Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Wednesday, June 23, 2010 1:38 PM
To: Romig, Jeff (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: Complaint of I J conduct

Jeff,
Letter looks good to me.
No cc to the Director, but, would you give us an extra signed copy so we can give a copy to OGC/ Terry Samuels?
Tx.
mtk

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, June 22, 2010 4:52 PM
To: Romig, Jeff (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: Complaint of I J conduct

Jeff,
I am talking to Jeff Rosenblum about these generally.
Have taken the liberty of sharing w/ him for purposes unrelated to you specifically!
I will take a look. I don't think that we should cc the Director or anyone, we can just provide a copy to them so Exec Sec can keep track of.
mtk

From: Romig, Jeff (EOIR)
Sent: Tuesday, June 22, 2010 4:46 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: Complaint of I J conduct

Here's the draft. I have two attorneys who confirmed to me (one who asked for non-attribution) that no disrespect came from the Court in this matter, only the complainant.

From: Keller, Mary Beth (EOIR)
Sent: Saturday, June 19, 2010 8:29 AM
To: Romig, Jeff (EOIR)
Subject: Re: Complaint of I J conduct

Yes will take a look at ltr. Let's talk re the cc.

Sent from my BlackBerry Wireless Device

From: Romig, Jeff (EOIR)
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Sent: Fri Jun 18 21:19:20 2010
Subject: RE: Complaint of I J conduct
I think it will go in the "disproven" category, do you want to see a draft of the letter? Should I "cc" the Chief Judge or Director since the complainant sent it to the AG?

From: Keller, Mary Beth (EOIR)
Sent: Friday, June 18, 2010 1:28 PM

7415

She stated that we might want to look into finding (b) (6) incompetent if it was found that he could not understand the proceedings. I asked the court at that time to schedule a hearing and that i would have to look into that since I was not familiar wiht the issue of incompetence in immigration proceedings and needed to know more about that but that in the meantime we were adamant about not having the hearings conducted in Ouoloff.

Judge (b) (6) indicated that (b) (6) will be scheduling the hearing for June 18, 2010 and that (b) (6) will not be ordering an interpreter. As we were exiting the courtroom Judge (b) (6) once more asked why my client was in (b) (6) and since (b) (6) seemed obsessed with the question I asked why did (b) (6) insist on knowing why he was in (b) (6) (b) (6) as my client did indeed have the right to be in (b) (6) and two moves in 16 years seemed reasonable to me. (b) (6) asked me what my client did for a living and I told (b) (6) I had no idea and once again i c not see the relevance of what he did and (b) (6) said that it was relevent as it would indicate what langage he spoke at work. I figured at this point that this was a lost cause. We have never claimed that my client did not speak any English or that he did not speak some Ouloff and some French., What we have said is that my client does speak some english, some French and some Ouloff but it is broken English, French and Ouloff. He does not speak enough of those languages to have the hearing conducted in those languages.

The whole hearing was lost with arguments with the interpreter and Judge (b) (6) rather than dealing with the issues at hand. The pleadings were never taken. It was not clear to the governement or us whether this was a master hearing or an individual hearing too. and Judge (b) (6) was just plain wrong in (b) (6) line of questioning and (b) (6) stand.

(b) (6) does not control the fact that the Court cannot find a serer interpreter any more than he can help the fact that he is Serer. and it is not fair for the court to demand he become something he is not. He is someone from Senegal, who happens to be Serer and is illiterate and does not speak but a smittering of Ouoloff, French and English. These facts are facts that the BIA have found convincing enough to remand the case for it to be processed in a language (b) (6) can understand. We are not sure why Judge (b) (6) wants to ignore these facts.

A hearing of the transcript will make it clear that (b) (6) cannot indeed receive a fair hearing in the hand of Judge (b) (6)

As well as the complaint they lodged against the interpreter (b) (6)

I am writing this complaint in conjunction with a matter I have before your office regarding Judge (b) (6) I am still waiting to hear from the office regarding the follow up on that matter as we were back in Court yesterday and there are even more issues at hand.

The interpreter for the 1:30 master hearing with Judge (b) (6) at the Immigration Court in (b) (6) in Courtroom (b) (6) is the reason for this complaint. (b) (6) was supposed to interpret in Serer for the

respondent. When we got to court he started speaking in Ouoloff. I tried to interject and object as the hearing was not supposed to be conducted in Ouoloff. This case was remanded from the BIA because respondent's best language is Serer and while he does speak some Ouoloff, he does not understand it enough to conduct his hearing in Ouoloff and his first hearings were so full of errors that the Board found that it would not be a fair hearing if the language spoken was Ouoloff.

Since I speak Ouoloff (but not Serer) I could tell that the interpreter was speaking in Ouloff and I objected to this and IJ (b) (6) stated that I was not given leave to speak and the interpreter continued to speak in Ouoloff. Finally he was asked what language he spoke and he said that he spoke Serer Sine, and my client spoke Serer Baol and that he did not speak or understand Serer Baol as the dialects are different. While he said that he spoke Serer Sine he did not utter a word in that language. Absolutely every thing he spoke was in Ouloff as I understood every single thing he spoke.

(b) (6) when my objection were continued told the judge that my client spoke Ouoloff very well and that every one in Senegal spoke Ouoloff and that indeed this was the language the was written in school. The judge started taking notes about what (b) (6) was telling. I further objected since the interpreter was there to interpret and was not admitted as an expert in country customs to be able to make such statements. Further I stated that the statements was not only inappropriate but inacurate as I happened to be from Senegal and I know that not every one spoke Ouoloff and that Ouoloff was not a written language. I also have to note that if this was a language thought in school since my client is illiterate this would not apply to him either.

Further, I am not sure how (b) (6) could have been able to assess the language skills of my client as the only communication we had with him prior to the hearing was when he got in and greeted us. He wanted to continue the conversation with us but I waived at him to proceed to a chair because Judge (b) (6) was conducting a hearing and I was not looking forward to a reprimand.

I am not sure how from a greeting he could assess the level of confidence in a language.

(b) (6) volunteered some more information and just kept going because he could see that Judge (b) (6) welcomed his comments and we argued for a good few minutes, which should not have happened at all. (b) (6) was not there to be an expert or a witness but rather to interpret and he went beyond what his role was.

I am not sure whether the Judge relied on his opinions or not but (b) (6) pushed for the government to administratively close the case because my client did not seem to want to speak in a language that he seem to understand. If he did not solely help (b) (6) make that decision (b) (6) did contribute to an already difficult situation by volunteering information that was totally wrong and not asked for and behaved quite unprofessionally from the time he arrived in court. non responsive s

to interpret what my client spoke and he could not do that because obviously he must not speak Serer as he did not utter a word in that language. And he tried to make for his ineptitude by volunterring things outside of his domain.
This is a serious matter and I hope to hear from your office soon about the steps necessary to have this matter resolved in an appropriate manner. I have also contacted Lionbridge directly to let them know that I expect to hear about actual steps taken to make sure this sort of things do not happen.

Counsel does not agree with your office's assessment about keeping judge (b) (6) on this case but due to the slow response to our concerns and the lack of even an acknowledgement of our complaints, it is not a stretch to believe that the office has taken quite lightly our concerns and the response is not a surprise.

As for your assessment regarding the way things were conducted in the courtroom, counsel does agree that the hearing was out of control and that it ended up being a shouting match between the different parties. Hearings should be conducted with proper decorum. The reason why Judges are asked to conduct hearing with impartiality and show respect to the courtroom and parties is to avoid such situations.

Judges have great control over how hearings are conducted. A Judge that is not following proper decorum leads to the situation in which we found ourselves. The fact that Judge (b) (6) failed to control (b) (6) courtroom and acted as if (b) (6) owns the respondents did not help the situation. (b) (6) does not have any respect for the courtroom, the respondents or the attorneys representing the non citizens. And it shows.

My client does not stand a chance with Judge (b) (6) to have a fair hearing. If Judge (b) (6) could not entertain the idea of finding an interpreter, something that so clearly falls under the court's responsibility, (b) (6) is not going to entertain such a discretionary claim such as a *nunc pro tunc* one let alone finding (b) (6) way to granting it no matter what the arguments are going to be.

Respectfully,

(b) (6)

7516

(b) (6)

Keller, Mary Beth (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, May 11, 2010 10:57 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: cases that I mentioned

(b)(5) & Non Responsive

mtk

From: Dean, Larry R. (EOIR)
Sent: Tuesday, May 11, 2010 10:51 AM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: cases that I mentioned

(b)(5) & Non-Responsive

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Sent: Monday, May 10, 2010 12:33 PM
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Cc: Moutinho, Deborah (EOIR)
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Larry,
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Tx.
mtk

From: Dean, Larry R. (EOIR)
Sent: Monday, December 07, 2009 12:49 PM
To: Hatch, Paula (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: cases that I mentioned

Matter of (b) (6) BIA, 9/28/09

BIA indicated that IJ's inappropriate comments raised issue of whether case was decided on considerations that were no part of the record.

IJ indicated newly appointed BIA member is possibly changing the law and that (b) (6) is concerned about being reversed. Also considered that respondent may have future violations of immigration law as providing a basis for denying discretionary relief.

Disciplinary issues: Dereliction of duty by deciding case on matters outside record.

Matter of (b) (6) BIA, 10/31/08

IJ said that (b) (6) could not comply with BIA remand.

7669; 7689; 7723; 7744; 7849; 8100; 8360; 8377; 8402

BIA indicated that noncompliance was not a possibility.

Disciplinary issues: Dereliction of duty; failure to follow instruction.

Matter of (b) (6) 11/6/08

Comments of I were unnecessarily caustic, sarcastic, or dismissive in tone. Created an appearance of partiality and detracted from dignity of the proceedings.

Disciplinary issue: Injudicious conduct

Matter of (b) (6) 9/21/09

IJ says that (b) (6) is "perplexed" by BIA's earlier decision, yet acknowledges ACIJ's counseling not to criticize the BIA

Disciplinary issue: Failure to follow instruction of superior

Matter of (b) (6) BIA 11/7/08

IJ says that the respondent is "an absolute liar," "would say and do anything to continue illegal presence in the United States," and "wouldn't tell the truth if it would gain him access to the Kingdom of Heaven . . ."

BIA remanded because language showed that IJ might be prejudiced toward respondent

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 9/28/09

Respondent has "feasted on the fruits of benevolence of this nation long enough . . ." "Would not know truth if it reached up and bit him. . ."

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 4/23/09

BIA indicates that IJ's comments are "pejorative remarks directed at the respondent in an *ad hominem* fashion by the Immigration Judge . . ."

IJ said that "[the respondent] is nothing but a taker and his representation that he is [preparing to file back taxes] . . . absolutely insults the intelligence of the court" and that the respondent is "the poster child of [those] who should not be allowed in our nation." (b) (6) said that the respondent was comfortable with how things were, is no longer comfortable, and wants me to make all of that better for him. "My job is not to make up for his negligence and misconduct."

Disciplinary issue: Injudicious conduct by verbal attack on respondent.

Matter of (b) (6) BIA 11/6/09

BIA indicates that IJ impermissibly applied a factor in the case that is not germane to (b) (6) decision, which tainted (b) (6) decision. Added factor was "fear of appellate criticism."

IJ stated, in part, ". . . the current climate effecting IJs who are the subject and target of external criticism . . . is such that I believe the current environment for IJs is such that in order to avoid undue criticism and potential disciplinary action that close calls must be decided in favor of a given respondent . . ." [Then continues with a discussion about another IJ] and then ". . . the current climate within the Department of Justice is such that . . . IJs are hld to a level of scrutiny . . . that I no longer feel I can always adhere to {the required legal] standard" and "[In} a close call, I would deny this case . . . [but based on the current environment] "and to avoid criticism, and I will grant this case."

7670; 7690; 7724; 7745; 7850; 8101; 8361; 8378; 8403a

Disciplinary issue: Dereliction of duty

Matter of (b) (6), BIA, 6/9/09

BIA notes that IJ engaged in "terse exchange" with attorney and does not give respondent an opportunity to present asylum claim.

Discplinary issue: Dereliction in handling case and injudicious conduct

The hardcopies are being FEDEXed today.

I am also enclosing two counseling statements issued earlier this year which relate to somewhat similar issues. It probably best not to mention those in this action, but it may be helpful for you to note these, except in 538. Re 538, (b) (6) acknowledges a prior counseling regarding commenting about the BIA, yet does so again. Mary Beth's log also reflects some earlier, verbal counseling for similar matters.

LRD

/

7671; 7691; 7725; 7746; 7851; 8102; 8362; 8379; 8403b

(b) (6)

Keller, Mary Beth (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, May 11, 2010 10:57 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: cases that I mentioned

(b)(5) & Non Responsive

mtk

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mtk

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Sent: Monday, December 07, 2009 12:49 PM
To: Hatch, Paula (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: cases that I mentioned

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BIA indicated that IJ's inappropriate comments raised issue of whether case was decided on considerations that were no part of the record.

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IJ said that (b) (6) could not comply with BIA remand.

7689; 7669; 7723; 7744; 7849; 8100; 8360; 8377; 8402

BIA indicated that noncompliance was not a possibility.

Disciplinary issues: Dereliction of duty; failure to follow instruction.

Matter of (b) (6) 11/6/08

Comments of I were unnecessarily caustic, sarcastic, or dismissive in tone. Created an appearance of partiality and detracted from dignity of the proceedings.

Disciplinary issue: Injudicious conduct

Matter of (b) (6) 9/21/09

IJ says that (b) (6) is "perplexed" by BIA's earlier decision, yet acknowledges ACIJ's counseling not to criticize the BIA

Disciplinary issue: Failure to follow instruction of superior

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IJ says that the respondent is "an absolute liar," "would say and do anything to continue illegal presence in the United States," and "wouldn't tell the truth if it would gain him access to the Kingdom of Heaven . . ."

BIA remanded because language showed that IJ might be prejudiced toward respondent

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 9/28/09

Respondent has "feasted on the fruits of benevolence of this nation long enough . . ." "Would not know truth if it reached up and bit him. . ."

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 4/23/09

BIA indicates that IJ's comments are "pejorative remarks directed at the respondent in an *ad hominem* fashion by the Immigration Judge . . ."

IJ said that "[the respondent] is nothing but a taker and his representation that he is [preparing to file back taxes] . . . absolutely insults the intelligence of the court" and that the respondent is "the poster child of [those] who should not be allowed in our nation." (b) (6) said that the respondent was comfortable with how things were, is no longer comfortable, and wants me to make all of that better for him. "My job is not to make up for his negligence and misconduct."

