contrary to the (b) (6) Circuit's decision, the availability of medical treatment in Africa, was not an issue at

the hearing. An issue was whether Respondent's wounds were stitched or not since "very deep" wounds, not stitched and allowed to heal over a two month period while bandaged would likely heal differently and have a different looking and textured scar aa opposed to stitched wounds. Thus, the contrast between Respondent's description of his wounds, albeit not very detailed, and the size and prominence of the scarring (two years old at the time of the hearing), would properly be a basis for a credibility finding —that is where the Court was going with its inquiry.

From my assessment of the ROP and tapes, whereby Respondent Counsel, was given a full and fair opportunity to examine his client, and to present additional evidence, after having the benefit of the Court's expressed concerns about the issues, I see no basis for the (b) (6) Circuit characterization of my manner as "prosecutorial," in content or in tone; and no basis for finding that my "inquisitorial inquiry" was for the purpose of undermining Respondent's credibility.

Admittedly, it was technically, not the best decision that I have rendered, as there was no applicable law section, perhaps omitted in error, or in the rush of trying to meet completion goals. One might also dispute my reliance on lack of credibility as opposed to lack of corroboration to deny the claim since this matter was pre-REAL ID. However, the case law on which I relied was cited, and appropriate.

Regarding the complaint by (b) (6) forwarded by AILA representatives (b) (6) and (b) (6) there was only one ROP available to review (b) (6) Both cases about which he specifically complained have been completed: the 672 page Motion to Reconsider (b) (6) filed 01/06/09 was completed on (b) (6) 09 at approximately 10:00 pm, because I was on leave the next day (my birthday). I believe that I stayed so late to complete it (despite being "lazy") because I may have had some word perfect problems and lost a draft (not certain if this was the case – but it happened); had a full docket that day; and the deadline was approaching or may have expired, but not by many days. I reviewed the submissions, relevant portions on country background, focusing on dates of the articles and events, and those portions relating to the alleged social group, and the general populace, whether highlighted or not; and of course counsels' briefs. I made a decision which was apparently sent out the following day.

Regarding (b) (6) it was timely handled with an order issued on 9/11/09, after receipt of DHS' non opposition. Despite representations by (b) (6) that DHS did not oppose, DHS did not respond until 9/03/09 with its non opposition letter. This matter had been a source of contention with (b) (6) (b) (6) at an earlier master on 10/06/08, so it was particularly important that DHS's agreement to the grant be in writing; my worksheet notes indicated that a joint motion would be filed. There is no evidence that (b) (6) ever requested a joint motion, but instead proceeded to phone (b) (6) legal tech,.almost daily, starting a few days after filing the motion, inquiring if the judge signed the order. (b) (6) unnecessarily escalated this matter to headquarters, even though DHS had not yet responded.

(b) (6) is further disingenuous when he ties the continuation of his client's matter with the Court's termination of a master calendar on that day (if it even occurred on that day) because (b) (6) usual combative conduct would not abate and DHS stated that they had no replacement. (b) (6) case was already finished when I aborted the rest of the morning master; his case was continued solely because DHS was to lodge a charge; and it is unlikely that he remained in the courtroom.

It is interesting how (b) (6) minimized the level of disruption that day (which occurred even during his case) by describing the impasse as "the judge not feel[ing] like going forward with (b) (6) in the Courtroom, [which] happened on many other occasions." (b) (6) may not have thought much of the conflict because of the level of drama that he engaged as a TA.

Actually (b) (6), as a TA, was often as disruptive and unprofessional as (b) (6) His manner always turned angrily disrespectful when the Court ruled against him – even coming out of his seat and flailing his arms. At masters, he attempted to always take charge, beginning a colloquy before I even had a chance to sit down, speaking over me, instructing me what I needed to do before I had a chance to open the ROP, always challenging me.. His disrespect was so apparent that on an occasion, a woman from the courtroom approached him while he was seated at counsel's table, and interrupted one of his performances with a note she had scribbled, stating that he must respect the lady judge.

Now it appears to me from these unsubstantiated personal attacks on me, that Mr. Murphy may not just be (b) (6) too – depicting me as lazy several times in his complaint. His description of my court as a "mystery court", I assume to be (b) (6) attempt at some humor, but appears to refer to my protracted nearly (b) (6) month absence in (b) (6); and then part time until about October because of (b) (6) I was on approved sick leave and I believe on that, you have the particulars.

(b) (6) accusation that I "belittle[]" parties, I assume refers to making a judgment and giving directions on the presentation of a case if it is inadequate. Brief continuances for preparation of a decision are routine; and if a party will be unavailable, I will accommodate them by rescheduling, allowing telephonic appearances; or for them to come and listen to a taped decision. So I'm unclear to what (b) (6) is referring when he accuses me of making parties return in the evening after a morning hearing. And while I have been here until as late as 8pm to do a decision after a hearing which may have ended around 6pm, it is only when all parties consent; and this is rare, contrary to (b) (6) (b) (6) accusation that it happens frequently. In fact, if I am such a violator of what a good judge should do, why does (b) (6) not have some concrete examples? For an attorney with the experience (b) (6) claims, I find it pathetic for him to base on rumor, innuendo, and lies, a formal complaint about an IJ.

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**From:** Smith, Gary (EOIR)
**Sent:** Thursday, October 22, 2009 12:56 PM
**To:** (b) (6) (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) BIA September 30, 2009)

I'll extend it until October 29th. That should help. Thanks for letting me know.

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**From:** (b) (6) (EOIR)
**Sent:** Thursday, October 22, 2009 12:55 PM
**To:** Smith, Gary (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)

Judge Smith: Is it possible for you to give me an extention for my comments, at least until Monday. My hearing docket is full today and tomorrow and I need to prepare for next week's televideo detail requiring some preparation on laws in other jurisdictions, as well as more focus on criminal aspects effecting relief? I go to (b) (6) and my weekends are still devoted to me catching up with personal matters (b) (6) so I have not had after- work hours time to spend on this. I have not had time to review yet the ROP which I understand is with (b) (6) Thanking you in advance for your time and consideration. IJ (b) (6)

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**From:** Smith, Gary (EOIR)
**Sent:** Wednesday, October 07, 2009 3:55 PM

**To:** (b) (6) (EOIR)
**Subject:** FW: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)
**Importance:** High

Dear Judge (b) (6)

Attached is a memorandum with attachments relating to a case that you heard on October 24 and 28, 2005, Matter of (b) (6) In this case the (b) (6) Circuit Court of Appeals rejected the adverse credibility determination and remanded this case, recommending that the BIA remand the case for a hearing before a different immigration judge. The BIA did so. The (b) (6) Circuit in its decision remanding the case, stated: "The prosecutorial manner of this IJ during (b) (6) hearing and the inquisitorial inquiry that underpins some of the IJ's reasons for rejecting (b) (6) credibility cause us to conclude that everyone is better served by having another 'pair of eyes' evaluate (b) (6) credibility if the Board concludes that the record must be developed further."

I have reviewed the matters provided by the BIA Chairman and the status of the case in our database. Please provide me your comments regarding the (b) (6) Circuit's characterization of your conduct of the proceedings, by not later than **October 23, 2009**. The Record of Proceedings will be mailed back to the (b) (6) Court.

Thanks.

**Gary W. Smith**
**Assistant Chief Immigration Judge**
**(703) 305-1247**

Post-Script: I have also attached (b) (6) complaint(s) that I provided you at the Court on September 16th and would like for you to provide me your comments regarding his complaint on or before October 23d. Thanks.

## EOIR FOIA Processing (EOIR)

**From:** Burr, Sarah (EOIR)
**Sent:** Thursday, June 18, 2009 8:21 AM
**To:** Keller, Mary Beth (EOIR)
**Cc:** Pomeranz, Sharon (EOIR)
**Subject:** FW: (b) (6) and (b) (6) decisions

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**From:** (b) (6) (EOIR)
**Sent:** Wednesday, June 17, 2009 11:21 AM
**To:** Burr, Sarah (EOIR)
**Subject:** RE: (b) (6) and (b) (6) decisions

I agree.

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**From:** Burr, Sarah (EOIR)
**Sent:** Tuesday, June 16, 2009 1:55 PM
**To:** (b) (6) (EOIR)
**Subject:** (b) (6) and (b) (6) decisions

To recap our discussion today, I am ordering you to issue decisions in each of these cases no later than Friday, July 17, 2009. The (b) (6) decision (b) (6) was remanded from the BIA in April, 2004 for a full decision and none has been issued to date, over 5 years later. The (b) (6) case, A (b) (6) was remanded by the Board in December, 2003, and no decision has been issued for almost 6 years. These cases must be decided by July 17th, 2009.

14812

## Moutinho, Deborah (EOIR)

**From:** Smith, Gary (EOIR)
**Sent:** Wednesday, June 02, 2010 5:20 PM
**To:** Keller, Mary Beth (EOIR)
**Cc:** Moutinho, Deborah (EOIR)
**Subject:** FW: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)
**Attachments:** (b) (6) Remand to Another Immigration Judge.pdf; Fwd IJ ComplaintFrom (b) (6) and (b) (6) (4).htm; FW IJC Memo - Matter of (b) (6) (BIA September 30 2009).htm; (b) (6) pdf; (b) (6) pdf

This pertains to **Complaint Number 157** (Matter o(b) (6) IJ (b) (6) IC) and **Complaint Number 89** (three matters raised by (b) (6) ).