Disciplinary issue: Injudicious conduct by verbal attack on respondent.

Matter of (b) (6) BIA 11/6/09

BIA indicates that IJ impermissibly applied a factor in the case that is not germane to (b) (6) decision, which tainted (b) (6) decision. Added factor was "fear of appellate criticism."

IJ stated, in part, ". . . the current climate effecting IJs who are the subject and target of external criticism . . . is such that I believe the current environment for IJs is such that in order to avoid undue criticism and potential disciplinary action that close calls must be decided in favor of a given respondent . . ." [Then continues with a discussion about another IJ] and then ". . . the current climate within the Department of Justice is such that . . . IJs are hld to a level of scrutiny . . . that I no longer feel I can always adhere to {the required legal] standard" and "[In} a close call, I would deny this case . . . [but based on the current environment] "and to avoid criticism, and I will grant this case."

7690; 7670; 7724; 7745; 7850; 8101; 8361; 8378; 8403a

Disciplinary issue: Dereliction of duty

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BIA notes that IJ engaged in "terse exchange" with attorney and does not give respondent an opportunity to present asylum claim.

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I am also enclosing two counseling statements issued earlier this year which relate to somewhat similar issues. It probably best not to mention those in this action, but it may be helpful for you to note these, except in 538. Re 538, (b) (6) acknowledges a prior counseling regarding commenting about the BIA, yet does so again. Mary Beth's log also reflects some earlier, verbal counseling for similar matters.

LRD

7691; 7671; 7725; 7746; 7851; 8102; 8362; 8379; 8403b

Keller, Mary Beth (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, June 08, 2010 2:08 PM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: FW: (b) (6) items

Larry,
I am back into Feb 2009 complaints, cleaning some up before I send to you in report form - I have discovered that the (b) (6) (courtroom observer) complaint and the (b) (6) respondent) complaint about Judge (b) (6) are one and the same, as we would track in our new db. There would simply be two sources. I will address that piece; I don't have a record of resolution though. The nature of the allegations are lack of fairness, due process concerns, and poor treatment in the courtroom – CASE indicates that a bond appeal was dismissed by the BIA on March 27, 2009, and the case appeal was dismissed by the BIA on May 7, 2009. I have not read either case to determine if the BIA addressed was raised with us.
(b) (6) retirement may overtake this, but wanted to forward what I have to you. If you take a look at the cases and determine the complaints were merits based or something else, let us know and we can close out that way.
Tx,.
mtk

From: Dean, Larry R. (EOIR)
Sent: Monday, November 16, 2009 10:18 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: (b) (6) items

A couple of these may have been handled by counseling statements.

With my visitors, I don't have a lot of time this week, but I'll try to work this in if possible. It's time.

LRD

From: Keller, Mary Beth (EOIR)
Sent: Friday, November 13, 2009 10:24 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: (b) (6) items

Larry,

Per my recent review of all we have relating to Judge (b) (6) below are where I don't think I have updated info. If you would take a look at the current db (attached) items below, and let me know, I will update and send to Brian as we all think about how to proceed:

Matter of (b) (6) BIA Decision from Sept. 2009

Matter of (b) (6) BIA Decision from Sept. 2009

Matter of (b) (6) BIA Decision from Sept . 2009

7692; 7726; 7747; 7852; 8098; 8313; 8363; 8380; 8406

Matter of (b) (6), BIA Decision from June 2009

Matter of (b) (6) BIA Decision from April 2009

Complaint from (b) (6) from February 2009

Complaint from (b) (6) (the respondent) relating to the proceeding immediately above

Matter of (b) (6) BIA Decision from November 2008.

Matter of (b) (6), BIA Decision from November 2008 (recently discovered, not sent by BIA)

Matter of (b) (6) BIA Decision from October 2008.

Also, I was just advised of another case up at BIA (we don't have a BIA decision yet) but the IJ during the hearing in recounting the bond history states: (b) (6) - hearing in April 2008)

"The only prior proceeding here was a bond hearing/custody redetermination hearing in which the respondent's bond was lowered from $20,000 to $2,500 by one of the more popular bond Judges in the country, Judge (b) (6) sic]. Folks just love (b) (6) In any event, (b) (6) the Judge and that's what (b) (6) decided.. Good for (b) (6) Anyway, so (b) (6) moved from the detained docket to the non-detained docket."

mtk

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

7693; 7727; 7748; 7853; 8099; 8314; 8364; 8381; 8407

(b) (6)

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LRD

7725; 7671; 7691; 7746; 7851; 8102; 8362; 8379; 8403b

Keller, Mary Beth (EOIR)

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Sent: Tuesday, June 08, 2010 2:08 PM
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Cc: Moutinho, Deborah (EOIR)
Subject: FW: (b) (6) items

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7727; 7693; 7748; 7853; 8099; 8314; 8364; 8381; 8407

(b) (6)

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Sent: Tuesday, May 11, 2010 10:57 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: cases that I mentioned

(b)(5) & Non Responsive

mtk

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Sent: Monday, December 07, 2009 12:49 PM
To: Hatch, Paula (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: cases that I mentioned

Matter of (b) (6) BIA, 9/28/09

BIA indicated that IJ's inappropriate comments raised issue of whether case was decided on considerations that were no part of the record.

IJ indicated newly appointed BIA member is possibly changing the law and that (b) (6) is concerned about being reversed. Also considered that respondent may have future violations of immigration law as providing a basis for denying discretionary relief.

Disciplinary issues: Dereliction of duty by deciding case on matters outside record.

Matter of (b) (6) BIA, 10/31/08

IJ said that (b) (6) could not comply with BIA remand.

7744;7669; 7689; 7723; 7849; 8100; 8360; 8377; 8402

BIA indicated that noncompliance was not a possibility.

Disciplinary issues: Dereliction of duty; failure to follow instruction.

Matter of (b) (6) 11/6/08

Comments of I were unnecessarily caustic, sarcastic, or dismissive in tone. Created an appearance of partiality and detracted from dignity of the proceedings.

Disciplinary issue: Injudicious conduct

Matter of (b) (6) 9/21/09

IJ says that (b) (6) is "perplexed" by BIA's earlier decision, yet acknowledges ACIJ's counseling not to criticize the BIA

Disciplinary issue: Failure to follow instruction of superior

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IJ says that the respondent is "an absolute liar," "would say and do anything to continue illegal presence in the United States," and "wouldn't tell the truth if it would gain him access to the Kingdom of Heaven . . ."

BIA remanded because language showed that IJ might be prejudiced toward respondent

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 9/28/09

Respondent has "feasted on the fruits of benevolence of this nation long enough . . ." "Would not know truth if it reached up and bit him. . ."

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 4/23/09

BIA indicates that IJ's comments are "pejorative remarks directed at the respondent in an *ad hominem* fashion by the Immigration Judge . . ."

IJ said that "[the respondent] is nothing but a taker and his representation that he is [preparing to file back taxes] . . . absolutely insults the intelligence of the court" and that the respondent is "the poster child of [those] who should not be allowed in our nation." (b) (6) said that the respondent was comfortable with how things were, is no longer comfortable, and wants me to make all of that better for him. "My job is not to make up for his negligence and misconduct."

Disciplinary issue: Injudicious conduct by verbal attack on respondent.

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BIA indicates that IJ impermissibly applied a factor in the case that is not germane to (b) (6) decision, which tainted (b) (6) decision. Added factor was "fear of appellate criticism."

IJ stated, in part, ". . . the current climate effecting IJs who are the subject and target of external criticism . . . is such that I believe the current environment for IJs is such that in order to avoid undue criticism and potential disciplinary action that close calls must be decided in favor of a given respondent . . ." [Then continues with a discussion about another IJ] and then ". . . the current climate within the Department of Justice is such that . . . IJs are hld to a level of scrutiny . . . that I no longer feel I can always adhere to {the required legal] standard" and "[In} a close call, I would deny this case . . . [but based on the current environment] "and to avoid criticism, and I will grant this case."

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BIA notes that IJ engaged in "terse exchange" with attorney and does not give respondent an opportunity to present asylum claim.

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Moutinho, Deborah (EOIR)

From: Sukkar, Elisa (EOIR)
Sent: Tuesday, June 15, 2010 5:00 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: (b) (6) update?

MTK and Deborah:

I am going to meet with IJ (b) (6) tomorrow. I have 2 matters that I want to go on record to address with (b) (6) They relate to the format of his decisions. (b) (6) apparently just received a BIA decision that he wanted to discuss with me. I told (b) (6) that I had a few matters to address with (b) (6) We agreed to meet tomorrow.

I know these do not appear on the latest report that Deborah sent out but I will sit down with IJ nevertheless to close out any loops:

(b) (6) (BIA June 9, 2009) The IJ's decision was in 2002 and was affirmed twice by BIA. But in 2009, they made a comment about his format and they vacated the IJ's and their own two previous decisions.

(b) (6) (BIA February 20, 2009). As MTK pointed out, the only issue here was that the BIA found the credibility determination of the IJ to be clearly erroneous. That is a decision the IJ made on the merits and that was (b) (6) determination. Absent any unusual or unnecessary commentary, it is best to close out. I believe it may be closed out already but if it shows pending anywhere please indicate that upon review by the ACIJ, the matter was properly addressed as an appealable issue by the parties and the BIA.

The one I cannot find is the (b) (6) IJC memo. Could you please forward? It seems from MTK's comments that the decision was informal but no criticism by BIA.

It also seems that the IJ received one today saying the decision was "terse". I have not seen that one but will review with IJ tomorrow. All of these cases relate to the format of (b) (6) decisions, a matter that has been addressed with IJ before.

Will keep you posted. Thanks. EMS

From: Sukkar, Elisa (EOIR)
Sent: Tuesday, June 15, 2010 4:18 PM
To: Sukkar, Elisa (EOIR)
Subject: FW: (b) (6) update?

FYI

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, June 08, 2010 2:35 PM
To: Sukkar, Elisa (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: FW: (b) (6) update?

Elisa,
Same thing wrt to (b) (6), which also came back in Feb 2009. IJ dec informal, but no criticism by bia.

7869

I've attached an email between us genlly discussing.
Let me know how you want to "close out."
Tx.
mtk

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Sent: Tuesday, June 08, 2010 2:31 PM
To: Sukkar, Elisa (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: (b) (6) update?

Elisa,
(b) (6) came back from BIA in 2/2009. (b) (6) Adverse cred finding was clearly erroneous.
I don't have a record of resolution. Was this one dismissed as merits based, or?
Tx.
mtk

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7870

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From: Keller, Mary Beth (EOIR)
Sent: Tuesday, May 11, 2010 10:57 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: cases that I mentioned

(b)(5) & Non Responsive

mtk

From: Dean, Larry R. (EOIR)
Sent: Tuesday, May 11, 2010 10:51 AM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: cases that I mentioned

(b)(5) & Non-Responsive

From: Keller, Mary Beth (EOIR)
Sent: Monday, May 10, 2010 12:33 PM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: FW: cases that I mentioned

Larry,
The cases in red below were not referred to OPR. Thus, I don't have resolutions on them. Nor do I have one on Matter of (b) (6) referred by BIA on 11/17/2009. (b) (6) Not sure what you want to do with those, but take a look and let me know.
Tx.
mtk

From: Dean, Larry R. (EOIR)
Sent: Monday, December 07, 2009 12:49 PM
To: Hatch, Paula (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: cases that I mentioned

Matter of (b) (6) BIA, 9/28/09

BIA indicated that IJ's inappropriate comments raised issue of whether case was decided on considerations that were no part of the record.

IJ indicated newly appointed BIA member is possibly changing the law and that (b) (6) is concerned about being reversed. Also considered that respondent may have future violations of immigration law as providing a basis for denying discretionary relief.

Disciplinary issues: Dereliction of duty by deciding case on matters outside record.

Matter of (b) (6) BIA, 10/31/08

IJ said that (b) (6) could not comply with BIA remand.

8100; 7669; 7689; 7723; 7744; 7849; 8360; 8377; 8402

BIA indicated that noncompliance was not a possibility.

Disciplinary issues: Dereliction of duty; failure to follow instruction.

Matter of (b) (6) 11/6/08

Comments of I were unnecessarily caustic, sarcastic, or dismissive in tone. Created an appearance of partiality and detracted from dignity of the proceedings.

Disciplinary issue: Injudicious conduct

Matter of (b) (6) 9/21/09

IJ says that (b) (6) is "perplexed" by BIA's earlier decision, yet acknowledges ACIJ's counseling not to criticize the BIA

Disciplinary issue: Failure to follow instruction of superior

Matter of (b) (6) BIA 11/7/08

IJ says that the respondent is "an absolute liar," "would say and do anything to continue illegal presence in the United States," and "wouldn't tell the truth if it would gain him access to the Kingdom of Heaven . . ."

BIA remanded because language showed that IJ might be prejudiced toward respondent

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 9/28/09

Respondent has "feasted on the fruits of benevolence of this nation long enough . . ." "Would not know truth if it reached up and bit him. . ."

Disciplinary issue: Injudicious conduct

Matter of (b) (6) BIA 4/23/09

BIA indicates that IJ's comments are "pejorative remarks directed at the respondent in an *ad hominem* fashion by the Immigration Judge . . ."

IJ said that "[the respondent] is nothing but a taker and his representation that he is [preparing to file back taxes] . . . absolutely insults the intelligence of the court" and that the respondent is "the poster child of [those] who should not be allowed in our nation." (b) (6) said that the respondent was comfortable with how things were, is no longer comfortable, and wants me to make all of that better for him. "My job is not to make up for his negligence and misconduct."

Disciplinary issue: Injudicious conduct by verbal attack on respondent.

Matter of (b) (6) BIA 11/6/09

BIA indicates that IJ impermissibly applied a factor in the case that is not germane to (b) (6) decision, which tainted (b) (6) decision. Added factor was "fear of appellate criticism."

IJ stated, in part, ". . . the current climate effecting IJs who are the subject and target of external criticism . . . is such that I believe the current environment for IJs is such that in order to avoid undue criticism and potential disciplinary action that close calls must be decided in favor of a given respondent . . ." [Then continues with a discussion about another IJ] and then ". . . the current climate within the Department of Justice is such that . . . IJs are hld to a level of scrutiny . . . that I no longer feel I can always adhere to {the required legal] standard" and "[In} a close call, I would deny this case . . . [but based on the current environment] "and to avoid criticism, and I will grant this case."

8101; 7670; 7690; 7724; 7745; 7850; 8361; 8378; 8403a

Disciplinary issue: Dereliction of duty

Matter of (b) (6), BIA, 6/9/09

BIA notes that IJ engaged in "terse exchange" with attorney and does not give respondent an opportunity to present asylum claim.

Discplinary issue: Dereliction in handling case and injudicious conduct

The hardcopies are being FEDEXed today.

I am also enclosing two counseling statements issued earlier this year which relate to somewhat similar issues. It probably best not to mention those in this action, but it may be helpful for you to note these, except in 538. Re 538, (b) (6) acknowledges a prior counseling regarding commenting about the BIA, yet does so again. Mary Beth's log also reflects some earlier, verbal counseling for similar matters.

LRD

/

8102; 7671; 7691; 7725; 7746; 7851; 8362; 8379; 8403b

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Room 3525
Washington, D.C. 20530

APR 23 2010

Ms. Robin Stutman
General Counsel
Executive Office for Immigration Review
Office of the General Counsel
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Dear Ms. Stutman:

Your office recently referred ten separate orders by the Board of Immigration Appeals (BIA) in which the BIA criticized Immigration Judge (IJ) (b) (6). The BIA criticized IJ (b) (6) for, among other things, inappropriate commentary; misrepresenting statements by counsel; acting in a manner that suggested (b) (6) prejudged a case; addressing potential Fifth Amendment issues in a manner that may have unduly restricted testimony; engaging in speculation; and granting relief because (b) (6) feared criticism of (b) (6) by the BIA. The cases are *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); *Matter of* (b) (6); and *Matter of* (b) (6).

We have initiated an investigation into the BIA's criticism of IJ (b) (6). To assist us in our investigation, please ask IJ (b) (6) to provide us with a written response to the BIA's criticism in each case. Please note that (b) (6) written response should be (b) (6) personal account of the conduct giving rise to the BIA's criticism and that the response should not be edited or revised by any EOIR employee. Please also provide us with copies of the complete Records of Proceeding (ROP), including the tapes from any hearings. Lastly, please have IJ (b) (6) identify any Department of Homeland Security trial attorneys, private attorneys, interpreters and EOIR personnel present during any hearings.

In preparing (b) (6) response, IJ (b) (6) should consult any relevant files and may contact other personnel if necessary to obtain documents, bu (b) (6) should refrain from discussing the matter with potential witnesses. IJ (b) (6) should identify any witnesses who would be able to provide relevant information, bu (b) (6) should not contact them for the purpose of obtaining a written or oral statement.

8104

IJ [redacted] should also provide us with information regarding [redacted] professional background and experience, including [redacted] length of service and positions held with the Department. In addition, to assist us in determining which ethical rules apply in light of the enactment of 28 U.S.C. § 530B (the "Citizens Protection Act of 1998"), IJ [redacted] should identify each state in which [redacted] is licensed to practice law and the category of membership (*e.g.*, active, inactive, associate, or some other membership category).

We would also like to know whether there has been any media coverage of the BIA's criticisms in these cases. If so, we ask that you provide us copies of any articles and/or any videotapes and/or transcripts of any broadcasts mentioning or discussing the matter.

For your information and to assist IJ [redacted] in responding to our request for information, enclosed is a document describing the policies and procedures this Office follows in handling allegations of misconduct and judicial findings made against Department attorneys.

IJ [redacted] should send [redacted] response directly to this Office within four weeks of the date of this letter. IJ [redacted] may, but is not required to, provide you with a courtesy copy of [redacted] response. In addition, we welcome any information or comments you may wish to provide within that time frame.

Thank you for your assistance in this matter. If you or IJ [redacted] have any questions, please contact me or Assistant Counsel Marlene M. Wahowiak at (202) 514-3365.

Sincerely,

Mary Patrice Brown
Acting Counsel

Enclosure

8105

(*) LRD - suspension? Then pull off? jump late fast

Keller, Mary Beth (EOIR)

From: Dean, Larry R. (EOIR)
Sent: Monday, November 30, 2009 3:34 PM
To: Keller, Mary Beth (EOIR)
Subject: RE: (b) (6) plan

The update that I would like added is that I issued a written counseling on April 13, 2009, re (b) (6) (b) (6) for comments about the respondent which were unnecessarily harsh to the extent that the BIA viewed them as disparaging the respondent and for making disparaging comments about the BIA. I advised tha(b) (6) cease making such comments about either. I also issued a written counseling on April 9, 2009, re(b) (6) (b) (6) for unnecessary criticism of the respondent and for criticizing the BIA.

I have also done some verbal counseling but unfortunately cannot retrieve that from any e-mail or other notes. So, that's what I have.

LRD

From: Keller, Mary Beth (EOIR)
Sent: Monday, November 30, 2009 1:49 PM
To: Dean, Larry R. (EOIR)
Subject: RE: (b) (6) plan

Larry,
I am going to need to forward some version of the db to Brian at some point b4 tomorrow at 4, so he can see what's been happening. Do you want me to wait for any updates from you, or, want me to just advise him that we are still in the process of updating? Lemme know.
Tx.
mtk

From: Dean, Larry R. (EOIR)
Sent: Monday, November 30, 2009 2:17 PM
To: O'Leary, Brian (EOIR); Keller, Mary Beth (EOIR)
Subject: RE: (b) (6) plan

That also works for me.

From: O'Leary, Brian (EOIR)
Sent: Monday, November 30, 2009 11:41 AM
To: Keller, Mary Beth (EOIR); Dean, Larry R. (EOIR)
Subject: RE: (b) (6) plan

We have the SFMS meeting at 2 and the personnel meeting at 3 tomorrow. How about 4?

From: Keller, Mary Beth (EOIR)
Sent: Monday, November 30, 2009 12:27 PM
To: Dean, Larry R. (EOIR)
Cc: O'Leary, Brian (EOIR)
Subject: RE: (b) (6) plan

I am available all day tomorrow, so either of those times works for me-

8156

From: Dean, Larry R. (EOIR)
Sent: Monday, November 30, 2009 11:58 AM
To: Keller, Mary Beth (EOIR)
Cc: O'Leary, Brian (EOIR)
Subject: RE: (b) (6) plan

My schedule tomorrow morning is difficult. Could we discuss tomorrow afternoon, maybe 2:30 or 3:00, eastern?

From: Keller, Mary Beth (EOIR)
Sent: Monday, November 30, 2009 8:20 AM
To: O'Leary, Brian (EOIR)
Cc: Dean, Larry R. (EOIR)
Subject: (b) (6) plan

Brian,
Larry wanted to discuss this early this week, and I think we need to make a call soon on how we want to proceed with Judge (b) (6) Shall we discuss after the staff mtg tomorrow? Depending on what we decide, we will need to do some work with BIA asap, as well as consult with ELR to make sure our message is clear.
mtk

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

8157

EOIR FOIA Processing (EOIR)

From: Hatch, Paula (EOIR)
Sent: Monday, June 21, 2010 12:12 PM
To: Dean, Larry R. (EOIR); Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
Cc: Reinfurt, Sandy (EOIR)
Subject: RE: (b) (6) proposed suspension

Thank you.

From: Dean, Larry R. (EOIR)
Sent: Monday, June 21, 2010 12:12 PM
To: Hatch, Paula (EOIR); Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
Cc: Reinfurt, Sandy (EOIR)
Subject: RE: (b) (6) proposed suspension

(b) (6)

From: Hatch, Paula (EOIR)
Sent: Monday, June 21, 2010 10:29 AM
To: Dean, Larry R. (EOIR); Keller, Mary Beth (EOIR); Rosenblum, Jeff (EOIR)
Cc: Reinfurt, Sandy (EOIR)
Subject: RE: (b) (6) proposed suspension

Judge Dean:

Could you please provide me the A number that coincides with the (b) (6) omplaint? Thanks, Paula

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From: Dean, Larry R. (EOIR)
Sent: Friday, June 18, 2010 9:39 AM
To: Dean, Larry R. (EOIR); Keller, Mary Beth (EOIR); Hatch, Paula (EOIR); Rosenblum, Jeff (EOIR)
Subject: RE: (b) (6) proposed suspension

(b) (5)

LRD

From: Dean, Larry R. (EOIR)
Sent: Friday, June 18, 2010 7:55 AM
To: Keller, Mary Beth (EOIR); Hatch, Paula (EOIR); Rosenblum, Jeff (EOIR)
Subject: RE: (b) (6) proposed suspension

(b) (5)

LRD

From: Keller, Mary Beth (EOIR)
Sent: Thursday, June 17, 2010 4:27 PM
To: Hatch, Paula (EOIR); Rosenblum, Jeff (EOIR)

8286

Keller, Mary Beth (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, June 08, 2010 2:08 PM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: FW: (b) (6) items

Larry,
I am back into Feb 2009 complaints, cleaning some up before I send to you in report form - I have discovered that the (b) (6) (courtroom observer) complaint and the (b) (6) respondent) complaint about Judge (b) (6) are one and the same, as we would track in our new db. There would simply be two sources. I will address that piece; I don't have a record of resolution though. The nature of the allegations are lack of fairness, due process concerns, and poor treatment in the courtroom – CASE indicates that a bond appeal was dismissed by the BIA on March 27, 2009, and the case appeal was dismissed by the BIA on May 7, 2009. I have not read either case to determine if the BIA addressed was raised with us.
(b) (6) retirement may overtake this, but wanted to forward what I have to you. If you take a look at the cases and determine the complaints were merits based or something else, let us know and we can close out that way.
Tx,.
mtk

From: Dean, Larry R. (EOIR)
Sent: Monday, November 16, 2009 10:18 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: (b) (6) items

A couple of these may have been handled by counseling statements.

With my visitors, I don't have a lot of time this week, but I'll try to work this in if possible. It's time.

LRD

From: Keller, Mary Beth (EOIR)
Sent: Friday, November 13, 2009 10:24 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: (b) (6) items

Larry,

Per my recent review of all we have relating to Judge (b) (6) below are where I don't think I have updated info. If you would take a look at the current db (attached) items below, and let me know, I will update and send to Brian as we all think about how to proceed:

Matter of (b) (6) BIA Decision from Sept. 2009

Matter of (b) (6) BIA Decision from Sept. 2009

Matter of (b) (6) BIA Decision from Sept . 2009

8313; 7692; 7726; 7747; 7852; 8098; 8363; 8380; 8406

Matter of (b) (6), BIA Decision from June 2009

Matter of (b) (6) BIA Decision from April 2009

Complaint from (b) (6) from February 2009

Complaint from (b) (6) (the respondent) relating to the proceeding immediately above

Matter of (b) (6) BIA Decision from November 2008.

Matter of (b) (6), BIA Decision from November 2008 (recently discovered, not sent by BIA)

Matter of (b) (6) BIA Decision from October 2008.

Also, I was just advised of another case up at BIA (we don't have a BIA decision yet) but the IJ during the hearing in recounting the bond history states: ((b) (6) - hearing in April 2008)

"The only prior proceeding here was a bond hearing/custody redetermination hearing in which the respondent's bond was lowered from $20,000 to $2,500 by one of the more popular bond Judges in the country, Judge (b) (6) sic]. Folks just love (b) (6) In any event, (b) (6) the Judge and that's what (b) (6) decided.. Good for (b) (6) Anyway, s (b) (6) moved from the detained docket to the non-detained docket."

mtk

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

8314; 7693; 7727; 7748; 7853; 8099; 8314; 8364; 8381; 8407

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

File No.: A(b) (6) March 29, 2005

In the Matter of)
(b) (6)) IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act - entry without inspection.

APPLICATIONS: Cancellation of removal under Section 240A(b) of the Immigration and Nationality Act; voluntary departure under Section 240B.

ON BEHALF OF RESPONDENT: ON BEHALF OF DHS:

(b) (6)

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 32-year-old single male native and citizen of Mexico.

The United States Immigration and Naturalization Service, now Department of Homeland Security, brought these removal proceedings against the respondent pursuant to the authority contained in Section 240 of the Immigration and Nationality Act.

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Proceedings were commenced with the filing of a Notice to Appear with the Immigration Court on December 11, 2001. See Exhibit 1.

Through counsel, the four allegations were admitted and the charge conceded. Specifically, that he entered the United States at, or near, (b) (6) on, or about, November 17, 1985, without inspection. On the basis of the respondent's admissions and concessions, I find he is removable by evidence which is clear and convincing. See Section 240(c)(3)(A) of the Immigration and Nationality Act.

The respondent initially applied for asylum, withholding of removal and Article 3, Convention against Torture with the Immigration and Naturalization Service. The filing of that application is what made the respondent become known to the Government. And, as a result of that application, he was placed in these Court proceedings.

Once in Court proceedings, that application, and all relief thereunder, was withdrawn and the respondent applied solely for cancellation of removal and voluntary departure. His application was marked into the record as Exhibit 2. And, his supplemental documents were all marked as Group Exhibit 3.

STATEMENT OF THE LAW

In order to be eligible for cancellation of removal under Section 240A(b) of the Act, the respondent must establish (1) that he has been continuously physically present in the United States for ten years immediately preceding the issuance of the

charging document; (2) that he has been a person of good moral character throughout such period; (3) that he has not been arrested or convicted for a crime which would bar relief; and (4) that his removal would result in exceptional and extremely unusual hardship to the respondent's spouse, parent or child who is either a United States citizen or a lawful permanent resident.

ANALYSIS

The Court is satisfied that the respondent has been continuously physically present in the United States for ten years immediately preceding the issuance of the charging document or ten years prior to October 29, 2001. The respondent's testimony has been credible and it is, furthermore, corroborated by supplemental documents.

The Court is also satisfied that the respondent has been a person of good moral character and he has never been arrested or convicted for an offense which would bar relief.

Unfortunately, the Court finds that the respondent has not established that his three United States citizen children, either individually or cumulatively, would suffer exceptional and extremely unusual hardship if the respondent had to return to Mexico. Specifically, the respondent's three children are (b) (6), a daughter born on (b) (6) 1995, currently a 9-year-old, (b) (6), born (b) (6) 1999, currently a five-5-old, and (b) (6), born on (b) (6) 2004, 11 months.