First, in regard to **Complaint Number 157**, I obtained the complete transcript of the original hearing (91 pages) and read it, I reviewed and printed out the pages from the CASE database regarding the case, read the (b) (6) Circuit decision, and sent the complete referral packet to Judge (b) (6) and gave (b) (6) a date by which to respond back to me. I am convinced that (b) (6) took this seriously and introspectively looked at (b) (6) own handling of the case. (b) (6) recognized the Court's criticism of (b) (6) as "prosecutorial" and that (b) (6) decision could have been much better. From my reading of the transcript, (b) (6) did give the respondent and his counsel a full opportunity to present their case. In sum, I believe that (b) (6) recognizes the issues raised by the Circuit Court and that no further action on this is required. I think this would likely fit in the "Other" block.

Second, in regard to **Complaint Number 89**, (b) (6) complaints, his first complaint pertained to a case that was in the process of appeal to the BIA. On October 5, 2009I reviewed that case in our database and was convinced that it would be inappropriate to intercede in that process. The BIA issued its decision (fourth attachment) and did not conclude that Judge (b) (6) was biased during the proceedings and dismissed the appeal. That aspect of his complaint was merits based. His second complaint was that (b) (6) had not given adequate attention to a motion to reopen that he had filed. The BIA had at the time of his complaint already decided that issue and dismissed the appeal (fifth attachment). Judge (b) (6) also addressed this in (b) (6) response and I am convinced this complaint is unsubstantiated and decided so on October 30, 2009. The third complaint pertained to an adjustment of status application. I directed the case be set back in earlier and it was completed on September 11, 2009. Judge (b) (6) also addressed this in (b) (6) response. (b) (6) raised the issue of the contentiousness between Judge (b) (6) and (b) (6) I have addressed that before with the Chief Counsel and the Chief Counsel removed (b) (6) from courtroom duties for six months because he was causing issues in cases. I believe that the three issues (b) (6) raised were all addressed—the first and second were decided by the BIA and the third case was moved up to an earlier date and completed. Judge (b) (6) is well aware from the Board referral and the complaint I referred to (b) (6) to address that (b) (6) conduct is carefully scrutinized.

Unless you see something further that needs to be done, I believe both complaints have been resolved.

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**From:** Smith, Gary (EOIR)
**Sent:** Friday, October 30, 2009 11:10 AM
**To:** (b) (6) (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)

Judge (b) (6) Thank you for carefully reviewing these. I will go over what you have submitted.

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**From:** (b) (6) (EOIR)
**Sent:** Thursday, October 29, 2009 8:45 PM
**To:** Smith, Gary (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)

Dear Judge Smith:

Thank you for allowing me to comment and for the extension.

After reviewing the subject through the ROP which included transcript, tapes, and evidence, it remains unclear to me the meaning of the [redacted] Circuit's conclusion that my inquiry was prosecutorial and inquisitorial and ,therefore, led to a faulty credibility finding, in light of me giving Respondent's counsel a full opportunity to conduct his direct examination, and even offering to keep the record open at the end of the hearing for more evidence -- specifically on the nature of the scars, which could have been supported through medical examination. .

The hearing began almost an hour late; it was in the afternoon after a 45-case morning master, and there was not just the issue of persecution, but the issues of Respondent's identity, and the timeliness of his filing – not shown in the ROP documents (no passport, no birth certificate), and not shown after the sole testimony of Respondent presented at the hearing. With this backdrop, and an unfamiliar Respondent counsel (only time in my six years that he has appeared before me), I can only surmise that for the sake of expediency I began the questioning which would also let parties know where the gaps in the evidence lie.

However, after my inquiry, Respondent counsel was always given the opportunity to question Respondent further, usually expressly by the Court. And at the conclusion of the hearing, I stated that the record would be closed unless there was additional evidence to be offered – a statement made after I had discussed with Respondent counsel the need for medical documentation to show that Respondent's head scars were not inconsistent with the manner in which he claimed that they had been inflicted – by sticks or tree branches; and for rebuttal of DHS evidence which disputed Respondent's claim about the time of his arrival in the US by cargo ship. Respondent counsel declined and decided to rest on the record.

The governing regulations expressly allow the IJ to "receive and *adduce* material and relevant evidence." 8 C..F.R. 1240.33 (b) (2005), 1240.32 (b) (2008). Respondent's head scars were demonstrative evidence, relevant and material to his claim of a persecutory beating, which could have influenced a favorable outcome if accompanied by medical documentation showing the scarring was consistent with cuts from tree branches or wood sticks from trees, as Respondent had described the weapons. I disagree with the [redacted] Circuit finding that I focused too much on the head wounds and scarring –to the contrary it was the best evidence that Respondent put forth, in light of the absence of reliable identity documents showing his relationship to alleged family members forming the basis for social group based persecution. My continued questioning was to illicit some detail to support his case as opposed to undermine his credibility as found by the [redacted] Circuit (p.5); for I could have just left the lack of evidence as it was and found that Respondent did not corroborate his claim. From the transcript, it appears that Respondent, without much detail, described a serious wound, but his head showed faint signs of scarring.

Since it is possible that tree branch cuts to the head may leave a particular type scarring, especially if there were no stitches, an adequate detailing by Respondent of his medical treatment was material, because Respondent had provided no expert medical documentation and apparently did not intend to offer such. This is where I was going with my inquiry on Respondent's head wounds and the treatment. The [redacted] Circuit discourse on the scarring, I believe, lends support to the proper focus of my inquiry, when it engages in speculation about head wounds not being a fleshy part of the body. (fn 1, p.5) and that stitches are not always appropriate. The resolution of these issues were best left for a medical expert, but absent such documentation, it was appropriate for the Court to attempt to elicit such details from Respondent about his wounds the treatment when he showed a resultant scar on his head. Contrary to the [redacted] Circuit's decision, the availability of medical treatment in Africa, was not an issue at

the hearing. An issue was whether Respondent's wounds were stitched or not since "very deep" wounds, not stitched and allowed to heal over a two month period while bandaged would likely heal differently and have a different looking and textured scar aa opposed to stitched wounds. Thus, the contrast between Respondent's description of his wounds, albeit not very detailed, and the size and prominence of the scarring (two years old at the time of the hearing), would properly be a basis for a credibility finding —that is where the Court was going with its inquiry.

From my assessment of the ROP and tapes, whereby Respondent Counsel, was given a full and fair opportunity to examine his client, and to present additional evidence, after having the benefit of the Court's expressed concerns about the issues, I see no basis for the (b) (6) Circuit characterization of my manner as "prosecutorial," in content or in tone; and no basis for finding that my "inquisitorial inquiry" was for the purpose of undermining Respondent's credibility.

Admittedly, it was technically, not the best decision that I have rendered, as there was no applicable law section, perhaps omitted in error, or in the rush of trying to meet completion goals. One might also dispute my reliance on lack of credibility as opposed to lack of corroboration to deny the claim since this matter was pre-REAL ID. However, the case law on which I relied was cited, and appropriate.

Regarding the complaint by (b) (6) forwarded by AILA representatives (b) (6) and (b) (6) there was only one ROP available to review (b) (6) Both cases about which he specifically complained have been completed: the 672 page Motion to Reconsider (b) (6) filed 01/06/09 was completed on (b) (6) 09 at approximately 10:00 pm, because I was on leave the next day (my birthday). I believe that I stayed so late to complete it (despite being "lazy") because I may have had some word perfect problems and lost a draft (not certain if this was the case – but it happened); had a full docket that day; and the deadline was approaching or may have expired, but not by many days. I reviewed the submissions, relevant portions on country background, focusing on dates of the articles and events, and those portions relating to the alleged social group, and the general populace, whether highlighted or not; and of course counsels' briefs. I made a decision which was apparently sent out the following day.

Regarding (b) (6) it was timely handled with an order issued on 9/11/09, after receipt of DHS' non opposition. Despite representations by (b) (6) that DHS did not oppose, DHS did not respond until 9/03/09 with its non opposition letter. This matter had been a source of contention with (b) (6) (b) (6) at an earlier master on 10/06/08, so it was particularly important that DHS's agreement to the grant be in writing; my worksheet notes indicated that a joint motion would be filed. There is no evidence that (b) (6) ever requested a joint motion, but instead proceeded to phone (b) (6) legal tech,.almost daily, starting a few days after filing the motion, inquiring if the judge signed the order. (b) (6) unnecessarily escalated this matter to headquarters, even though DHS had not yet responded.

(b) (6) is further disingenuous when he ties the continuation of his client's matter with the Court's termination of a master calendar on that day (if it even occurred on that day) because (b) (6) usual combative conduct would not abate and DHS stated that they had no replacement. (b) (6) case was already finished when I aborted the rest of the morning master; his case was continued solely because DHS was to lodge a charge; and it is unlikely that he remained in the courtroom.

It is interesting how (b) (6) minimized the level of disruption that day (which occurred even during his case) by describing the impasse as "the judge not feel[ing] like going forward with (b) (6) in the Courtroom, [which] happened on many other occasions." (b) (6) may not have thought much of the conflict because of the level of drama that he engaged as a TA.

Actually (b) (6), as a TA, was often as disruptive and unprofessional as (b) (6). His manner always turned angrily disrespectful when the Court ruled against him – even coming out of his seat and flailing his arms. At masters, he attempted to always take charge, beginning a colloquy before I even had a chance to sit down, speaking over me, instructing me what I needed to do before I had a chance to open the ROP, always challenging me.. His disrespect was so apparent that on an occasion, a woman from the courtroom approached him while he was seated at counsel's table, and interrupted one of his performances with a note she had scribbled, stating that he must respect the lady judge.

Now it appears to me from these unsubstantiated personal attacks on me, that Mr. Murphy may not just be (b) (6) too – depicting me as lazy several times in his complaint. His description of my court as a "mystery court", I assume to be (b) (6) attempt at some humor, but appears to refer to my protracted nearly (b) (6) month absence in (b) (6); and then part time until about October because of (b) (6) I was on approved sick leave and I believe on that, you have the particulars.