In making this determination, the Court is mindful of the

8340

precedent set forth in Matter of Monreal, Int. Dec. 3447 (BIA 2001). In Monreal, the Board looked to the dictionary definitions of exceptional and extremely unusual and found that exceptional is that defined as that forming an exception, not ordinary, uncommon and rare. And, that the added phrase, extremely unusual, plainly indicates circumstances in which an exception to the norm is very uncommon. The Court is mindful that the terms are not affixed in inflexible content or meaning, but must tailored to the individual facts and circumstances on each respondent present before the Court.

The Court, as was the Board, is also mindful of the legislative history, wherein Congress changed the hardship standard in 1996 from extreme hardship to exceptional and extremely unusual hardship in order to indicate that the respondent must establish evidence of harm. In this case, to a child substantially beyond that which would ordinarily be expected to result from the alien's deportation. Thus, it appears that Congress intended that cancellation of removal should be available to non-permanent residents only in compelling cases. The Board indicated in dicta that a child with a very serious health issue or compelling needs in school might constitute such hardship.

Mr. Monreal was 34-years-old. He had three U.S. citizen children. The eldest was 12, the middle child, 8, and an infant child. In the instant matter, the children are nine, five and 11

months. Mr. Monreal was married. His spouse had returned to Mexico under a prior grant of voluntary departure and had taken the infant U.S. citizen child with her. Moreover, Mr. Monreal had the equity of two lawful permanent resident parents present in the United States. However, the record in that regard was not sufficiently developed for the Board to find any hardship in Matter of Monreal to the lawful permanent resident parents. The Board noted that the children were both healthy. They could speak, read and write Spanish. And, that the family would be reunited in Mexico.

In the instant matter, the respondent testified that he has been in the United States since he was 13-years-old. And, at age 14, he was working at (b) (6), a restaurant in (b) (6). He started off as a dishwasher, where he was employed for 12 years, up until 2001, when he was earning $16 an hour as a general manager. He, then, changed jobs, to (b) (6) Installation in (b) (6), where he worked as a mechanic from August 2001 until October 2002. And, then, since October of 2002, he has been employed as a supervisor, earning $1,000 a week for (b) (6) Maintenance. He testified orally that he has been since October of 2002 at (b) (6), an oil company in (b) (6) adjacent to the (b) (6), as a supervisor in charge of scaffolding now earning $22 an hour.

He testified his daughter, (b) (6), is a great student. She is in the fourth grade. She does not read, nor write, in the

Spanish language. She is in good health.

His second child, (b) (6) was born on (b) (6) 1999, a five-year-old. He is in kindergarten.

And, the respondent's youngest son, (b) (6) was diagnosed at two months with whooping cough. The respondent testified that the child could not breath, he took him to the emergency hospital, at (b) (6). And, also, to (b) (6), where he was hospitalized in June of 2004 for 20 days in the ICU Pediatric Unit. He testified that the child will be subject to reoccurrences and he should be kept at home for two months. If he coughs more than three times in a day, the respondent returns him to the hospital. This, he has done twice. The respondent testified that he may have complications, including asthma, pneumonia and bronchitis.

The respondent testified if he had to return to Mexico, his three U.S. citizen children would stay in the United States with their mother. The respondent is not married to her. He testifies that if he were in Mexico, that she, in the United States, does not make sufficient money to support her three children here. And, stated that his children might be forced to be on welfare or on the streets.

In Mexico, the respondent stated, his brother works in a restaurant at $35 a week.

The respondent was asked what hardship his children would suffer if he were to return to Mexico and they stay in the United

States. Primarily economic was his first answer. His second answer was, who would watch the baby if their mother had to get a job? And, that he was afraid if somebody else was watching the baby, (b) (6) he might die of a whooping cough attack. (b) (6) was last at the doctor on the Thursday prior to the March 8, 2005, hearing. He was advised to take the rest of the medicine that he been prescribed. Hardship to (b) (6) if the respondent left her in the United States with her mother. The respondent testified that she would miss her dad and lose her confidence. Therefore, her grades would decline. And, that she might hang out with a bad crowd and use drugs.

Further, the respondent stated that he did not believe there were any refineries in Mexico and he knows the restaurant business. If he were earning $35 a week, how much of that money could he send to the United States to support their children? He stated, none, because he must support his mother and his little sister in Mexico.

The respondent stated that he helps his daughter with her homework. But, without her dad, with regard to her school work, "everything would go bad." He stated that his daughter was evaluated by the psychologist. And, the respondent testified that nothing replaces a dad. She would be insecure and depressed, economically and socially.

The respondent, on cross-examination, acknowledged he has a mother, four sisters and two brothers in Mexico. The respondent

also has a U.S. citizen brother living in Texas.

(b) (6) paid for the birth of his three children.

He stated the first school he attended in the United States was in 1991. He has no documents to that affect. When asked why he did not present any, he indicated that he did not know.

He acknowledged that he worked in an undocumented status for (b) (6) Restaurant all of those years until he got his work authorization, concurrent with filing the cancellation application with the Court.

When asked if the mother of is children could return to Mexico, he indicated that she has no place to stay and that she has family in the United States, including a sister and two brothers.

He testified that his earnings of 400 pesos in Mexico in a restaurant would be insufficient to support his family.

The respondent testified that he has some tax returns at home. None were presented to the Court.

The respondent's nine-year-old daughter, (b) (6), testified in English that she is at (b) (6) Elementary. She is a fourth grader. She is an A, B student. Acknowledges she has family in the United States who are legally here. And, she was on the honor roll her first semester. She would miss her father a lot. That they are a very close family.

The mother of the respondent's children, (b) (6) also testified that she entered the United States 1988. She has

never left. She stated if the respondent were to return to Mexico, it would cause the three United States citizen children moral and physical hardship and trouble at school. And, that he is a good father. And, that he assists her in raising the three children and, in particular, assists her with (b) (6) health problem. She testified that she will stay in the United States and that she will get a job. And, that her family members in the United States would not turn their back on her and the three U.S. citizen children.

(b) (6), a psychologist, also testified in support of her written report. She indicated that she spoke one time with (b) (6), who was then nine-years-old, in 2003. Has not spoken to her since. And, found at that time, that (b) (6)s total problem score was in the borderline clinical range for girls ages 6 to 11. And, her internalizing score was in the clinical range above the 90th percentile. Her anxious/depress syndrome score was in the borderline clinical range. As was her anxiety problem scale in the borderline clinical range. In her oral testimony, she indicated that this is not clinically high, the current level. However, she anticipates that if the young lady were to return to Mexico with her father or be separated from her father, it might cause her stress. And, then, when confronted with stress, there is a potential that the conflict would escalate to an anxiety or depressed level of a clinical significance. This might require

treatment and, or medication. And, if she fails to get it, she stated it might result in one being withdrawn, staying at home, lacking motivation or acting out in anger, irritability and, in extreme cases, a suicide. She was asked what the likelihood was of a suicide and she indicated that she could not state because there are so many different factors that went into it. But, in very general terms, the younger the child, the less likely. The more into their adolescence, the more likely. The Court notes that (b) (6) is nine-years-old. She also indicated that if her little brother was unable to get medical treatment that she perceived that he ought to have, that it might add another conflict or a stress to the mix, further complicating her psychological state.

She acknowledged the error in her report with regard to the level of education that the respondent has.

The respondent has testified his three children are staying in the United States. Matter of Ige requires a written declaration from both parents in such cases. However, the Court has sworn testimony of the respondent and the sworn testimony of the mother of the children that that was their intention. Accordingly, their sworn testimony is the equivalent of a written declaration. Accordingly, the Court finds it is the parental choice that the three children will stay in the United States. That being the parent choice, the Court sees the hardship only as a separation from their father.

The young man, (b) (6), will continue to receive the medical care he has in the United States. He is, apparently, getting care now and he has no health insurance, so I assume that he will continue to get it. It makes no difference whether the respondent is in Mexico or not in whether or not the young man will get his medical care, because he is a U.S. citizen and he is entitled to benefits thereunder.

The respondent testified that his wife and children will be on the streets if he were out. To the contrary, his wife testified that she would get a job and that she has family members in the United States who would not turn their back on her. Moreover, the respondent also has a U.S. citizen sibling in the United States to assist, if he sees fit.

The respondent stated that he might earn 400 pesos a week in Mexico. That would be insufficient to support his family. He stated he would not be able to send money to his children in the United States, because he would be supporting his mother in Mexico.

Accordingly, as with regard to psychological hardship and any medical hardship which might befall the young man, assuming that it is a very serious health issue, which the Court finds on this record is insufficient of such, noting a short note on a prescription pad (at page 15) from a doctor, without curriculum vitae or testimony or more elaborate evidence therefrom, that is on albuterol, prednisone, amoxical, tylenol, something, something

and neosporin something, is insufficient to establish exceptional and extremely unusual hardship. Noting that the child is remaining in the United States. Thus, any psychological hardship from the separation is that of the parents' choice. Accordingly, the Court finds for all these reasons, independently and cumulative, the respondent has not established his three U.S. citizen children would suffer exceptional and extremely unusual hardship if he were to return to Mexico.

The respondent is eligible for voluntary departure. The Court finds that he is statutorily eligible for such. There being no adverse factors, in the Court's discretion, it will grant such relief to the respondent on the condition that he post a $500 voluntary departure bond within five business days of today's date. Or, on, or before, April 4, 2005.

Should the respondent fail to timely post bond, or depart the United States after any extension granted to him by either the Board of Immigration Appeal or the Department of Homeland Security, there will be an alternate order of removal to Mexico.

ORDER

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal was denied.

IT IS FURTHER ORDERED his application for voluntary departure is granted until April 28, 2005.

Bond due on April 4, 2005, with an alternative order of removal to Mexico.

(b) (6)

United States Immigration judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE (b) (6), in the matter of:

(b) (6)

A (b) (6)

(b) (6)

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Terri L. Marshall, ST

Terri L. Marshall, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

February 27, 2006
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

8351

(b) (6)

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Sent: Tuesday, May 11, 2010 10:57 AM
To: Dean, Larry R. (EOIR)
Cc: Moutinho, Deborah (EOIR)
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(b)(5) & Non Responsive

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Matter of (b) (6) BIA Decision from October 2008.

Also, I was just advised of another case up at BIA (we don't have a BIA decision yet) but the IJ during the hearing in recounting the bond history states: (b) (6) - hearing in April 2008)

"The only prior proceeding here was a bond hearing/custody redetermination hearing in which the respondent's bond was lowered from $20,000 to $2,500 by one of the more popular bond Judges in the country, Judge (b) (6) sic]. Folks just love (b) (6) In any event, (b) (6) the Judge and that's what (b) (6) decided.. Good for (b) (6) Anyway, s (b) (6) moved from the detained docket to the non-detained docket."

mtk

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

8407; 7693; 7727; 7748; 7853; 8099; 8314; 8364; 8381;

Mary.Beth.Keller@usdoj.gov
-----Original Message-----
From: Dean, Larry R. (EOIR)
Sent: Thursday, March 06, 2008 4:17 PM
To: Keller, Mary Beth (EOIR)
Subject: RE (b) (6)

It's going to be (b) (6) but early May, to fit in with everything else (b) (6) is doing. They have "new judges" coming in during April, and I don't think we want them there during this refresher training. Rico and I will have the precise dates worked out by the end of the week.

Thanks.

LRD

-----Original Message-----
From: Keller, Mary Beth (EOIR)
Sent: Thursday, March 06, 2008 1:07 PM
To: Dean, Larry R. (EOIR)
Subject: RE (b) (6)

I'm going to tell Ohlson it will be schedule for next month. Does that work? (b) (6) right? And we'll go from there. Unless you want to tell me something else to put on the chart.
Thanks.

MaryBeth Keller

Assistant Chief Immigration Judge
Office of the Chief Immigration Judge, EOIR
703/305-1247
Mary.Beth.Keller@usdoj.gov

-----Original Message-----
From: Dean, Larry R. (EOIR)
Sent: Thursday, March 06, 2008 1:52 PM
To: Keller, Mary Beth (EOIR)
Subject: RE: (b) (6)

It is not.

-----Original Message-----
From: Keller, Mary Beth (EOIR)
Sent: Thursday, March 06, 2008 12:38 PM
To: Dean, Larry R. (EOIR)
Subject: (b) (6)

Larry,
Is (b) (6) remedial training set up yet, and if so, when and with whom?
Tx.
mtk

MaryBeth Keller

8457

EOIR FOIA Processing (EOIR)

From: Sukkar, Elisa (EOIR)
Sent: Wednesday, September 17, 2008 5:53 PM
To: Keller, Mary Beth (EOIR)
Cc: Pomeranz, Sharon (EOIR)
Subject: RE: Continued Cases

Dear Mary Beth:

Today, I reviewed the complaint on Judge (b) (6) who is also at (b) (6) . The alien is detained at (b) (6) and wants his conviction vacated and the judge gave him one continuance but refuses to give him another one.

So we see the impact of this issue in a detained population, the alien in his complaint to the Chief Judge says how he wants his case transferred to the other judge because he has heard that those aliens get to have more time to have their convictions vacated.