(b) (6) accusation that I "belittle[]" parties, I assume refers to making a judgment and giving directions on the presentation of a case if it is inadequate. Brief continuances for preparation of a decision are routine; and if a party will be unavailable, I will accommodate them by rescheduling, allowing telephonic appearances; or for them to come and listen to a taped decision. So I'm unclear to what (b) (6) is referring when he accuses me of making parties return in the evening after a morning hearing. And while I have been here until as late as 8pm to do a decision after a hearing which may have ended around 6pm, it is only when all parties consent; and this is rare, contrary to (b) (6) (b) (6) accusation that it happens frequently. In fact, if I am such a violator of what a good judge should do, why does (b) (6) not have some concrete examples? For an attorney with the experience (b) (6) claims, I find it pathetic for him to base on rumor, innuendo, and lies, a formal complaint about an IJ.

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**From:** Smith, Gary (EOIR)
**Sent:** Thursday, October 22, 2009 12:56 PM
**To:** (b) (6) (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) BIA September 30, 2009)

I'll extend it until October 29th. That should help. Thanks for letting me know.

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**From:** (b) (6) (EOIR)
**Sent:** Thursday, October 22, 2009 12:55 PM
**To:** Smith, Gary (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)

Judge Smith: Is it possible for you to give me an extention for my comments, at least until Monday. My hearing docket is full today and tomorrow and I need to prepare for next week's televideo detail requiring some preparation on laws in other jurisdictions, as well as more focus on criminal aspects effecting relief? I go to (b) (6) and my weekends are still devoted to me catching up with personal matters (b) (6) so I have not had after- work hours time to spend on this. I have not had time to review yet the ROP which I understand is with (b) (6) Thanking you in advance for your time and consideration. IJ (b) (6)

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**From:** Smith, Gary (EOIR)
**Sent:** Wednesday, October 07, 2009 3:55 PM

**To:** (b) (6) (EOIR)
**Subject:** FW: IJC Memo - Matter of (b) (6) (BIA September 30, 2009)
**Importance:** High

Dear Judge (b) (6)

Attached is a memorandum with attachments relating to a case that you heard on October 24 and 28, 2005, Matter of (b) (6) In this case the (b) (6) Circuit Court of Appeals rejected the adverse credibility determination and remanded this case, recommending that the BIA remand the case for a hearing before a different immigration judge. The BIA did so. The (b) (6) Circuit in its decision remanding the case, stated: "The prosecutorial manner of this IJ during (b) (6) hearing and the inquisitorial inquiry that underpins some of the IJ's reasons for rejecting (b) (6) credibility cause us to conclude that everyone is better served by having another 'pair of eyes' evaluate (b) (6) credibility if the Board concludes that the record must be developed further."

I have reviewed the matters provided by the BIA Chairman and the status of the case in our database. Please provide me your comments regarding the (b) (6) Circuit's characterization of your conduct of the proceedings, by not later than **October 23, 2009**. The Record of Proceedings will be mailed back to the (b) (6) Court.

Thanks.

**Gary W. Smith**
**Assistant Chief Immigration Judge**
**(703) 305-1247**

Post-Script: I have also attached (b) (6) complaint(s) that I provided you at the Court on September 16th and would like for you to provide me your comments regarding his complaint on or before October 23d. Thanks.

14834; 14730

**Sent:** Tuesday, May 08, 2007 5:58 PM
**To:** (b) (6) (EOIR)
**Subject:** FW: Judge (b) (6) Visit to (b) (6)

(b) (6)

I want to thank you again for conducting training for IJ (b) (6) last week at the (b) (6) Court.

I would like for you to provide me with an summary/assessment of IJ (b) (6) week with you. Your assessment, along with the one provided by ACIJ Rico Bartolomei (below) will better enable us to determine our next step with regards to training for Judge (b) (6)
Please contact me if you have any questions.

Thanks

MCM

-----Original Message-----
**From:** Bartolomei, Jr. Rico (EOIR)
**Sent:** Friday, April 27, 2007 8:23 PM
**To:** Neal, David L. (EOIR); McGoings, Michael (EOIR)
**Cc:** Keller, Mary Beth (EOIR); (b) (6) (EOIR); Barrett, Robert J. (EOIR)
**Subject:** Judge (b) (6) Visit to (b) (6)

Good Afternoon David & Mike,

As the "field" ACIJ here in (b) (6), I felt it my duty to provide to you both a summary report of Judge (b) (6) visit with us this week. Judge (b) (6) arrived timely and with an open mind. (b) (6) sat in with several Judges including myself, and observed the proceedings carefully. (b) (6) was receptive to feedback, inquisitive about our styles of adjudication, and willing to entertain constructive comments from several of us regarding approaches to the conduct of our hearings. While our time together was only one week, I am satisfied that Judge (b) (6) was very reflective of (b) (6) practices and is willing to consider new ways of approaching the hearings.

In fact, I would like to make a request of you. As you know, we are currently attending to the (b) (6) docket through the detail of other IJs while we await the permanent reassignments. I am now in the process of filling details for June, July, and August. With yours and Mike's permission, I would like to detail Judge (b) (6) to (b) (6) for two weeks in July. I believe that it would benefit us all. I would be able to fill that void in the (b) (6) calendar. I would also be in a position (if this is something that you and Mike might desire) to monitor those two weeks and provide further feedback to you on the matters I wrote above. I believe that it would benefit Judge (b) (6) because (b) (6) would be back on the bench hearing cases (b) (6) would consider cases in a different circuit, and (b) (6) would be challenged to adjudicate matters in a new court. As you and Mike consider the course of action, I wanted to let you know that I would welcome the opportunity to have his help for two weeks in (b) (6) If you approve of the detail, please let me know at your earliest convenience.

Also, I wanted to commend to you the fine work of (b) (6) once again. I am not sure what (b) (6) thoughts might be about (b) (6) but once again he has done a terrific job. I am not sure who made the decision to ask for (b) (6) assistance again, but whoever did made the right one. I wanted to let you know just how much I appreciate all that he continues to do for the (b) (6) Immigration Court and for EOIR.

If you need any further information or feedback from me, please let me know. Regards, Rico.

14844

**EOIR FOIA Processing (EOIR)**

**From:** Wahowiak, Marlene (OPR) <Marlene.Wahowiak2@usdoj.gov>
**Sent:** Tuesday, February 10, 2009 1:48 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: IJ (b) (6)

Can someone forward the BIA decisions in these cases along with (b) (6) decisions?

Thanks,
Marlene

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**From:** Keller, Mary Beth (EOIR) [mailto:Mary.Beth.Keller@usdoj.gov]
**Sent:** Tuesday, February 10, 2009 12:30 PM
**To:** Wahowiak, Marlene (OPR)
**Subject:** RE: IJ (b) (6)

Marlene,
Also, per our conversation re: Judge (b) (6), though we have received some additional "complaints" relating to Judge (b) (6) they were either frivolous, not substantiated, or matters that were appropriately addressed to the BIA.
mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
**Mary.Beth.Keller@usdoj.gov**
***703.305.1247***

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Tuesday, February 10, 2009 10:47 AM
**To:** Wahowiak, Marlene (OPR)
**Subject:** RE: IJ (b) (6)

Marlene,

As with IJ (b) (6) I also do not have supervisory records on Judge (b) (6) those would be with ACIJ Burr in (b) (6) (b) (6) I am not aware of any prior disciplinary actions.

According to my information, following some criticisms by the (b) (6) Circuit, as well as some concerns expressed by the BIA, the judge was counseled and sent to training at the (b) (6) immigration court with IJ (b) (6) in April 2008.

We were aware of the (b) (6) case in 2007 when it was being briefed by OIL, as well as when it was being argued, i.e., before the decision. We were also apprised by the AUSA who handled the case of another argument that occurred in the (b) (6) Circuit in October 2007, in which the ij was criticized at oa, but the actual decision that came out was only a summary order. (b) (6)

See also

(b) (6) 2006).

(b) (6) BIA 2/01/2007

14994; 15086; 15175; 15190; 15231; 15237

(b) (6), BIA 10/24/2008.

(b) (6), BIA 10/22/2008.

(b) (6) BIA 11/06/2008.

(b) (6), BIA 12/18/2008.

(b) (6) BIA 1/16/2009.

Obviously many of the above cases out of BIA came following (b) (6) as well as post dated the judge's training in April 2008.

Mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
**Mary.Beth.Keller@usdoj.gov**
***703.305.1247***

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**From:** Wahowiak, Marlene (OPR) [mailto:Marlene.Wahowiak2@usdoj.gov]
**Sent:** Monday, February 09, 2009 5:30 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: IJ (b) (6)

Thanks.

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**From:** Keller, Mary Beth (EOIR) [mailto:Mary.Beth.Keller@usdoj.gov]
**Sent:** Monday, February 09, 2009 5:27 PM
**To:** Wahowiak, Marlene (OPR)
**Subject:** RE: I (b) (6)

Marlene,
I should be able to get back to you tomorrow.
Tx.
mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
**Mary.Beth.Keller@usdoj.gov**
***703.305.1247***

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**From:** Wahowiak, Marlene (OPR) [mailto:Marlene.Wahowiak2@usdoj.gov]
**Sent:** Sunday, February 08, 2009 12:52 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** IJ (b) (6)

14995; 15087; 15176;
15191; 15232; 15238

**Mary Beth:**

**I'm preparing for an upcoming interview with [redacted] Any priors, complaints, etc. re: [redacted]?**

**The case I have is [redacted] *v. Mukasey*.**

**Thanks,**
**Marlene**

14996; 15088; 15177; 15192; 15233; 15239;

**To:** (b) (6) (EOIR)
**Subject:** RE:

Judge (b) (6)
Apologies for the delay. Non-Responsive
Non-Responsive
I will take a look soon, and know how worrisome this kind of thing can be. But, keep it in perspective and remember that reviewing bodies aren't perfect either ☺. And please know that we know you are not a bigot ---
Go home and have a good weekend, and will talk next week.
mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
**Mary.Beth.Keller@usdoj.gov**
***703.305.1247***

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**From:** (b) (6) (EOIR)
**Sent:** Friday, April 24, 2009 11:53 AM
**To:** Keller, Mary Beth (EOIR)
**Subject:**

Hi Mary Beth,
I haven't heard back from you on the (b) (6) decision but I wanted to give you a few of my thoughts. Naturally, I am disappointed by the circuit court's accusation that I engage in stereotyping and the implication that I am homophobic. I do not believe this is true. Regarding stereotyping, it is clear to me that the circuit court completely misunderstood the point I was trying to make. I wanted the record to reflect that the respondent's appearance conforms to his gender. That observation is relevant because a gender conforming individual is less likely to be targeted for mistreatment. In other cases, I have made the opposite observation that the respondent's appearance was non-gender conforming. That fact supported a finding that the respondent's sexual orientation was more visible, leading to a greater likelihood of persecution. Clearly, in the (b) (6) case, I was not engaging in stereotyping since I found that the respondent had credibly established that he was homosexual despite his gender conforming appearance.
I would hope that DOJ could support its people when they are unfairly accused. On the other hand, it may be that the best course at this point is to let this thing blow over. I have been getting that advice from the people around me who tell me "not to worry". Yet, I do worry. I have many gay friends and relatives and it hurts to know that they may read that I am, after all, a bigot.
Thanks for taking the time to read this.
(b) (6)



15021

## EOIR FOIA Processing (EOIR)

**From:** (b) (6) (EOIR)
**Sent:** Thursday, April 30, 2009 6:38 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** (b) (6)

Hi Judge,
I've got the transcript from the Immigration Court hearing and the respondent's appeal brief. I am looking forward to getting the briefs from the circuit court. If you can't get the briefs, I could walk over to the circuit court and ask to copy their record. Which illustrates a problem with the way the circuit court operates. Even though this is a sensitive case, the circuit court has created a public record with no concern for that sensitivity. They have published the respondent's name and his story, thereby outing him. I do think this changes the case so that the respondent can argue the changed circumstances exception to the one-year asylum filing rule. Now, he is eligible for asylum, not just withholding!
I agree that it is best to avoid head on collisions-although I think it wouldn't hurt if the circuit court (as well as the IJ) learned something from this experience.
Non-Responsive
Thanks again.
DLL

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Thursday, April 30, 2009 3:12 PM
**To:** (b) (6) (EOIR)
**Subject:** RE:

Judge,
I am trying to get the briefs from OIL and will probably be successful. I'll keep you posted.
I know that BIA looks carefully at these when they come back, first to determine whether they've been specifically ordered to do something, and then, if not, and they've been instead "encouraged", they then decide the prudent course of action.
I'd rather try to avoid the head on collision on that matter of the circuit courts' authority, at least at this point. But, let's see how things unfold.
mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
**Mary.Beth.Keller@usdoj.gov**
***703.305.1247***

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15022

## EOIR FOIA Processing (EOIR)

**From:** (b) (6) (EOIR)
**Sent:** Monday, May 18, 2009 3:51 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: (b) (6) Cir. criticizes IJ in this one.

Thank you for the briefs. I read them right away.
It is some consolation to see that the OIL Trial Attorney understood my decision and the BIA decision. But it is alarming to see how the alien's attorney changed the focus of the decisions and how she invented issues based on things that were "implied" or "suggested". Then she attacked those things rather than what the decisions actually said. The Circuit Court did the same thing.
I am starting to think that we can no longer do oral decisions if we face such hostile treatment on review.
By the way, our Kurzban's arrived today. Thanks again, (b) (6)

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Monday, May 18, 2009 10:30 AM
**To:** (b) (6) (EOIR)
**Subject:** FW: (b) (6) Cir. criticizes IJ in this one.

Judge (b) (6)
See the attached briefs.
mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
(b) (6)
***703.305.1247***

15023

## EOIR FOIA Processing (EOIR)

**From:** Griswold, Stephen (EOIR)
**Sent:** Friday, January 08, 2010 5:55 PM
**To:** Moutinho, Deborah (EOIR); Keller, Mary Beth (EOIR)
**Cc:** Griswold, Stephen (EOIR)
**Subject:** RE: ACIJ report (b) (6)

Marybeth –

Please close out complaint against (b) (6) received 4/21/09. My understanding was that this was adequately addressed when you were the ACIJ.

Thanks,
- Steve

Stephen S. Griswold
Assistant Chief Immigration Judge
Executive Office for Immigration Review
Immigration Court
120 Montgomery Street, Suite 800
San Francisco, CA 94104
(415) 705-4415 x (b) (6)
stephen.griswold@usdoj.gov

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**From:** Moutinho, Deborah (EOIR)
**Sent:** Tuesday, December 22, 2009 9:00 AM
**To:** Griswold, Stephen (EOIR); Keller, Mary Beth (EOIR)
**Subject:** RE: ACIJ report

Hello Sir

Here is your portion of the open reports in the DB. Please let me know if you have any questions or need more information.

Thanks
Deborah

---

**From:** Griswold, Stephen (EOIR)
**Sent:** Wednesday, December 16, 2009 4:53 PM
**To:** Keller, Mary Beth (EOIR); Moutinho, Deborah (EOIR)
**Subject:** RE: ACIJ report

OK. Thanks!

---

**From:** Keller, Mary Beth (EOIR)
**Sent:** Wednesday, December 16, 2009 1:53 PM
**To:** Moutinho, Deborah (EOIR)
**Cc:** Griswold, Stephen (EOIR)
**Subject:** ACIJ report

Deborah,
Next week could you please send Judge Griswold a copy of what is in the DB relating to his courts?
Steve,



15024

It's in disarray, but, should give you an idea. We're working on it!!
mtk

*MaryBeth Keller*
Assistant Chief Immigration Judge
EOIR/OCIJ
703/305-1247
mary.beth.keller@usdoj.gov

15025

**EOIR FOIA Processing (EOIR)**

**From:** Wahowiak, Marlene (OPR) <Marlene.Wahowiak2@usdoj.gov>
**Sent:** Tuesday, February 10, 2009 1:48 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: IJ (b) (6)

Can someone forward the BIA decisions in these cases along with (b) (6) decisions?

Thanks,
Marlene

---

**From:** Keller, Mary Beth (EOIR) [mailto:Mary.Beth.Keller@usdoj.gov]
**Sent:** Tuesday, February 10, 2009 12:30 PM
**To:** Wahowiak, Marlene (OPR)
**Subject:** RE: IJ (b) (6)

Marlene,
Also, per our conversation re: Judge (b) (6), though we have received some additional "complaints" relating to Judge (b) (6) they were either frivolous, not substantiated, or matters that were appropriately addressed to the BIA.
mtk

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***MaryBeth Keller***
***Assistant Chief Immigration Judge***
***OCIJ/EOIR***
**Mary.Beth.Keller@usdoj.gov**
***703.305.1247***

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**Sent:** Tuesday, February 10, 2009 10:47 AM
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See also

(b) (6) 2006).

(b) (6) BIA 2/01/2007

15086; 14994; 15175; 15190; 15231; 5237;

(b) (6), BIA 10/24/2008.

(b) (6), BIA 10/22/2008.

(b) (6) BIA 11/06/2008.

(b) (6), BIA 12/18/2008.

(b) (6) BIA 1/16/2009.

Obviously many of the above cases out of BIA came following (b) (6) as well as post dated the judge's training in April 2008.

Mtk

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**Sent:** Monday, February 09, 2009 5:30 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: IJ (b) (6)

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**Sent:** Monday, February 09, 2009 5:27 PM
**To:** Wahowiak, Marlene (OPR)
**Subject:** RE: I (b) (6)

Marlene,
I should be able to get back to you tomorrow.
Tx.
mtk

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**From:** Wahowiak, Marlene (OPR) [mailto:Marlene.Wahowiak2@usdoj.gov]
**Sent:** Sunday, February 08, 2009 12:52 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** IJ (b) (6)

14995; 15087; 15176;
15191; 15232; 15238;

**Mary Beth:**

**I'm preparing for an upcoming interview with I(b) (6) Any priors, complaints, etc. re:(b) (6)?**

**The case I have is(b) (6) *v. Mukasey*.**

**Thanks,**
**Marlene**

15088; 14996; 15177; 15192; 15233; 15239;

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15175; 14994; 15086; 15190; 15231; 15237

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Mtk

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15176; 14995; 15087;
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15177; 14996; 15088; 15192; 15233; 15239;

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Mtk

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15191; 14995; 15087;
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**Thanks,**
**Marlene**

15192; 14996; 15088; 15177; 15233; 15239;

## Moutinho, Deborah (EOIR)

**From:** Keller, Mary Beth (EOIR)
**Sent:** Tuesday, January 11, 2011 5:44 PM
**To:** Moutinho, Deborah (EOIR)
**Cc:** Keller, Mary Beth (EOIR); Dufresne, Jill (EOIR)
**Subject:** (b) (6) 330