The detainees are now comparing notes on their IJ's! Elisa

-----Original Message-----
From: Keller, Mary Beth (EOIR)
Sent: Wednesday, September 17, 2008 2:24 PM
To: Keller, Mary Beth (EOIR); Sukkar, Elisa (EOIR)
Cc: Pomeranz, Sharon (EOIR)
Subject: RE: Continued Cases

Elisa,

(b) (5)

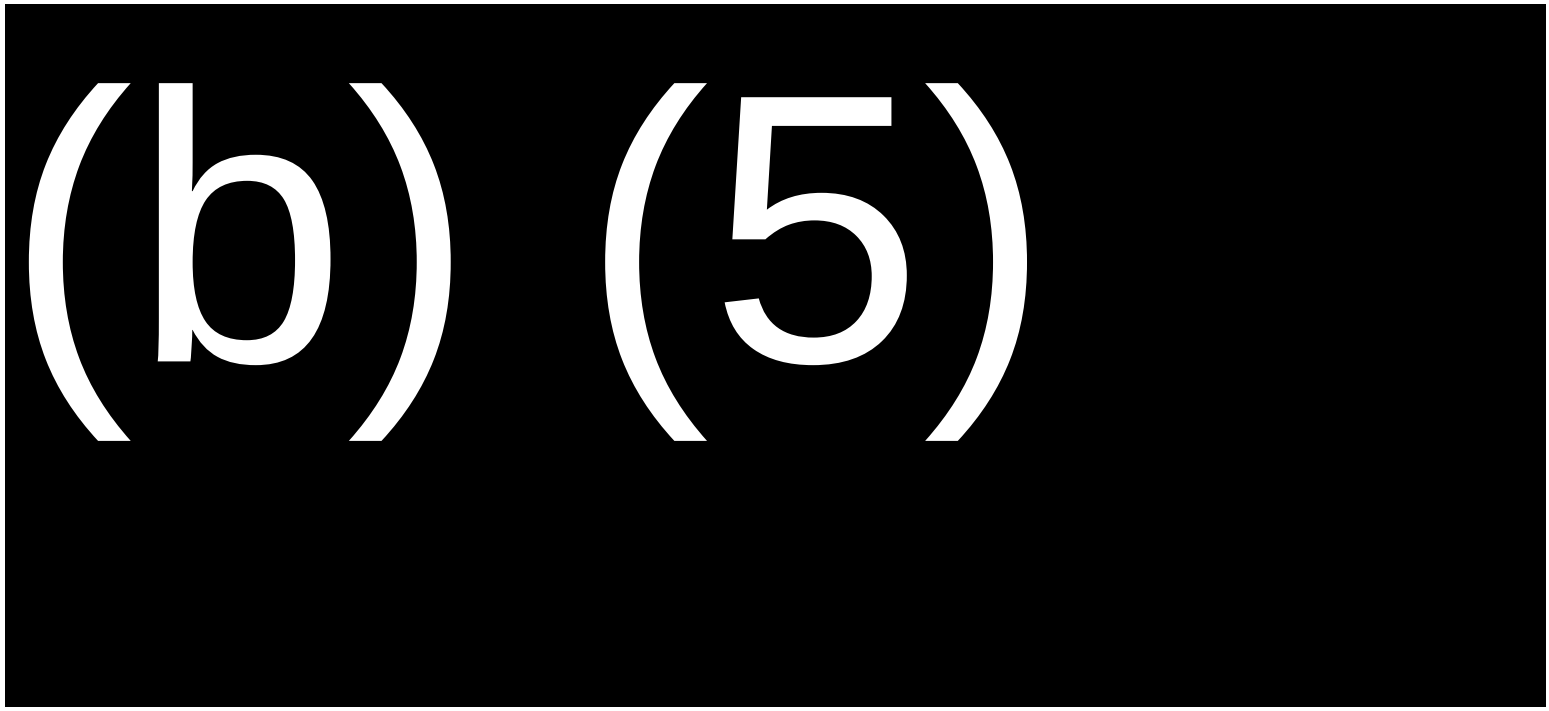
Your approach below sounds good. I think Judge (b) (6) needs to know what the perception is regardless, and, I'm not sure that 11 continuances, absent some serious justification in the vacation of a conviction context, makes sense even under (b) (6) "conservation of resources" argument.

(b) (5)

I think the balance here is that you talk to (b) (6) about it.
Let me know if you think differently.
mtk

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

8463



-----Original Message-----
From: Sukkar, Elisa (EOIR)
Sent: Tuesday, September 16, 2008 9:38 PM
To: Keller, Mary Beth (EOIR)
Cc: Pomeranz, Sharon (EOIR)
Subject: RE: Continued Cases

Dear Sharon and Mary Beth:

I reviewed the timelines enclosed in the attachments and the number of Master calendars is excessive. One of the cases is very familiar to one of the cases being handled by OPR but I would have to check the alien numbers (b) (6).

The one that concerns me the most is the last one, A(b) (6) it appears the person is detained since at least August of 2007. That alien has had 11 Master Calendars and some continuances were granted so that he could vacate his conviction.

I spoke to IJ (b) (6) on September 5 since (b) (6) called in reference to (b) (6) recusal from the OPR matter. At that time, I did indicate to (b) (6) that the government is very concerned about continuances being granted for the purpose of the aliens having their convictions vacated. (b) (6) indicated (b) (6) did so because if (b) (6) goes forward with the case, if the alien then vacates his conviction, all that time and effort is lost. I could not address the matter involving calling on their behalf since there is an inquiry pending with OPR.

What I may start doing as part of our compliance with the Nadarajah protocols is to ask WHY a continuance is being granted and see what happens. Right now we grant the IJs exceptions for 30 days. But if this data is correct this alien has been detained for over a year. The Nadarajah protocol exceptions should not be used for the purposes of an alien getting his conviction vacated. I can see 1 or even 2 reasonable continuances but not as many as we see here.

Thank you, Elisa

-----Original Message-----
From: Keller, Mary Beth (EOIR)
Sent: Monday, September 15, 2008 12:20 PM
To: Sukkar, Elisa (EOIR)

8464

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BIA & AAU Non-Precedent Decisions

Matter of (b) (6)

(b) (6) - Atlanta, GA

Board of Immigration Appeals

Slip Opinion

Decided: Feb. 26, 2009

COUNSEL:

Counsel: ON BEHALF OF RESPONDENT: Thomas Fulghum, Esquire

ON BEHALF OF DHS: Nicole F. Kelly, Assistant Chief Counsel

OPINIONBY: Holmes, Panel Member:

OPINION:

The respondent has appealed from the decision of the Immigration Judge dated March 28, 2008, finding the respondent removable as charged and denying her application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The appeal will be sustained, and the record will be remanded to the Immigration Court.

We review the findings of fact, including any determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge in the instant case did not make a credibility determination. Counsel for the Department of Homeland Security (DHS) indicated at proceedings below that the DHS did not contest the credibility of the respondent (Tr. at 98), and we find that both the respondent and her uncle, (b) (6) were credible witnesses. The determinative issue presented on appeal is whether the evidence presented establishes that the respondent's two United States citizen children, and particularly her son (b) (6) would suffer exceptional and extremely unusual hardship upon the respondent's removal from the United States. *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

We consider this to be a close case regarding whether a showing of the requisite degree of hardship has been made. No one factor is determinative on this issue. However, when considered in the aggregate, as the law requires, the evidence establishes that the respondent's son (b) (6) would suffer exceptional and extremely unusual hardship should the

respondent be forcibly removed from the United States and returned to her native Guatemala. In addition to the typical economic, social, and emotional hardships the respondent's son would encounter in adjusting to life in Guatemala, where the standard of living is less than he enjoys here in the United States, he has special health care and educational needs.

In this regard, the record reflects that (b) (6) was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) while in pre-kindergarten. The treatment of this chronic condition involves an ongoing, multi-faceted approach which includes daily medication, participation in special education classes, development of an individual education plan for (b) (6) and psychotherapy. The respondent takes (b) (6) to his medical appointments, makes sure he takes his medication, and participates in the therapy he receives to address aggressive behavior. Additionally (b) (6) participates in group counseling at his school to deal with issues relating to his not having a relationship with his father. As a result of his ADHD, (b) (6) repeated kindergarten, has engaged in aggressive behavior which resulted in him being suspended from school and from riding on the school bus, and had to be saved from drowning when he fell into a river after having slipped out unnoticed from his grandmother's house while visiting Guatemala.

We also find that the respondent has sufficiently established that (b) (6) would not have access to appropriate counseling or to any kind of specialized educational services if they should return to her hometown of (b) (6) Guatemala. A letter from the director of the local school at (b) (6) indicates that classes generally have 40 or more students and that no specially trained teachers are available, which is consistent with the testimony of the respondent and her uncle regarding the limited education they received while in Guatemala. Additionally, the respondent's mother had no luck in finding appropriate medication for (b) (6) when his medication ran out during a 2-month visit. Although (b) (6) medication has since changed, it appears unlikely that he would have access to this medication if he relocates to his mother's hometown in Guatemala since he now receives it through a special program of the pharmaceutical company.n1

The realistic employment opportunities for the respondent in Guatemala are extremely limited in view of her third grade education, her residence in the United States since the age of 16 years, and her limited employment skills. This, of course, would adversely affect the respondent's ability to provide for her children economically and to take care of their present and future health care needs. Although the respondent has relatives in Guatemala, they are unlikely to be of much assistance to her. The respondent reported that her mother lives in a 2-bedroom house with her five small children as well as two adult daughters and their four children. Only one of the adults has a job, and the respondent has provided them with financial assistance over the years. On the other hand, the respondent has several close relatives residing legally in the United States, including her father and uncle, who are close to the respondent and her children, as well as some siblings. Additionally, she owns a home in this country, although she currently has little equity in it.

This is a close case, and no one factor presented is determinative. However, when all of the factors are considered cumulatively, the totality of the evidence establishes that the respondent's United States citizen son (b) (6), would suffer exceptional and extremely unusual hardship if she is forced to depart the United States and return to her native Guatemala. Accordingly, the respondent has established her statutory eligibility for cancellation of removal. Additionally, we find that she merits such relief in the exercise of discretion.

ORDER: The appeal is sustained.

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

Return to Text

(n1)Footnote 1. The respondent asserts on appeal that the Immigration Judge failed to adjudicate this case in an impartial manner. In support of this argument, the respondent cites, inter alia, the Immigration Judge's submission into

evidence, on the day of the hearing, of a general document about health care in Guatemala (Exh. 8), which [redacted] then relied upon to conclude that the respondent's son would likely be able to obtain the necessary medication in Guatemala. *See* 8 C.F.R. § 1003.10(b) (stating that Immigration Judges "shall seek to resolve the questions before them in a timely and impartial manner"). We agree with the respondent that under the facts presented in this case the Immigration Judge's submission and consideration of this document as the hearing was ongoing raises questions of fairness, and we have not relied upon this document, which contains only general, and often dated, information about Guatemala's health care system, on appeal. We do not find it necessary to reach the respondent's remaining arguments about the Immigration Judge's conduct of these removal proceedings in view of our ultimate resolution of this case. #00002822#

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Matter of (b) (6)

(b) (6) --Dallas

Board of Immigration Appeals

Slip Opinion

JUN 30, 2006

COUNSEL:

COUNSEL: ON BEHALF OF RESPONDENT: Joseph Reina, Esquire

ON BEHALF OF DHS: Mary F. Agnello
Assistant Chief Counsel

OPINIONBY: Opinion by: N/A

OPINION:

The respondent appeals the Immigration Judge's March 7, 2005, decision denying the respondent's application for cancellation of removal. The appeal will be sustained.

The Immigration Judge found that the respondent demonstrated her continuous physical presence and good moral character for the requisite periods (I.J. at 5). However, her request for cancellation of removal was denied for lack of a showing that her removal from the United States would result in the necessary degree of hardship to her qualifying relatives (I.J. at 5-9).

We adopt the Immigration Judge's findings of fact (I.J. at 1-4). We agree with the respondent that the facts of this case closely resemble those in *Matter of Recinas*, 23 I. & N. Dec. 467 (BIA 2002), in which we granted cancellation of removal, and render it distinguishable from *Matter of Andazola*, 23 I. & N. Dec. 319 (BIA 2002), and *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001). The respondent is a single mother of two United States citizen children, currently ages 6 and 9. The children are older, accustomed to life in the United States, and know no other way of life. The eldest daughter has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), requiring twice daily medication with Ritalin and ongoing psychiatric evaluation. In addition, she participates in a program at her school for children diagnosed with attention deficit disorder. The children are wholly dependent on the lead respondent for support. The respondent does not receive any child support from the father of her children, and at the time of the hearing, he was in prison. Furthermore, the respondent testified that he had mentally, emotionally and physically abused her, even hitting her in front of her eldest daughter. The respondent is the beneficiary of an approved visa petition filed

in 1993 by her father, but a visa number will not be available for many years. The respondent has negligible assets to ease her transition to Mexico. She has some family ties in Mexico; however, she has not seen them in over 17 years. Thus, she does not have a family network to return to in Mexico that could help support her and her children. All of these factors render this case very similar to that in *Matter of Recinas*. For these reasons and as set forth in more detail in the respondent's brief, we are unable to meaningfully distinguish this case from *Matter of Recinas*. Thus, upon considering the factors cumulatively, we find that the respondent has demonstrated that her removal would result in exceptional and extremely unusual hardship to her qualifying family members. *See Matter of Recinas, supra*, at 469-71 .

Accordingly, and consistent with the recently-published interim rule relating to background and security investigations of aliens who have established eligibility for relief to the course of their proceedings before this Board or Immigration Judges, the record is remanded for further proceedings. *See* 70 Fed. Reg. 4743 (Jan. 31, 2005) (effective April 1, 2005).

ORDER: The appeal is sustained.

FURTHER ORDER: The respondent's eligibility for cancellation of removal is established.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and for further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005) .

Board Member Gerald S. Hurwitz respectfully dissents without separate opinion. #00002185#

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IMMIGRATION NON-PRECEDENT DECISIONS

Matter of (b) (6)

A (b) (6) – San Francisco

Board of Immigration Appeals

(b) (6)

SEP 09 2005

HOLDING

The Board sustained appeal from decision of immigation judge ("IJ") that respondent was not entitled to cancellation of removal upon finding that respondent's removal to Guatemala would cause exceptional and extremely unusual hardship to her 5 minor children because of the need for her to raise the children alone and support them financially, combined with the learning disabilities of the second oldest child and her need for therapy.

SUMMARY OF ISSUES

CANCELLATION OF REMOVAL; HARDSHIP: Respondent will be found eligible for cancellation of removal because of exceptional and extremely unusual hardship to her 5 minor children where respondent, if removed to her native Guatemala, would be required to care for the children by herself and provide for them financially, and respondent's second oldest child suffers from learning disabilities for which she receives therapy here in the U.S.

FACTS

Respondent was charged with being present without being admitted or paroled and applied for cancellation of removal based upon claim that removal to her native Guatemala would cause exceptional and extremely unusual hardship 5 minor U.S. citizen children. If removed, respondent would be required to provide care for her children by herself and provide for them financially. Additionally, respondent's second oldest child suffers from multiple learning disabilities for which she receives therapy here in the U.S. The IJ denied respondent's application for cancellation of removal. Respondent appealed.

CROSS-REFERENCES

Immigration Law and Procedure chap. 64.

COUNSEL: COUNSEL: ON BEHALF OF RESPONDENT: Pro se n1

——————————Footnotes——————————

Mr. (b) (6) filed a Notice of Entry of Appearance as Attorney (Form EOIR-27) on behalf of the

respondent on March 15, 2004. Mr. (b) (6) has been suspended from practice before the Board, the Immigration Judges and the Department of Homeland Security (formerly the Immigration and Naturalization Service) As this attorney is not permitted to practice law before the Board at this time, this order is being sent directly to the respondent, and a copy is being sent to Mr. (b) (6) Please see the attached copy of the order suspending Mr. (b) (6) from practice.

----------EndFootnotes----------

Before: N/A

OPINIONBY: Opinion by: N/A

OPINION: The respondent appeals the Immigration Judge's March 8, 2004, decision denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). We will sustain the appeal. We find that the respondent has established eligibility for cancellation of removal under section 240A(b) of the Act.

The respondent is a native and citizen of Guatemala who has lived in the United States since 1989. She is the mother of five United States citizen children, aged 13, 12, 11, 9 and 8 at the time of the hearing before the Immigration Judge. The respondent has an additional child who is not a United States citizen. The respondent is separated from the father of her children.

In Matter of Monreal, 23 I. & N. Dec. 56 (BIA 2001), we held that to establish exceptional and extremely unusual hardship under section 240A(b), an alien must demonstrate that his or her spouse, parent or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure. We specifically stated, however, that the alien need not show that such hardship would be "unconscionable." We also noted that, in deciding a cancellation of removal claim, consideration should be given to the age, health, and circumstances of the qualifying family members, including how a lower standard of living or adverse conditions in the country of origin might affect those relatives. Id. at 63. We revisited the hardship issue in Matter of Andazola, 23 I. & N. Dec. 319 (BIA 2002). In that case, we found that the exceptional and extremely unusual hardship standard was not met in the case of a single Mexican mother of two U.S. citizen children, ages 11 and 6. Finally, in Matter of Recinas, supra, we granted cancellation of removal to a single woman who was the mother of six children, including four U.S. citizen children ages 12, 11, 8 and 5. In distinguishing this case from Matter of Andazola, and Matter of Monreal, supra, we noted that while the exceptional and extremely unusual hardship standard constitutes a high threshold that is in keeping with Congress' intent to substantially narrow the classes of aliens who could qualify for relief, the standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief. Matter of Recinas, supra, at 470.

We find that the facts of this case bring it under the ambit of Matter of Recinas, supra, and therefore that the respondent merits cancellation of removal. We concur in the respondent's appellate contention that the Immigration Judge erred in denying her application for cancellation of removal under section 240A(b) of the Act based upon the determination that the respondent failed to establish that her removal from the United States will result in exceptional and extremely unusual hardship to her United States citizen children (I.J. at 13-16; 20). In particular, while a review of the transcript provides some support for the Immigration Judge's determination that the respondent's testimony regarding the particulars of her relationship with the children's father and his immigration status in the United States was vague, we find that the Immigration Judge's decision presupposes a separation of the children from the respondent or possibly from their father (I.J. at 5). Moreover, meaningful hardship to her children would arise were the respondent expected to live in Guatemala without the benefit of any family while she attempts to raise her five children while working a full-time job.

Most significantly, however, we find that the evidence of record regarding the respondent's second-oldest United States citizen child, (b) (6) tips the scales in favor of finding that the respondent has met the "exceptional and extremely unusual hardship" standard. The record shows that (b) (6) suffers from significant multiple learning disabilities which have resulted in her functioning in school at a much lower level than is normal for a child her age. The record contains evidence from a school psychologist to the effect tha (b) (6) was diagnosed as being leaning disabled in various categories, and the child receives special therapy in school to address the problem (I.J. at 12). We find that removing (b) (6) from her ongoing therapy would be a significant hardship on the child.

Looking at the record as a whole, includin (b) (6) disability and the tremendous burden on the respondent of raising five children on her own, we conclude that the respondent has established that her removal would result in exceptional and extremely unusual hardship to a qualifying relative. Matter of Retinas, supra. We will therefore sustain her appeal and remand this matter to the Immigration Judge.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: Pursuant to 8C.F.R.§ 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). See Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

DISSENTBY: DISSENTING OPINION: Patricia A. Cole, Board Member:

DISSENT: I respectfully dissent. The Immigration Judge appropriately assessed the respondent's relevant factors to find that the respondent has not established exceptional and extremely unusual hardship to her United States citizen children. I would dismiss the respondent's appeal.

The majority reverses the Immigration Judge and erroneously concludes that the respondent has established eligibility for cancellation of removal. I do not agree.

I do not find clear error with the Immigration Judge's findings of fact. The respondent has not shown that her second-oldest daughter would face inadequate schooling in Guatemala, nor that there are no special education schools in Guatemala. In addition, a difference in economic conditions and educational opportunities is not sufficient to sustain the respondent's burden of proof. See Matter of Andazola, 23 I. & N. Dec. 319 (BIA 2002); Matter of Monreal, 23 I. & N. Dec. 56 (BIA 2001). The respondent is young and in good health and has not presented any evidence that she would be unable to work or support her children if she is returned to Guatemala. Furthermore, the difficulty of readjusting to life in Guatemala is the type of hardship experienced by most aliens and their children who have spent time abroad.

I also disagree with the majority's reliance on Matter of Retinas, 23 I. & N. Dec. 467 (BIA 2002) and find that the case is distinguishable since the respondent presented no evidence to establish that her separation from family members in the United States would cause her financial and familial burden. In fact, the record establishes that the respondent maintains several family ties in Guatemala, such as another child, a sister, and a father (I.J. Dec. at 20). Moreover, the respondent has failed to establish that the father of her children will not continue to provide financial support for the children as he has done since their births (I.J. Dec. at 20). In addition, I note that the respondent's children are bilingual and that the record indicates that the children's father has at least some type of legal status in the United States and has expressed some intention of taking care of his children in this country. Furthermore, this Board stated that Retinas was "on the outer limit of the narrow spectrum of cases" in which the exceptional and extremely unusual hardship standard would be met. Matter of Recinas, supra at 470. We also noted that Monreal and Andazola remained our seminal interpretations of the meaning of exceptional and extremely unusual hardship standard and that the cumulative factors in Recinas were unusual and not typical. Matter of Recinas, supra.

Accordingly, I would dismiss the appeal and affirm the Immigration Judge's finding that the respondent's removal to Guatemala would not result in exceptional and extremely unusual hardship.

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Matter of (b) (6)

A(b) (6) - San Francisco

Board of Immigration Appeals

Slip Opinion

FEB 02 2005

COUNSEL:

COUNSEL: ON BEHALF OF RESPONDENT: Pro se n1(n1)Footnote 1. We note that (b) (6) Esquire has been suspended from practice before the Board. As this attorney is not permitted to practice law before the Board at this time, this order is being sent directly to the respondent, and a copy only is being sent to Mr. (b) (6) Please also see the attached copy of the order suspending (b) (6) from practice.

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

OPINIONBY: FILPPU, Board member:

OPINION:

The Department of Homeland Security ("DHS") appeals the Immigration Judge's January 31, 2003, order granting the respondent's application for cancellation of removal. The appeal will be dismissed. The request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7).

The respondent, a 32-year-old native and citizen of Mexico, entered the United States in 1988. When placed in removal proceedings in 1998, the respondent conceded that he was removable as charged, and he applied for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). There is no dispute that the respondent has the 10 years of continuous physical presence in the United States and the good moral character required for cancellation of removal. The only issue on appeal is the Immigration Judge's finding that the respondent's removal from the United States would result in exceptional and extremely unusual hardship to the respondent's qualifying relative, his United States citizen son. *See* section 240A(b)(1)(D) of the Act.

The respondent and his former wife have one child, a son, born in the United States on April 4, 1996. Since the respondent and his wife divorced in September 1997, the respondent has been the primary caretaker for his son. The child's mother "has visitation with the child every other weekend; otherwise, the child is in the physical custody of the respondent" (I.J. at 4). The respondent and his former wife share legal custody of the child. Because of the legal custody arrangement, the respondent cannot take his child with him to Mexico (I.J. at 11).

The DHS argues on appeal that this case presents a "common fact pattern" (divorced parents) and "ordinary hardships" (a child's geographic separation from one of the divorced parents), and it therefore does not involve hardship that is " 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal*, 23 I. & N. Dec. 56, 62 (BIA 2001), *see also Matter of Recinas*, 23 I. & N. Dec. 467, 468 (BIA 2002); *Matter of Andazola*, 23 I. & N. Dec. 319 (BIA 2002). As the Immigration Judge found, however, there are important aspects of this case that elevate this child's separation hardships substantially beyond those normally found in cases involving the separation of a child from a parent. As we have emphasized, "[E]ach case must be assessed and decided on its own facts." *Matter of Monreal, supra*, at 63 .

The Immigration Judge identified several unusual and compelling aspects of the hardship to the respondent's child that place this case outside the realm of the "ordinary" case involving separation of parent and child. Most importantly, as the Immigration Judge emphasized, the respondent has been the child's primary caretaker since the 1997 divorce (I.J. at 11). As the Immigration Judge explained,

[O]rdinarily, when a person is removed from the United States, he or she is able to take their [sic] children with them. Ordinarily, this results in reuniting with family in Mexico, as it did in both *Monreal* and *Andazola*. And ordinarily, it does not result in a separation from the primary care-giver from a very young child.

(I.J. at 13). *See Matter of Ige*, 20 I. & N. Dec. 880, 886 (BIA1994) (discussing parental choice in the context of a hardship determination for suspension of deportation). In this case, the respondent has no choice in the matter. He is unable to take his son with him to Mexico because the child's mother has shared legal custody and the right, through a court order, to remain involved in the child's life (I.J. at 11). Removal of the respondent will separate the child from his father, his primary caretaker (I.J. at 11).

As the Immigration Judge observed, the single most important hardship factor in suspension of deportation or cancellation of removal cases may be the separation of the alien from family members living in the United States. *See, e.g., Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) . For that reason, considerable, if not predominant, weight should be accorded the hardship resulting from family separation. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) .

In this case, the respondent has been the child's primary caretaker since the child was 11/2 years old (I.J. at 5 and 11). The Immigration Judge found that the respondent and his child have an unusually close relationship (I.J. at 12). The respondent's mother testified that the respondent was an "unusually good and responsible father who focuses entirely on his child" (I.J. at 6). When a case involves separating a very young child from a father who has been actively involved in the child's life as the primary caretaker, the hardship to the child is above and beyond that involved in a case involving, for example, the relocation of a parent with visitation rights or who is otherwise less than fully engaged in the child's day-to-day care. In this regard, the DHS has not demonstrated that the Immigration Judge erred in assessing the separation hardship in this case.

The Immigration Judge also found that removal of the respondent may affect the relationship his child now has with his paternal grandparents, one of whom is a United States citizen and the other a lawful permanent resident, who share a home with the respondent and their grandchild (I.J. at 12). While hardship to the respondent's parents is not included in the assessment of hardship to the child, the Immigration Judge appropriately considered that the respondent's removal will disrupt a stable family situation and that the child may also lose the daily care and support he now receives from his grandparents (I.J. at 7 and 12).

The Immigration Judge also found that the respondent would be unable to provide the same level of financial support from Mexico and, as a result, his removal will result in some loss of financial support for his son (I.J. at 12). Although the loss of financial support alone does not establish exceptional and extremely unusual hardship, the Immigration

Judge did not err in finding that the combination of hardship factors in this case met that standard. *See Matter of Recinas, supra*, at 472 (stating that hardship factors must be assessed "in their totality").

The DHS contends that the Immigration Judge misapplied the legal standard for exceptional and extremely unusual hardship established in our precedent decisions construing that term. *See Matter of Recinas, supra ; Matter of Andazola, supra ; Matter of Monreal, supra.* These cases, however, addressed situations in which the children in question would accompany the parent being removed. Moreover, they did not involve the separation of a minor child from a parent who had been the child's primary caregiver. In *Matter of Andazola, supra* , the United States citizen children's father, an alien with temporary resident status, apparently "live[d] with" the respondent, the children's mother, but there is no indication that he was a significant presence in the children's lives. *Id.* at 324 . Therefore, family separation was not a significant factor in assessment of hardship in *Andazola.*

The Immigration Judge's decision in this case is thorough and well reasoned and applies the correct legal standard to undisputed findings of fact. The DHS has not demonstrated that the Immigration Judge erred in finding that the cumulative hardships to the citizen child from the loss of his father's companionship and guiding influence, the disruption of the stable extended family household, and the reduction in the level of financial support, meet the exceptional and extremely unusual hardship standard. We will therefore dismiss the appeal.

ORDER: The appeal is dismissed.

I cannot agree that a 7-year-old United States citizen child without any health problems will experience exceptional and extremely unusual hardship by dint of having to remain in the United States in the care of his mother (who has shared legal custody), largely because of the separation created by the primary caregiver father's removal to Mexico. It may be that separation, due to an alien respondent's removal, of a qualifying relative child from the child's primary parental caregiver is sufficiently infrequent that it satisfies the "extremely unusual" prong of the statutory standard; but in no way do the facts of this case meet the requirement that the degree of hardship must be "exceptional." *See Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001).

The three (b) (6) Circuit cases cited by the majority under the former suspension of deportation regime do indeed stand for the proposition that that circuit, in which this case arises, views separation of the alien from other family members as the single most important hardship factor. We are obligated to apply the appropriate circuit law. However, it is telling that in none of the cited cases does the court hold that separation suffices to establish even the lesser standard then in force of "extreme hardship." Much less does the separation factor alone meet the "exceptional" threshold in current law. n1

While there is no doubt that removal of the respondent will cause substantial emotional hardship to his child in light of their close relationship and his role for the past five or six years as primary caregiver, such hardship simply does not rise to the requisite "exceptional" level considering that the child - unlike most qualifying relative children whose hardship we consider - will not be parted from his other relatives, friends and schoolmates and will continue to have the enormous benefit of living in the United States with all the advantages that that carries in terms of quality of education, access to medical services, safety, opportunity, and freedom. Moreover, the child will not be without parental care. Although the mother has not been the primary caregiver, and currently enjoys only biweekly weekend visitation rights, there is no allegation that the child does not love his mother, or that such love is not reciprocated, or that the mother will be unable to assume the role of primary caregiver once the respondent is removed. In addition, removal will not sever the respondent from contact with his child. The mail and telephone may almost certainly be employed (and more speculatively contact through computers), and it is possible the mother will allow the child to go or will take the child on trips to visit the respondent in Mexico.