D –
I've edited the language describing the allegations to reflect the problem better. We can close this one out as merits related. The BIA found the judge erred in certifying the case back for "reconsideration." If you do that defiantly, as Judge (b) (6) did, you may wind up with a disciplinary action. Here, the BIA was more reserved in its language finding the certification was "error". It was really a performance issue that I'm sure the subsequent BIA decision took care of!
I will provide copies of all the decisions to Judge Dufresne, just so that she is aware of what transpired in the past with Judge (b) (6) on this – it happened in 2008 so pre dates the evaluation period.
mtk

*MaryBeth Keller*
Assistant Chief Immigration Judge
EOIR/OCIJ
703/305-1247
mary.beth.keller@usdoj.gov

15198

## EOIR FOIA Processing (EOIR)

**From:** Wahowiak, Marlene (OPR) <Marlene.Wahowiak2@usdoj.gov>
**Sent:** Tuesday, February 10, 2009 1:48 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: IJ (b) (6)

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***Assistant Chief Immigration Judge***
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***703.305.1247***

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15231; 14994; 15086; 15175; 15190; 15237;

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**Sent:** Sunday, February 08, 2009 12:52 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** IJ (b) (6)

15232; 14995; 15087;
15176; 15191; 15238;

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15233; 14996; 15088; 15177;
15192; 15239;

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**Sent:** Sunday, February 08, 2009 12:52 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** IJ (b) (6)

15238; 14995; 15087;
15176; 15191; 15232

**Mary Beth:**

**I'm preparing for an upcoming interview with [redacted] Any priors, complaints, etc. re: [redacted]?**

**The case I have is [redacted] *v. Mukasey*.**

**Thanks,**
**Marlene**

15239; 14996; 15088; 15177; 15192; 15233

## EOIR FOIA Processing (EOIR)

**From:** Dean, Larry R. (EOIR)
**Sent:** Wednesday, January 04, 2012 9:24 AM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: (b) (6) complaint #396

It was a verbal counseling. I'm not sure if I have the date; I will try to find that, but believe it was in the late October timeframe. LRD

---

**From:** Keller, Mary Beth (EOIR)
**Sent:** Tuesday, January 03, 2012 5:10 PM
**To:** Dean, Larry R. (EOIR)
**Cc:** Moutinho, Deborah (EOIR)
**Subject:** (b) (6) complaint #396

Larry,
This one is old old old.
Believe that this one was closed out with performance counseling (despite being outside of the rating period)(b) (5)
(b) (5)
Need to close out – is it oral performance counseling, and if so, what date?
Tx.
Mtk

---

**From:** Dean, Larry R. (EOIR)
**Sent:** Thursday, September 08, 2011 4:50 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: report questions

No update on (b) (6) I should have taken Deborah up on her offer to get the ROP for me when I was at HQ. Not here yet.

You are correct on (b) (6) It was because of the delay treated as a performance issue. Incidentally, October 22 is the end of the current extension. It will come very quickly.

LRD

---

**From:** Keller, Mary Beth (EOIR)
**Sent:** Thursday, September 08, 2011 2:28 PM
**To:** Dean, Larry R. (EOIR)
**Subject:** report questions

Larry,

Here's where I have questions on your IJs:

(b) (6)– Matter of (b) (6) came in from BIA on 7/11/11 – any update on that?

(b) (6)– Matter of (b) (6) from BIA on 10/20/10. Last entries are that you rec'd the rop on 10/27/10 and (b) (5)
(b) (5)
(b) (5) Did you decide to just mention this in (b) (6) performance assessment or am I making that up?



15348

## EOIR FOIA Processing (EOIR)

**From:** Keller, Mary Beth (EOIR)
**Sent:** Friday, August 19, 2011 11:50 AM
**To:** Burr, Sarah (EOIR)
**Subject:** RE: 2 IJC memos from the BIA

Hi Sarah,
I've now read the 47 page (b) (6) decision. I agree with you that this is a merits based dismissal. I would change the allegations in the db to "reversal of ijs's 47 page discretionary grant of asylum" just so that we know that. (b) (5)
(b) (5)
mtk

---

**From:** Keller, Mary Beth (EOIR)
**Sent:** Wednesday, August 10, 2011 1:19 PM
**To:** Burr, Sarah (EOIR)
**Subject:** Re: 2 IJC memos from the BIA

Sarah
I will take a look nxt week. Meantime, it sounds to me like the (b) (6) complaint may be dismissd as unsubstantiated and (b) (6) complaint may be dismissd as merits based. (b) (5)
(b) (5)
Mtk

---
Sent from my BlackBerry Wireless Device

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**From:** Burr, Sarah (EOIR)
**Sent:** Wednesday, August 10, 2011 12:29 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** 2 IJC memos from the BIA

I know you are on vacation and I hope you are having a fabulous time. I'm going on vacation soon...

I have had referred to me recently 2 IJC memos from the BIA and I am at a loss as to what, if anything, to do about them.

The first regards Judge (b) (6), and is complaint number 520. This regards an IJ decision, which the Board upheld, with a notation that the respondent alleges that the IJ ridiculed him and he did not receive a fair hearing. However, the decision goes on to note that the respondent points to nothing in the record, and presumably the Board found nothing in the record to substantiate this claim, with the BIA concluding that there is no showing that the hearing was not fairly conducted. So, what do I do with this? Tell the IJ that an alien claims (b) (6) wasn't fair, although the Board upheld (b) (6)

The second case regards Judge (b) (6), and doesn't have a complaint number yet. I just got it Monday. In this case the BIA reversed a discretionary grant of asylum, agreeing with the government that the particular crimes committed by the respondent should bar asylum as a matter of discretion. The IJ wrote a comprehensive opinion, explaining in detail why (b) (6) granted in the exercise of discretion. (b) (5)
(b) (5)



15946

**Moutinho, Deborah (EOIR)**

**From:** Smith, Gary (EOIR)
**Sent:** Monday, August 29, 2011 9:44 AM
**To:** Moutinho, Deborah (EOIR); Keller, Mary Beth (EOIR)
**Subject:** FW: Status of Open Complaints in the Database
**Attachments:** Summary of open ACIJ Smith 8-11.pdf; ACIJ Smith detail of open 8-11.pdf

424 and 425 were resolved with a five-day suspension. I understand (b) (6) (IJ (b) (6) ) grieved it but I haven't seen that and don't know what has transpired on that. On 455 (IJ (b) (6) ), that one is pending with the Deciding Official at Main Justice (David Margolis). On 530, that one on IJ (b) (6) was resolved with a leave restriction which (b) (6) is now under. (There is a parallel issue of behavior on the bench that surfaced as a consequence of looking into (b) (6) tardiness issues.)

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**From:** Moutinho, Deborah (EOIR)
**Sent:** Monday, August 22, 2011 1:06 PM
**To:** Smith, Gary (EOIR)
**Cc:** Keller, Mary Beth (EOIR)
**Subject:** Status of Open Complaints in the Database

Good Afternoon ACIJ Smith

Per ACIJ Keller's request I am sending you a summary report of all open complaints from your courts currently in the database along with detail report that shows you the specifics concerning each of the open complaints.

After reviewing the reports please let me know if there are any updates and or resolutions to the open complaints – no need to complete a new complaint intake sheet just send me the update along with the corresponding complaint number found on the left hand side of the summary report.

Please let me know if you have any questions or require additional assistance.

Thank you
Deborah

*Deborah M. Moutinho*

Staff Assistant
Office of the Chief Immigration Judge
Executive Office for Immigration Review
*(703) 605-1389*

15951

9/6/2011

## Keller, Mary Beth (EOIR)

**From:** Keller, Mary Beth (EOIR)
**Sent:** Thursday, August 18, 2011 9:13 AM
**To:** Smith, Gary (EOIR); Scheinkman, Rena (EOIR)
**Subject:** RE: One Year Bar.

(b) (5)

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**From:** Smith, Gary (EOIR)
**Sent:** Thursday, August 18, 2011 8:04 AM
**To:** Keller, Mary Beth (EOIR); Scheinkman, Rena (EOIR)
**Subject:** FW: One Year Bar.

(b)(6) & (b)(7)(C) concern was that Judge (b) (6) may have retaliated against DHS for reporting (b) (6) lateness on August 15th. (b) (6) may actually be more reflective of (b) (6) behavior and may need to be transcribed.

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**From:** Smith, Gary (EOIR)
**Sent:** Thursday, August 18, 2011 7:59 AM
**To:** (b)(6) & (b)(7)(C)
**Subject:** RE: One Year Bar.

Thanks, (b)(6) & (b)(7)(C) I will look into the below. However, A(b) (6) did not appear to me to be on the master calendar for August 15, 2011, unless your note was referring to an earlier master calendar in that case. It was a case in which the respondent testified and was cross-examined on August 11, 2011, and is now set for decision on November 18, 2011. (b)(6) & (b)(7)(C) was the Assistant Chief Counsel. If I am mistaken on that, please let me know. A(b) (6) is a case that was on the master calendar for August 15th. In listening to (b) (6) (b)(6) & (b)(7)(C) indicated she was taking some leave. Is she available, if needed, for me to speak with?

On another issue, I talked with (b) (6) I believe that the judges are regularly passing out the FLSP List to aliens, including a (b) (6) The case involved was from 2009. She was going to confirm that with both judges (Judge (b) (6) was on leave). Thanks again.

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**From:** (b)(6) & (b)(7)(C)
**Sent:** Wednesday, August 17, 2011 4:47 PM
**To:** Smith, Gary (EOIR)
**Subject:** One Year Bar.

Judge Smith:

I mentioned some frustrating issues with IJ (b) (6) over the one year bar. (b) (6) approach is not driving the ball forward and will result in some unnecessary appeals. In A(b) (6) the ACC was not allowed to cross examine the alien regarding the one year bar issue because we did not submit a prehearing brief on the issue. Additionally, on master calendar IJ (b) (6) told the same ACC that since we did not file a prehearing brief we were waiving the one year bar in A(b) (6) The alien has not even testified in this case yet. This approach is a waste the courts, the BIA and my office's resources. I do not think it is a coincidence since this ACC was scheduled before (b) (6) on the day (b) (6) repeatedly called out late and I reported it to you. This is a matter fleshed out in a hearing and does not require briefing, indeed it is the alien's burden. Thank you for your consideration of these matters. - (b)(6) & (b)(7

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(b) (6) (EOIR)

From: (b) (6) (EOIR)
Sent: Monday, November 01, 2010 1:08 PM
To: Smith, Gary (EOIR)
Subject: RE: (b) (6) /Security/Parking

Thank you Judge Smith. Correction on my e-mail – it was 4:45 pm when I was leaving and had an unpleasant encounter with a marshal.

From: Smith, Gary (EOIR)
Sent: Monday, November 01, 2010 10:54 AM
To: (b) (6) (EOIR)
Subject: RE: (b) (6) Security/Parking

Non-Responsive

From: (b) (6) (EOIR)
Sent: Friday, October 29, 2010 6:11 PM
To: Smith, Gary (EOIR)
Subject: RE: (b) (6) n/Security/Parking

Judge Smith: Non-Responsive

Non-Responsive

I'd also like to know the status of the parking situation as you did not address that concern which I already brought to your attention. Again, yesterday, my ability to complete an assignment was hampered by having to park on the street with limited hours, after I returned from a medical appointment and could not access the lot again. Moreover, as I left the building to add hours to the parking, a confrontation with a marshal caused me too much anguish to even return to complete work.

Specifically, around 5:45, upon getting off the elevator and heading toward the (b) (6) exist, which is closet to where I park, a marshal advanced rapidly toward me summoning me to exit a different door. He was animated and cocky, seeming to mock me as he loudly bid me goodnight. I had been rushing, because I was trying to beat getting a parking ticket, and I explained that I always exit this doorway which leads to the P.O. I did not explain that (b) (6) because weeks ago I was told by other marshals, one of whom was present during this encounter, that anyone can exist the building through this door which leads to the P.O., although (b) (6) can enter the building through the P.O. I shared this with other colleagues and EOIR employees here, who subsequently have exited the building through this door, and have never been stopped. So, I explained to the marshal, that I had been told that "anyone" can exit this door and looked to the other present marshal to clarify since it was actually she who told me this. Her only response to the pursuing marshal was that she previously had given me the okay to leave this way. The pursuing marshal continued, however, to be confrontational with me about



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the rules for this door, and chided me for not returning his farewell greeting, in any event -- again saying something like "have a nice evening" in a loud voice. I found his manner bizarre, with no intent but to harass; and at the end of a day which I had to interrupt preparing a decision in order to handle street parking (b) (6) (b) (6) and my trepidation to re-enter the building after this strange encounter, I didn't return to court as I had intended to finish the decision.

I further believe that the IJs are particular targets of the marshals based on reports that ACCs enter without submitting to searches, only showing their ids; at least one private bar member reported that she was permitted to enter without a screening of her belongings. You probably recall at a Sept. meeting with (b) (6), Deputy Chief Counsel, she stated how she sympathized with our over burdensome security demands, while she was permitted to enter without search after only showing her gov't id.

A few weeks ago, IJ (b) (6), told me of an encounter (b) (6) had with the marshals in which (b) (6) was wrongly accused of refusing to be screened (wanded after setting off the buzzer) and was yelled at by the supervising marshal when (b) (6) reported the untruthfulness of the report.

My point is that we need some uniformity regarding security procedures, and should not have to rely on the whimsical and arbitrary methods of individual marshals who apparently harbor some personal resentment against our tenancy in this building as manifested through pointless searches of IJs. Thus, the unduly burdensome requirements for IJs, to ingress and egress the building, is a continued concern. I'd like to know if there is any uniform procedure by EOIR, or GSA for building security (and parking). Our 10/04/10 Federal Employees News Digest, reported on security challenges to lobby and common area control in private leased spaces, noting the serious risks to federal employees in federal buildings also. Significantly, it describes an Interagency Security Committee's security standards for privately leased space. Are there similar standards for federal buildings and EOIR courts? Thank you for your time and consideration. IJ (b) (6)

Non-Responsive

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**From:** Smith, Gary (EOIR)
**Sent:** Wednesday, October 27, 2010 3:48 PM
**To:** (b) (6) (EOIR)
**Subject:** RE: (b) (6) Security/Parking

Judge (b) (6)

(b) (6)

Gary W. Smith
Assistant Chief Immigration Judge
(703) 306-1247

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**From:** (b) (6) (EOIR)
**Sent:** Thursday, October 21, 2010 6:22 PM
**To:** Smith, Gary (EOIR)
**Cc:** (b) (6) (EOIR)
**Subject:** (b) (6) /Security/Parking

1/11/2011

16111

# Non-Responsive

You mentioned the other day that arrangements were being made to obtain parking for the IJs in the lot across the street, where I am currently parking. I request that such arrangements only include fixed parking spaces so that we will require no valet services. I've been parking in this lot for over a month now, and last week, one of the attendants inquired what I did [for a living]. Such inquiry took me by surprise and made me very uncomfortable. I pretended to not hear, he made no further inquiry— likely knowing that it was an inappropriate question to a patron. My point is that the lot is manned by a number of parking attendants, who are not born in this country. And while I don't know their immigration status, it is hardly far fetched to assume many have connections through family, friends, or themselves, with our Court. This is awkward, not to mention the potential danger. At the time I came on the bench in (b) (6) I recall that IJ (b) (6) had just transferred from (b) (6) to (b) (6) after her brake line was cut, presumably by a disgruntled alien. I heard that an IJ remains under constant security after family of an alien whom he deported, made threats on his life – I assume HQ knows whether this is rumor or true.

I hardly have to remind you that security has become a big issue with IJs, as reflected by our own conferences which dedicate entire sessions on how an IJ should exercise vigilance regarding safety, e.g, not to take the same travel route to and from work and the need for dedicated parking. Ironically, our current work conditions eliminate our ability to exercise reasonable precautions. Such conditions include not being permitted separate entry into the building as the trusted public employees we are (who are cleared every five years during a vigorous background check). Being subjected daily to the same routine security searches as are people off the street entering the building can hardly be justified as necessary.

Speaking of people off the street, IJ (b) (6) told me that during an asylum hearing, a respondent who was not scheduled for a hearing was permitted to enter the building and go to (b) (6) court room where he sat unattended without his attorney. He had come to inquire about when his matter would be scheduled –something a phone call could accomplish; or his attorney should have done. Thus, it appears that people are allowed to come to our floor without being screened for legitimate business, which can include someone who was deported, and not happy about it, or someone who is inquiring about the status of their case which is more appropriately directed to a legal assistant through a phone call, and not interrupting a hearing. Persons are not allowed to just walk into a federal agency (even to state motor vehicle depts.), unless they have legitimate business. Respondents were not allowed into the Court, or other services, at (b) (6) unless they could demonstrate that they had legitimate business, i.e., an appointment for a hearing or other immigration service. We need some security on our floor which is not provided by the marshals, to insure safety. Without security on our floor, I remain nervous, about persons meandering past my court room. It has certainly become unsafe to open early as in the past, because there is no one to keep respondents in the waiting area until their case is called. Even the design and configuration of new court rooms have been largely dictated by concerns of safety from irate respondents. The current situation is a contradiction.

The ineffectiveness and arbitrariness of the security procedures conducted by the marshals in this building, becomes further apparent when IJ (b) (6) is waived in without screening, by marshals, if he arrives early, around 7:00 ;and I, personally have entered the building without screening, after 4:30 or 5:00 pm, when the marshals have left.

In talking to IJs from other courts who have moved to federal facilities, these type obstacles to reasonable parking accommodations and separate entrances are not new, but have been favorably resolved. I question why these problems persist, particularly since Space and Facilities must be involved in the resolutions, and thus before any move, would have knowledge of the requirements for IJs.

Anyway, I appreciate that you are working on resolving these issues for the (b) (6) Court, but I needed to vent and to let you know that I am stressed by them –(b) (6) (b) (6) (b) (6) I also appreciate the temporary parking accommodation across the street, but must inform you of its limits. When I have left before the end of the work day –medical appointment, lunch— I cannot get back in, and certainly not in a space that would not require valet service. Thus, I have to circle the block up to half hour for street parking which requires more walking to the kiosk during the day, to add hours. This has seriously interfered with my scheduled hearings. I sincerely hope that some of my observations may assist in us finally settling safely in our new court, which is otherwise beautiful. Thank you for your time and consideration. IJ (b) (6)

1/11/2011

16112

## EOIR FOIA Processing (EOIR)

**From:** Santoro, Christopher A (EOIR)
**Sent:** Thursday, September 27, 2012 5:48 PM
**To:** Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR); Scheinkman, Rena (EOIR)
**Subject:** FW: Recap of September 27, 2012

FYI

**Christopher A. Santoro**
Assistant Chief Immigration Judge

**From:** Santoro, Christopher A (EOIR)
**Sent:** Thursday, September 27, 2012 5:48 PM
**To:** (b) (6) (EOIR)
**Subject:** Recap of September 27, 2012

Judge (b) (6)

This e-mail summarizes our discussion this morning:

1. Because we could not conduct the training program today due to your late arrival, training has been rescheduled for Monday, October 15, 2012. Your day will begin at 9am with a meeting with the Chief Immigration Judge which will be followed by the training curriculum prepared for today by ACIJ Weil. Please have (b) (6) do a travel authorization for you. You will be authorized to travel the evening of October 14 and should plan to return the afternoon/evening of October 15.