The other hardship factors invoked by the majority - potential loss of some financial support from the respondent and some measure of daily care from the child's grandparents with whom (with his father) the child now lives - are not in

themselves either unusual or of great weight. Considering the totality of circumstances, the hardship here, while significant, does not merit a grant of relief. I would sustain the appeal. I therefore respectfully dissent.
Return to Text
(n2)Footnote 1. Moreover, the (b) (6) Circuit's decisions focus on hardship to the alien parent (which was a proper area of consideration under the former relief of suspension of deportation but is not today under cancellation of removal), not so much on hardship to the child. #00002020#

LexisNexis

20 of 21 DOCUMENTS

IMMIGRATION NON-PRECEDENT DECISIONS

Matter of (b) (6)

File: A (b) (6) – San Francisco

Board of Immigration Appeals

(b) (6)

SEP 30 2002

HOLDING

The BIA dismissed the INS' appeal of the grant of cancellation of removal to respondent. While asserting that this case presented a close call, the BIA noted the factors in favor of a grant of the application, including the fact that respondent's wife would lose her status as a lawful permanent resident if she accompanied respondent to Mexico; the education of his 3 U.S. citizen children, ages 15 (twins) and 11, none of whom could read or write in Spanish; close ties with extended family living in the U.S.; and the loss of medical insurance. Considered cumulatively, the BIA found that these factors comprised the exceptional and extremely unusual hardship needed to justify a grant of cancellation of removal.

SUMMARY OF ISSUES

HARDSHIP: The BIA upheld an IJ's grant of a cancellation of removal application, finding that respondent and his family would suffer exceptional and extremely unusual hardship if he were deported. Factors in favor of the application included respondent's wife's loss of her status as a lawful permanent resident; the education of his 3 U.S. citizen children, ages 15 (twins) and 11, none of whom could read or write in Spanish; close ties with extended family living in the U.S.; and the loss of medical insurance.

FACTS

Respondent, a native and citizen of Mexico, entered the U.S. in 1985 without inspection. His wife is a lawful permanent resident and they have 3 U.S. citizen children. In November, 1999, his application for cancellation of removal was granted by an IJ. The INS appealed, asserting that respondent had not established that his removal would result in exceptional and extremely unusual hardship to his spouse or children.

CROSS-REFERENCES

Immigration Law and Procedure chaps. 1, 42, 64, 74.

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

Before: N/A

OPINIONBY: Opinion by: N/A

OPINION: The respondent is a native and citizen of Mexico who entered the United States in 1985, without inspection. By decision dated November 10, 1999, the Immigration Judge granted his application for cancellation of removal. The Immigration and Naturalization Service appealed arguing that the Immigration Judge erred in granting relief because the respondent had not established that his removal would result in exceptional and extremely unusual hardship to his lawful permanent resident spouse or his three United States citizen children. The appeal will be dismissed.

I. Factual Background

The respondent is a 37-year-old native and citizen of Mexico who entered the United States without inspection on January 1, 1985 (Tr. at 8, 10; Exh. 1). While in Mexico he completed a program which qualified him to work as an agricultural technician (Tr. at 10). He testified that after his graduation he was unable to find work because of government corruption (Tr. at 11). Upon entering the United States, he established a home in (b) (6) (b) (6) (Tr. at 12).

The respondent is married and he and his wife are the parents of their three United States citizen children. Since coming to the United States, the respondent has worked steadily (Tr. at 15). He supplies the sole regular income to support his family (Tr. at 18). He testified that the only time his family received public assistance was around 1993 when they received food stamps for several months (Tr. at 14). The respondent had medical insurance for his family, but lost the coverage when his former employer went out of business (Tr. at 15).

The respondent's wife is (b) (6) (Tr. at 15). He testified that they have been together for 12 years (Tr. at 17). His wife is a lawful permanent resident and she plans on naturalizing when eligible (Tr. at 16-17, 30). The respondent testified that his wife and children would move to Mexico with him if he is removed from the United States (Tr. at 17). Specifically, he testified that his family depends on him and that they could not survive here without him (Tr. at 17). The respondent's wife testified that she knew if she returned to Mexico with her husband she would lose her lawful permanent resident status in this country, and that such a move would derail her current plan of naturalizing (Tr. at 33-34).

The respondent testified that his family would suffer in Mexico because his wife would most likely be unable to find occasional jobs in Mexico at a decent wage to help provide money for the family (Tr. at 19). The respondent's wife echoed this sentiment when she testified that it would be very difficult for her family if she and the children moved to Mexico with the respondent (Tr. at 31). Specifically, she testified that it would be difficult for them to obtain clothing, food and health insurance (Tr. at 31). She pointed out that she is occasionally able to work in the United States to help provide money for the family, and that she has never worked in Mexico (Tr. at 32).

At the time of the Immigration Judge's decision, the respondent's twin sons, (b) (6) and (b) (6), were 12 years old and in 7<th> grade, and his daughter, (b) (6), was 8 years old (Tr. at 15-16, 18; Exh. 2). (b) (6) and (b) (6) are now 15 years old, and (b) (6) is nearly 11. The respondent testified that he and his wife are involved in the education of their children and that they regularly meet with their teachers (Tr. at 18). The respondent testified that his children have lived their entire lives in the United States and that all of their friends and everything they know are here in this country (Tr. at 18-19). He testified that his children primarily speak English and do not read or write Spanish correctly, and that it would be extremely disruptive to their education if they had to move to Mexico and begin their education in Spanish (Tr. at 20).

The respondent testified that his children would not have health insurance, either private or government-provided, if they return with him to Mexico (Tr. at 20). Both the respondent and his wife have large families in the United States

that his children visit on a weekly basis (Tr. at 27). The respondent's parents live in Mexico and he has four siblings living in the United States, one of whom is a lawful permanent resident and a second whose status as a lawful permanent resident is pending (Tr. at 20, 28). His wife's father and ten of her siblings are lawful permanent residents and another sibling is a United States citizen (Tr. at 27).

II. Eligibility for Cancellation of Removal

This case requires us to apply the "exceptional and extremely unusual hardship" standard that Congress created as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *enacted as* Division C of Pub. L. No. 104-208, 110 Stat 3009, *codified at* section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2001). That provision allows cancellation of removal for an alien who has been physically present in the United States for at least 10 years, has been a person of good moral character, has not been convicted of specific criminal offenses, and who establishes that removal would result in "exceptional and extremely unusual" hardship to the alien's spouse, parent, or child, who is a United States citizen or alien admitted for permanent residence. The only issue in this case is whether the respondent has established the requisite level of hardship.

The elements required to establish exceptional and extremely unusual hardship are dependent upon the facts and circumstances peculiar to each case. *Matter of Chumpitazi*, 16 I. & N. Dec. 629, 635 (BIA 1978) (discussing the "extreme hardship" standard used in suspension of deportation cases). In *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001), we held that in order to establish "exceptional and extremely unusual hardship," an applicant for cancellation of removal must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, and beyond that which has historically been required for suspension of deportation. We specifically stated, however, that the alien need not show that such hardship would be "unconscionable." In *Matter of Monreal*, the respondent was the father of three citizen children, the oldest two 12 and 8 years of age. The respondent there had been working for 10 years for his uncle's business, but acknowledged that he had a brother living in Mexico who also worked for the uncle's business. Our decision emphasized that the respondent was in good health, able to work, and would in fact be reunited with family members in Mexico. Most significantly, we noted that the respondent's wife, the mother of the three children, had already returned to Mexico, and the respondent would be joining her there if removed. *Matter of Monreal, supra*, at 64.

In *Matter of Andazola*, 23 I. & N. Dec. 319 (BIA 2002), we considered an application for cancellation of removal of a 30-year-old Mexican national, the mother of two United States citizen children, 11 and 6 years of age. While the respondent argued that she would face discrimination as a single mother, and pointed to the poor education system and economic conditions, we found that we could not meaningfully distinguish the case from *Matter of Monreal, supra*. Our decision emphasized that the respondent was young and able to work, and had some financial assets that would aid her in establishing a new life in Mexico. Most significantly, we noted that the father of the children lived with the family and it was certainly possible that he could provide them some support in Mexico, if necessary. *Matter of Andazola, supra*, at 324.

In *Matter of Andazola, supra*, the respondent had no family in Mexico to help her make her adjustment. However, with the exception of her mother, who apparently had temporary resident status under the special agricultural worker program, her siblings were undocumented. We specifically stated that, in assessing hardship, we should not consider the fact that the respondent's extended family is here illegally, as a factor that weighs in her favor. *Matter of Andazola, supra*, at 323. After reviewing the case, we concluded that the hardships the respondent had outlined were not substantially different from those that would normally be expected upon removal to a less developed country.

In a recent Board decision, *Matter of Recinas*, 23 I. & N. Dec. 467 (BIA 2002), we again considered an application for cancellation of removal. The lead respondent was a divorced mother with limited financial resources, who provided the sole support for her six children. She had no immediate family remaining in Mexico as her parents were lawful permanent residents and her five siblings were United States citizens. The Board found that the United States citizen children, who were 12, 11, 8, and 5 years old, two of whom experienced difficulty speaking Spanish and did not read or

write in that language, would experience "exceptional and extremely unusual" hardship upon the lead respondent's removal from this country. Significant factors we noted in that decision were the children's dependence on the respondent as their sole source of support, their unfamiliarity with the Spanish language, the absence of any immediate family in Mexico, and the family support structure in place in the United States as well as the lack of the support from the children's father.

The present case presents a very close call. Undoubtedly, the respondent and his family would face substantial hardship if removed. However, because of the high standard for cancellation of removal, discussed in *Matter of Monreal, Matter of Andazola* and *Matter of Recinas*, this is not a case which presents an overwhelming set of facts dictating a grant of cancellation of removal. In the end, however, given the particular facts presented by the respondent and his family, we cannot conclude that the Immigration Judge's decision granting cancellation was erroneous.

In the present case, as in *Matter of Recinas, supra*, the respondent's entire immediate family unit, and much of the extended families of both the respondent and his wife, are in the United States, most of whom are in legal status. Moreover, the respondent's wife is a lawful permanent resident and well on her way toward becoming a citizen of the United States. If the respondent is ordered removed, his wife and their three United States citizen children would all accompany him to Mexico. This would have the dramatic effect of not only ending her lawful permanent resident status, but also derailing her chance to naturalize. However, according to the testimony of the respondent and his wife, this result is inevitable as the respondent's wife could not afford to maintain a household in the United States for herself and the children without the respondent's support. The respondent's wife would also suffer hardship because she would leave a large and close-knit family behind in the United States if she returns to Mexico.

In addition to the hardship the respondent's wife would suffer, their children would also be subjected to extraordinary hardship if the respondent is removed. Indeed, the more compelling hardship scenario in this case concerns the children, especially the 15-year old twins. The respondent's children, who are by this time in high school (b) (6) and (b) (6) and middle school (b) (6), are United States citizens who have spent their entire lives in the United States. As the Immigration Judge noted, should their father be removed from the United States, they would be separated from their schools, friends, extended family, and the only world they have ever known, and sent to a land that is completely foreign to them. The evidence of record establishes that their father, who provides the sole means of regular income to support the family, would have a hard time trying to support them economically in Mexico, and they would lose the access to health care and education that they currently have. The respondent noted that the family he does have left in Mexico would not be able to help him financially. The respondent's children speak and write in English, which is their best language, and the respondent and his wife both testified that the children would face difficulties if their education is disrupted by a move to Mexico as none of the children is able to read and write Spanish correctly.

The determination of whether an alien has satisfied the exceptional and extremely unusual hardship requirement is inherently fact-specific, and requires substantial and careful weighing of all the hardship factors presented. For this reason, an Immigration Judge's factual findings are particularly important in a cancellation of removal case, especially a close case like this one. Here, the Immigration Judge found that the respondent had shown the requisite level of hardship. Although each one of the factors considered by the Immigration Judge individually may not be enough to meet the exceptional and extremely unusual hardship standard, taken together, we agree that with this family's particular set of circumstances, the respondent's wife and his citizen children would suffer exceptional and extremely unusual hardship if the respondent is removed.

ORDER: The appeal is dismissed.

EOIR FOIA Processing (EOIR)

From: Smith, Gary (EOIR)
Sent: Wednesday, December 08, 2010 10:08 AM
To: Rosenblum, Jeff (EOIR)
Cc: Hatch, Paula (EOIR); Keller, Mary Beth (EOIR)
Subject: RE: Disobedience and Security Problem

Her work hours are 8:30 to 6:00 pm. She is on CWS. This occurred at 8:55 am last Thursday.

From: Smith, Gary (EOIR)
Sent: Tuesday, December 07, 2010 11:25 AM
To: Smith, Gary (EOIR); Rosenblum, Jeff (EOIR)
Cc: Hatch, Paula (EOIR); Keller, Mary Beth (EOIR)
Subject: RE: Disobedience and Security Problem

Additionally, I will be looking into it, but Judge (b) (6) appeared to be late for work that day.

From: Smith, Gary (EOIR)
Sent: Sunday, December 05, 2010 3:06 PM
To: Rosenblum, Jeff (EOIR)
Cc: Hatch, Paula (EOIR); Keller, Mary Beth (EOIR)
Subject: Disobedience and Security Problem

Jeff: (b) (5) I directed both employees (along with all employees in (b) (6) on November 3d (see fourth attachment) to cooperate fully with security personnel. In the third attachment, Judge (b) (6) refers to a clerk with jewelry (that is the same clerk who left the security area on Friday without completing the screening process—(b) (6)). I will probably need to interview Court Security Officers (b)(6) & (b)(7)(C) and (b)(6) & (b)(7 this week, the officers who reported the conduct in the first two attachments. Marshal (b)(6) & (b)(7)(C) called me Friday afternoon and I spoke with him on the phone about the incidents. He told me if they don't cooperate with the security officers coming in, they won't allow them entry into the building. The Court Administrator (b) (6) had reinforced with the support staff before this incident Friday that they have to cooperate with security personnel at the front entrance. Non-Responsive

Non-Responsive

8809

EOIR FOIA Processing (EOIR)

From: Smith, Gary (EOIR)
Sent: Wednesday, December 08, 2010 4:01 PM
To: Scheinkman, Rena (EOIR)
Cc: Rosenblum, Jeff (EOIR); Keller, Mary Beth (EOIR)
Subject: Interviews
Attachments: Memorandum for Record (Interviews of Court Security Officers).wpd; Memorandum for Record (Interviews of Court Security Officer(b)(6) & (b)(7)(C).wpd; Security Incident.htm

Rena/Jeff: Here is a summary of my interviews with the three CSO's today. Non-Responsive

Non-Responsive

8811

Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Friday, December 17, 2010 8:54 AM
To: Moutinho, Deborah (EOIR)
Subject: Fw: Two Disciplinary Actions

Sent from my BlackBerry Wireless Device

From: Smith, Gary (EOIR)
To: Keller, Mary Beth (EOIR)
Sent: Fri Dec 17 08:50:48 2010
Subject: Two Disciplinary Actions

MB, on Wednesday, I signed a proposal letter, proposing a five-day suspension for Judge (b) (6) for inappropriate conduct (two incidents of tardiness within one week and uncooperation/inappropriate conduct concerning security procedures). Non-Responsive
Non-Responsive
Non-Responsive. Mike will be the deciding official. Paula let him know. Both are documented.