2. I had previously approved your request for official time on Friday, September 28 to work on your pending EEO matter. You advised me that you were withdrawing the request for the 28th and requested an alternate 8 hours. That request is approved. You may take up to 8 hours of official time to work on your pending matters but that time shall be taken during your Friday afternoon administrative time (i.e., 2 four-hour blocks on two Friday afternoons). Given the nature of the work to be performed during that Friday afternoon official time, I also approved your request that you spend that administrative time at a location other than the immigration court. When you decide which Friday afternoon sessions will be your official time, please notify me where you will be during those time(s).

3. You requested annual leave for the week of October 8. This was an unscheduled/unplanned leave request. I have reviewed your calendar for that week and determined that for operational reasons, I must disapprove that request. We need you to hear the cases that are presently on your docket.

4. You have a pending WebTA leave request for Monday, September 24, for 1 hour. The stated reason for the leave is late arrival due to an unexpected traffic backup. Although the WebTA leave request is for one hour, you advised me that you were present in your chambers by 8:20am (20 minutes late). Your master calendar was scheduled to begin at 8:30am. You went on the record for your first case at 8:57am. I will approve this leave request once you clarify the duration requested, but please take note of paragraph 6.

5. On Tuesday, September 25, you arrived at 8:35am (35 minutes late). The stated reason for the late arrival was "leaving later than usual and traffic." You had an 8:30am hearing scheduled which did not begin until 9:04am. You were on the record for 1 hour and 51 minutes. You then recessed to consider the case and rendered an oral decision that lasted 1 hour and 5 minutes. Your total time on the record was 2 hours and 56



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minutes. Had you been present for work and started the case at 8:30, you could have completed the case – including time to deliberate on the evidence – by noon or shortly thereafter. However, due in part to the late start, you were unable to complete this case in the allotted time. You had another case set for 1pm which you continued because the 8:30am case was not concluded. You reset the 1:00pm case to January 30, 2014, causing a delay of 16 months. I have considered your explanation for your late arrival, including your statement that you are dependent upon someone else for transportation to work; I have also considered the impact of your late arrival upon the court's docket and operations. I have decided that under these circumstances I will not approve leave for September 25 and you will be placed into an absence without leave status for the period from 8:00am-8:45am (as leave is charged in 15-minute increments).

6. We discussed your recent arrival times. During the month of September, you have been on time 4 days; you have been late to work 12 times and were out sick 2 additional days. As you know, I have approved all of those after-the-fact leave requests despite their impact on your docket (in some cases your late arrival caused hearings to be delayed; in other cases your late arrival reduced the amount of preparation time for the day's cases). In the future, it is extraordinarily unlikely that I will approve any leave requests that involve your arriving at work after the start of your scheduled hearings (8:30am). You should also understand that even if you arrive before 8:30 – but still after your 8:00am start time – it is unlikely that I will approve leave requests for reasons that involve traffic delays, late departures, or other routine commuting matters that all of us must anticipate.

7. Non-Responsive

I look forward to your effort, as we discussed, to alter your departure schedule to ensure your timely arrival. Non-Responsive

Non-Responsive

Non-Responsive

If there is anything in this message that you believe is inconsistent with our discussion today or needs clarification, please ask. Thank you.

**Christopher A. Santoro**
Assistant Chief Immigration Judge

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## EOIR FOIA Processing (EOIR)

**From:** Santoro, Christopher A (EOIR)
**Sent:** Tuesday, October 16, 2012 7:47 AM
**To:** Scheinkman, Rena (EOIR)
**Cc:** Rosenblum, Jeff (EOIR); Keller, Mary Beth (EOIR)
**Subject:** (b) (6) update

Rena,

The good news is that (b) (6) seemed receptive to the training and information provided. The bad news is that (b) (6) didn't arrive on time (although this time (b) (6) was only about 7-8 minutes late). I decided not to serve the proposal yesterday and instead will do it either Friday or Monday. At a minimum I'll need to change the date on the letter and I'm also considering a change to the proposed number of days. I know you sent me a Word copy of what I think was the final draft, but if you wouldn't mind sending me what was actually the "final" in Word format I'll make the date change, adjust the days if necessary, and reprint. Thanks.

**Christopher A. Santoro**
Assistant Chief Immigration Judge



16164

## Keller, Mary Beth (EOIR)

**From:** Moutinho, Deborah (EOIR)
**Sent:** Wednesday, March 14, 2012 3:28 PM
**To:** Weisel, Robert (EOIR); Keller, Mary Beth (EOIR)
**Subject:** RE: Complaint against Judge (b) (6)

Thank you Sir. ACIJ Keller was in for a few hours today but has left, on her agenda tomorrow is to call and catch up with the ACIJ's (don't worry I am putting the one's with time sensitive issues first in line)

Thanks again
Deborah

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**From:** Weisel, Robert (EOIR)
**Sent:** Wednesday, March 14, 2012 3:24 PM
**To:** Keller, Mary Beth (EOIR)
**Cc:** Moutinho, Deborah (EOIR)
**Subject:** Complaint against Judge (b) (6)

Hi Mary Beth:
I know you have a full plate right now and did not want to bother you with this so I took the plunge and handled it myself. I received a letter of complaint dated March 12, 2012 from (b) (6) Esq. against Judge (b) (6) I had (b) (6) fax a copy of it down to Deborah the same day. Essentially, the complaint indicates the Judge without justification has adjourned the case several times and not rendered an oral decision in accordance with the Order of Remand from the BIA. I listened to DAR. The letter specifically focuses on three adjournments. Two of the three were the result of the Judge not having the file. The third adjournment (February 2nd), was a consequence of the Judge not feeling well and explaining *that on the record. Suffice it to say, this matter has been up and down from the* (b) (6) *Circuit and the Board. I counseled* Judge (b) (6) that it was important to finalize this case and (b) (6) assured me (b) (6) would render a decision on April ninth as scheduled. I contacted the attorney and advised I spoke to Judge (b) (6) and told her I was confident the case would be finalized in April. She said she appreciated that I called her expeditiously with this information. I would close this case with counseling as the disposition.
Bob

Robert D. Weisel
Assistant Chief Immigration Judge
26 Federal Plaza- Suite 1237
NY, NY 10278

16188

## EOIR FOIA Processing (EOIR)

**From:** Dean, Larry R. (EOIR)
**Sent:** Tuesday, March 19, 2013 9:17 AM
**To:** Moutinho, Deborah (EOIR)
**Cc:** Keller, Mary Beth (EOIR); Davis, John (EOIR)
**Subject:** RE: IJ Conduct Database Reports

Deborah,

It is correct to say that the sexual harassment allegations against IJ (b) (6) were unsubstantiated. (b) (6) was given a written counseling for spreading gossip and being disruptive in the office. I don't know if that changes the report. Mary Beth, how do you feel about whether that should be listed on the close out entry?

LRD

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**From:** Moutinho, Deborah (EOIR)
**Sent:** Tuesday, March 19, 2013 8:10 AM
**To:** Davis, John (EOIR)
**Cc:** Dean, Larry R. (EOIR); Keller, Mary Beth (EOIR)
**Subject:** IJ Conduct Database Reports

Good Morning

Attached are the IJ Conduct Database reports for (b) (6) that you will be supervising. I will change your name as the supervisor for the open complaint on March 24th. If you have any questions please let me know.

Deborah

*Deborah M. Moutinho*

Staff Assistant
Office of the Chief Immigration Judge
Executive Office for Immigration Review
(703) 605-1389

16234

## Moutinho, Deborah (EOIR)

**From:** Keller, Mary Beth (EOIR)
**Sent:** Thursday, November 08, 2012 8:56 AM
**To:** Moutinho, Deborah (EOIR)
**Subject:** FW: IJC Memo - Matter of (b) (6) (August 13, 2012)

Aug 27 oral counseling on (b) (6) –and close.
Thanks.
Mtk

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**From:** Weisel, Robert (EOIR)
**Sent:** Thursday, November 08, 2012 8:51 AM
**To:** Keller, Mary Beth (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (August 13, 2012)

Hi Mary Beth:

An IJ Complaint Intake Form was sent to you and we spoke about this on August 27th. It was a bizarre decision. I spoke to (b) (6) about it on August 27th. I would close it – Oral Counselling". When we get a chance, we should talk about other matters that were blown off because of the storm and JLC interviewing, ie (b) (6) (b) (6) and lastly (b) (6)
Bob

Robert D. Weisel
Assistant Chief Immigration Judge
26 Federal Plaza- Suite 1237
NY, NY 10278

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Wednesday, November 07, 2012 5:08 PM
**To:** Weisel, Robert (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (August 13, 2012)

Bob,
I seem to recall you doing a counseling on this weird BIA decision, and have a cryptic note to that effect, but no real record of resolution.
Would you please let me know how this one was resolved, and if it was an oral counseling, could I have the date?
Thanks.
Mtk

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Wednesday, August 22, 2012 2:47 PM
**To:** Weisel, Robert (EOIR)
**Subject:** RE: IJC Memo - Matter of (b) (6) (August 13, 2012)

Of course...! Get off that bb!!

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**From:** Weisel, Robert (EOIR)
**Sent:** Wednesday, August 22, 2012 2:41 PM
**To:** Keller, Mary Beth (EOIR)
**Subject:** Re: IJC Memo - Matter of (b) (6) (August 13, 2012)

Mary Beth:
I am unable to access the decision from my Blackberry. I will certainly take a look at it next week. Thanks.



16295

**EOIR FOIA Processing (EOIR)**

**From:** Scheinkman, Rena (EOIR)
**Sent:** Thursday, November 01, 2012 10:16 AM
**To:** Davis, John (EOIR); McGoings, Michael (EOIR)
**Cc:** Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
**Subject:** RE: (b) (6) - grievance due today

Good morning, Judge Davis.

As far as I know, we have not received a grievance. Judge McGoings said he would forward it if he received anything. I would give it until Monday – just to make sure it's not in the mail. Then you can pick the day you wan(b) (6)o serve the suspension, and have(b) (6) actually serve it.

As for the other things, I am working on a draft PIP.

Please let me know if you need anything else.
Rena

**From:** Davis, John (EOIR)
**Sent:** Thursday, November 01, 2012 9:57 AM
**To:** Scheinkman, Rena (EOIR); McGoings, Michael (EOIR)
**Cc:** Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
**Subject:** RE: (b) (6) - grievance due today

Good Morning Rena,

Did we receive anything from Judge (b) (6)? If not, can you tell me how we proceed forward.

Thank You!

Warmest Regards

***John W. Davis***
***Assistant Chief Immigration Judge***
*3130 North Oakland Street*
*Aurora, CO 80010*
*(303) 739-5203*

**From:** Scheinkman, Rena (EOIR)
**Sent:** Wednesday, October 31, 2012 8:11 AM
**To:** McGoings, Michael (EOIR)
**Cc:** Davis, John (EOIR); Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
**Subject:** (b) (6) - grievance due today

Judge McGoings:



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Today is the deadline for IJ (b) (6) to file a grievance of (b) (6) one-day suspension. Please let me know if you receive something.

Thanks!
Rena

Rena Scheinkman
Associate General Counsel
EOIR/OGC, Employee & Labor Relations Unit
T: 703.605.0442
F: 703.605.0491
rena.scheinkman@usdoj.gov



16304

**U.S. Department of Justice**

Executive Office for Immigration Review

*Immigration Court*

*Assistant Chief Immigration Judge*

*26 Federal Plaza, 12th Floor Room 1237*
*New York, NY 10278*

February 20, 2013

To: (b) (6)
Immigration Judge

From: Robert Weisel
Assistant Chief Immigration Judge

Re: Letter of Counseling

By this letter, I counsel you for inappropriate, demeaning remarks in connection with two matters over which you presided, and which the Board of Immigration Appeals remanded to a different immigration judge. With this counseling, I expect you to improve your demeanor and professionalism, without the need for further intervention or future administrative action. The chairman of the Board of Immigration Appeals had referred the two matters at issue to the Chief Immigration Judge, for review and I specifically relate the following:

1. Matter of (b) (6) (BIA October 12, 2012). In rendering its opinion, the Board stated that "While we do not determine whether the Immigration Judge acted improperly in proceedings below, we deem it appropriate, under the totality of the circumstances to remand this matter to a different Immigration Judge, particularly given that the allegations of bias and prejudice are coupled with concerns raised as to the respondent's mental competency."

Additionally, inappropriate comments by you in the proceeding held on June 9, 2011 (transcript at page 9), undermined the attorney's ability to fully represent his client, including that "I am not interested in the opinions of the law firm. You thought he had problems, you didn't get an evaluation. Maybe you couldn't because he wasn't cooperating, but I am not interested in the opinion of the law firm about psychological problems, especially from a person who has only been with the firm for a few months." Furthermore, additional comments made by you cast doubt on your impartiality and demonstrate a rush to demeaning conclusions without any support

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in the record (see transcript at page 11), to wit: "You haven't had a mental, mental health evaluation done, and I don't know the reason why.

I don't think there is any indication that your client is mentally incapable of getting his fingerprints renewed, which is the issue in question ... You are not a mental health professional ... I have listened to the respondent for several hours in Court on other occasions and seen him in Court on master calendar hearings, and I am not going to venture an opinion about his psychological health. But, certainly think he is capable of getting his biometrics done on time."

2. Matter of (b) (6) (BIA December 10, 2012). In this matter, the Board opined that "We find certain of the Immigration Judge's statements regarding the respondent's past relationships and his cognitive abilities to be unprofessional (IJ at 13-14, 16-17). Furthermore, we agree that the Immigration Judge improperly injected (b) (6) past experience to make assumptions about what occurred during the respondent's prior deportation proceedings in (b) (6)"

Also, your comments in the Oral Decision on February 24th 2011 were inappropriate and (again) relied on assumptions, without any support in the record, to wit: "So, the idea that a person spent a substantial period of time in an Immigration detention center, went to court twice, but did not understand he had a deportation case is, in the Court's view, close to the point of being totally unbelievable, even if the person had more cognitive problems than the respondent seems to have."

In sum, I counsel you to refrain from using demeaning statements, particularly with regard to the mental health of respondents, and from offering speculative and gratuitous commentaries. Such remarks are inappropriate and unprofessional. You are also cautioned not to engage in conduct which tends to cut off or inhibit attorneys from adequately developing the record, and thereby denying a full and fair proceeding.

**Please contact me this week after you have reviewed my comments to set up a mutually convenient time for us to further discuss these cases.**

I acknowledge receipt of this Letter of Counseling as noted below.

(b) (6) 2-20-13

Employee Date

16446

**Keller, Mary Beth (EOIR)**

**From:** Scheinkman, Rena (EOIR)
**Sent:** Tuesday, June 11, 2013 5:03 PM
**To:** Keller, Mary Beth (EOIR); McGoings, Michael (EOIR)
**Subject:** Re: OIG Matters: (b) (6) and (b) (6)

No issue. This makes sense. Thanks.

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**From:** Keller, Mary Beth (EOIR)
**Sent:** Tuesday, June 11, 2013 04:59 PM
**To:** Scheinkman, Rena (EOIR); McGoings, Michael (EOIR)
**Subject:** RE: OIG Matters: (b) (6) and (b) (6)

And, actually, the one against Judge (b) (6) would be closed as unsubstantiated, unless and until something would come back from eeo.
Does that create an issue for you? I just think that for Mike to "investigate" the matter with a pending eeo is problematic. Mtk

*MaryBeth Keller*
Assistant Chief Immigration Judge

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**From:** Scheinkman, Rena (EOIR)
**Sent:** Tuesday, June 11, 2013 4:50 PM
**To:** McGoings, Michael (EOIR)
**Cc:** Keller, Mary Beth (EOIR)
**Subject:** RE: OIG Matters: (b) (6) and (b) (6)

Understood. Thank you.

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**From:** McGoings, Michael (EOIR)
**Sent:** Tuesday, June 11, 2013 4:48 PM
**To:** Scheinkman, Rena (EOIR)
**Cc:** Keller, Mary Beth (EOIR)
**Subject:** RE: OIG Matters: (b) (6) and (b) (6)

Rena – your description of both matters is correct. We also agreed that, should the EEO investigation in the first matter disclose any ACIJ misconduct warranting an investigation, the complaint would be reopened. Thanks.

MCM

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**From:** Scheinkman, Rena (EOIR)
**Sent:** Tuesday, June 11, 2013 3:41 PM
**To:** McGoings, Michael (EOIR)
**Cc:** Keller, Mary Beth (EOIR)
**Subject:** RE: OIG Matters: (b) (6) and (b) (6)

Judge McGoings:



16542

Just to confirm, based on further discussions between you and MaryBeth, OCIJ will close both cases without further action. The first matter (b) (6) will be entered into the IJ complaint database as a complaint against ACIJ (b) (6) and closed on the basis that it is the subject of a pending EEO investigation.

Please let me know if this is accurate, or make any necessary corrections if I misunderstood something.

Thank you,
Rena

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**From:** McGoings, Michael (EOIR)
**Sent:** Tuesday, June 11, 2013 8:32 AM
**To:** Scheinkman, Rena (EOIR)
**Cc:** Keller, Mary Beth (EOIR)
**Subject:** RE: OIG Matters: (b) (6) and (b) (6)

Rena –

(b) (5)

No problem closing out the second matter. Judge (b) (6) retired several years ago. Thanks.

MCM

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**From:** Scheinkman, Rena (EOIR)
**Sent:** Monday, June 10, 2013 10:55 AM
**To:** McGoings, Michael (EOIR)
**Cc:** Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
**Subject:** OIG Matters: (b) (6) and (b) (6)

Judge McGoings:

Attached please find two OIG matters. In both matters, OIG has determined that an investigation is not necessary and has referred the matter to EOIR for appropriate action.

The first one is a purported whistleblower action by (b) (6) an interpreter in (b) (6) The complaint asserts a number of allegations against ACIJ (b) (6) including alleged harassment when (b) (6) issued him a letter of counseling and an ethics issue involving (b) (6) outside employment. Please note that the events surrounding the letter of counseling are the subject of a pending EEO investigation. (b) (5)

(b) (5)

The second one is an allegation that IJ (b) (6) (Immigration Court) accepted fraudulent documents related to citizens of Eritrea. I reviewed the list of judges at the (b) (6) Court, and I was not able to find (b) (6) (b) (6). Again, I do not believe that any further action is needed in this matter, but I defer to you and would be happy to discuss this matter at your convenience.

I look forward to your thoughts.



16543

**EOIR FOIA Processing (EOIR)**

**From:** Weisel, Robert (EOIR)
**Sent:** Tuesday, July 23, 2013 12:42 PM
**To:** Moutinho, Deborah (EOIR)
**Cc:** Keller, Mary Beth (EOIR)
**Subject:** A#'s (b) (6) (Judge (b) (6) and (b) (6) (Judge (b) (6)

Deborah:
I have concluded both these matters with oral counseling. You may close them. Thanks

Robert D. Weisel
Assistant Chief Immigration Judge
26 Federal Plaza, Room 1237
New York, N.Y. 10278

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