8818

Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Wednesday, January 12, 2011 5:52 PM
To: Moutinho, Deborah (EOIR)
Subject: FW: Second Request for an Extension

(b) (6) extension granted.
Non-Responsive
Non-Responsive

From: McGoings, Michael (EOIR)
Sent: Wednesday, January 12, 2011 5:50 PM
To: Slavin, Denise (EOIR)
Subject: RE: Second Request for an Extension

Judge Slavin:

Pursuant to your request, a one week extension until Tuesday, January 25, 2011, is granted to IJ (b) (6)

MCM

From: Slavin, Denise (EOIR)
Sent: Wednesday, January 12, 2011 3:11 PM
To: McGoings, Michael (EOIR)
Cc: Slavin, Denise (EOIR); (b) (6) (EOIR)
Subject: Second Request for an Extension

Dear Deputy Chief Judge McGoings:

On behalf of Judge (b) (6), I am requesting an additional one week extension, until **January 25, 2011**, to respond to the "Proposed Suspension" letter dated Dec. 15, 2010 signed by ACIJ Gary Smith. The severe weather in (b) (6) has caused difficulties for Judge (b) (6) in preparing (b) (6) response.

Thank you for your attention to this matter.

Sincerely,

Denise Noonan Slavin, VP
NAIJ

From: McGoings, Michael (EOIR)
Sent: Wednesday, December 22, 2010 2:14 PM
To: Slavin, Denise (EOIR)
Subject: RE: Request for an Extension

Judge Slavin:

Pursuant to your request on behalf of IJ (b) (6) am granting an extension through Tuesday, January 18, 2011.

MCM

From: Slavin, Denise (EOIR)
Sent: Wednesday, December 22, 2010 1:20 PM
To: McGoings, Michael (EOIR)
Cc: Slavin, Denise (EOIR); (b) (6) (EOIR); Marks, Dana (EOIR)
Subject: Request for an Extension

8819

Dear Deputy Chief Judge McGoings:

To: Smith, Gary (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: The deportation of my wife (b) (6)

It's what we're here for…

From: Smith, Gary (EOIR)
Sent: Monday, September 19, 2011 3:36 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: The deportation of my wife (b) (6)

(b) (5) and I like your answer even better. I expect you may still get a second rant from him.

From: Keller, Mary Beth (EOIR)
Sent: Monday, September 19, 2011 3:34 PM
To: Smith, Gary (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: The deportation of my wife (b) (6)

Gary,
(b) (5) , so, see what you think of the below –
mtk

From: Smith, Gary (EOIR)
Sent: Monday, September 19, 2011 3:18 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: FW: The deportation of my wife (b) (6)

MaryBeth, perhaps an answer from the website along these lines would be appropriate:

Subject: The deportation of my wife (b) (6) A# (b) (6)

Dear (b) (6)

We received your email communication of September 12, 2011, and have reviewed the status of the case to which you referred involving your wife. Your stated concerns relate to the merits of your wife's case. Since your wife was represented in her proceedings before the immigration judge, any issues you have with the decision in your wife's case should be addressed with that attorney.

Sincerely yours,

From: Smith, Gary (EOIR)
Sent: Sunday, September 18, 2011 2:31 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: RE: The deportation of my wife (b) (6)

MaryBeth: I checked the case in our database. Her final hearing was on August 29, 2011. The final hearing lasted 5 minutes and 39 seconds, and I listened to it. (b) (6) who speaks perfect English, was represented by counsel. She was being

Dean, Larry R. (EOIR)

From: (b) (6) (EOIR)
Sent: Thursday, September 29, 2011 2:11 PM
To: Dean, Larry R. (EOIR)
Subject: RE: FYI on (b) (6)

FYI. Merits heard today with final order granting asylum, withholding, and CAT. No issues; interpreter did break-down for a short while (but still very professional), after I recounted the highlights of alien's persecution and severe torture spanning 10 years. Thanks (b) (6)

From: Dean, Larry R. (EOIR)
Sent: Friday, September 09, 2011 2:49 PM
To: (b) (6) (EOIR)
Subject: FW: FYI on (b) (6)

(b) (6)

I received the following from the (b) (6) DCC.

> ACC (b)(6) & (b)(7)(C) informed me that IJ [redacted] was claiming (b) (6) and seeking to have the parties request (b) (6) recusal on the above case.
>
> (b) (6)
>
> Neither party did. Rather, we went for a joint continuance to give the IJ the time buffer (b) (6) needs to properly assess the case. The IJ reset the case to Sep. 29, 2011 @ 1pm and then advised (b) (6) would consult the ACIJ (Judge Dean) about (b) (6) comments on the record and whether a recusal would be warranted.

I wanted to make you aware that I have received this. Do you believe this accurately summarizes what happened? Was the discussion on the record or off-the-record? Is there additional information that may be relevant? I know, for example, that you mentioned to me that t case is an Eritrean case. I know that you had received information about country conditions other recent Eritrean cases.

I know you are out. Please get back with me by Tuesday or Wednesday.

LRD

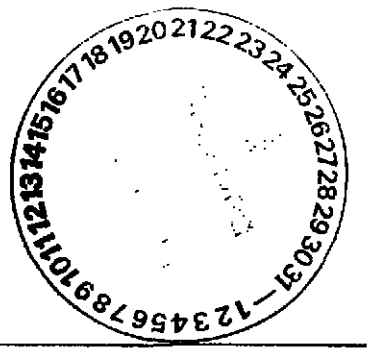
9109

[redacted]

March 15, 2011

VIA FEDEX

Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike
Suite 2000
Falls Church, VA 22041
(703) 605-1007



Re: RESPONDENT'S MOTION TO REOPEN
[redacted]

Dear Sir or Madam:

Enclosed please find Respondent's Motion to Reopen along with a Proof of Service.

Please contact me directly if you should have any questions or require additional information.

[redacted]

Attachment

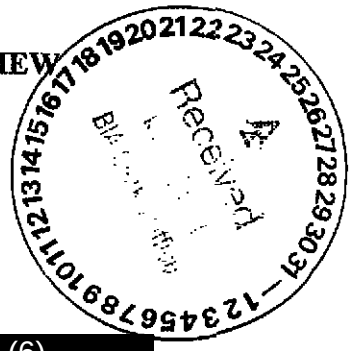
Cc: ICE/Office of Chief Counsel
[redacted]

DOC ID-15830304.2

9165

(b) (6)

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA



In the Matter of:

(b) (6)

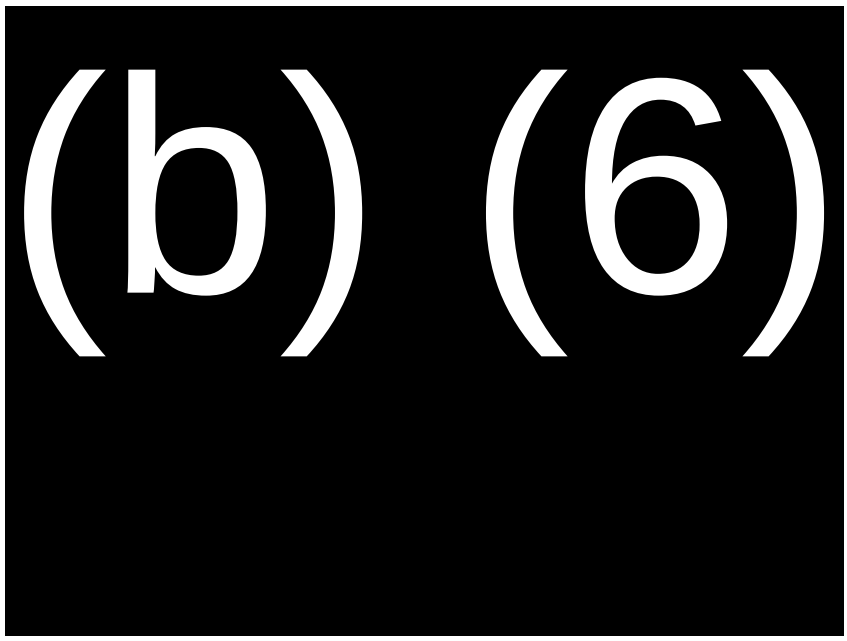
In Removal Proceedings

Detained

File No.: A(b) (6)

(Immigration Judge (b) (6)

RESPONDENT'S MOTION TO REOPEN



U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	**Detained**
(b) (6)	File No.: A(b) (6)
In Removal Proceedings	In Removal Proceedings

RESPONDENT'S MOTION TO REOPEN

Respondent (b) (6) by and through his counsel, moves the Board of Immigration Appeals (the "Board") to remand and order the Immigration Court to reopen the above-captioned proceedings for consideration of Respondent's Convention Against Torture claim. Pursuant to 8 C.F.R. 1003.2(c)(4), a motion to reopen a decision rendered by an Immigration Judge that is filed while an appeal is pending before the Board may be deemed a

motion to remand for further proceedings before the Immigration Judge from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board. *Id.* In support of this Motion, Respondent avers as follows:

1. On December 16, 2010, Immigration Judge (b) (6) (the "IJ") denied (b) (6) Convention Against Torture claims ("December 16th Hearing"). This Motion was timely filed with the 90 day timeline set forth in 8 C.F.R. 1003.2(c)(2).[1] No other such Motion has been made in this case.

2. During the December 16th Hearing, the IJ found (b) (6) to be credible. (Transcript of Hearing ("Tr.") at 141, a true and correct copy of which is attached hereto as Ex. 1.) As demonstrated in the transcript from the December 16th Hearing, however, a significant basis for the denial was the IJ's inability to connect any potential torture to the Afghan Government.

3. One of the stated bases for (b) (6) request for relief under the Convention Against Torture was the fact that since (b) (6) fled from Afghanistan, he has become an observant and devoted Christian.

4. On January 27, 2011, after (b) (6) merits hearing and the denial of his claim, the Wall Street Journal published an article about efforts by the U.S. government and some international Christian organizations to pressure the Afghan government into releasing two

[1] In the appeal currently pending with the Board, the Government has filed a Motion to Dismiss for lack of jurisdiction, under the theory that (b) (6) waived his right to appeal at the December 16th hearing. (b) (6) does not concede the jurisdiction issues, and has argued in the Appeal Brief that that waiver was not "considered and intelligent." However, should the Board agree with the Government and find it lacks jurisdiction over these proceedings, (b) (6) requests that it be recognized that since a Notice of Appeal was filed with the Board, and the Board has not yet ruled on the jurisdiction issue, the Board has jurisdiction at the time this Motion to Reopen. Therefore, (b) (6) requests the opportunity to refile this Motion to Reopen with the Immigration Court without being prejudiced by the fact that the 90-day deadline will have since expired.

men who converted to Christianity, were arrested on apostasty charges, and were facing the death penalty. (Maria Abi-Habib, "U.S. Lobbies Afghanistan to Release Christian Converts," *The Wall Street Journal,* January 27, 2011, a true and correct copy of which is attached hereto as Ex. 2.)

5. Significantly, this article includes a statement by Jamal Khan, chief of staff at the Ministry of Justice in Afghanistan, in which he unequivocally asserts the following: "The sentence for a convert is death and there is no exception. They must be sentenced to death to serve as a lesson for others." *Id.* The article also suggests that that opinion is shared by President Hamid Karzai, who was said to be "bristling against foreign influence...under pressure from the West." *Id.* While the two prisoners alleged physical and sexual abuse by prison authorities, officials at the Ministry of Interior denied those claims and Afghan lawyers refused to represent them out of fear of backlash. *Id.*

6. If he is deported to Afghanistan, (b) (6) will be placed directly in the hands of the government, who will know from his file that he is Christian, and will likely arrest and execute him for this "crime."

7. This evidence is material. Although the IJ found the (b) (6) story credible and sympathetic, the IJ expressed significant concerns about the Government's role in any possible torture, as required under the Convention Against Torture. This article demonstrates that the Afghan Government not only "acquiesces" to the torture and killing of Afghan converts to Christianity—of which (b) (6) is one—but is enthusiastic in its support for and enforcement of such a policy. Government action or acquiescence is a significant requirement under the Convention Against Torture, and therefore, it is significant to (b) (6) claim.

8. This evidence was not available and could not have been discovered or presented at a former hearing. Although the (b) (6) record contains evidence of mistreatment towards Christians in Afghanistan, that evidence did not provide such a direct endorsement of such mistreatment by government officials. The direct endorsement of religion-based murder provided by Jamal Khan was, at least to (b) (6) knowledge, only uttered in January 2011, and therefore could not have been presented at the December 16th hearing.

9. (b) (6) has continued to be detained since his hearing and has not left the country.

10. (b) (6) is not the subject of any pending criminal proceedings.

For the aforementioned reasons, (b) (6), by and through undersigned counsel, respectfully asks Board to grant his Motion to Reopen and remand the proceedings to the Immigration Court. (b) (6) also requests an oral argument on the motion to reconsider to be granted by this court.

Dated: March 15, 2010

(b) (6)

PROOF OF SERVICE

Case Name: (b) (6)

Alien No: A(b) (6)

On March 15, I,(b) (6) Esq., mailed a copy of this Respondent's Motion to Reopen and any attached pages via overnight mail to

Office of Chief Counsel

(b) (6)

March 15, 2011
Date

(b) (6)

ATTORNEY FOR RESPONDENT

DOC ID-15830304.2

9171

[redacted]

March 16, 2011

VIA FEDEX

Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike
Suite 2000
Falls Church, VA 22041
(703) 605-1007

Re: RESPONDENT'S APPEAL BRIEF
[redacted]

Dear Sir or Madam:

Enclosed please find Respondent's Appeal Brief along with a Proof of Service and other documents.

Tab A - Respondent's Appeal Application
Tab B - Respondent's Briefing Extension Request (later granted)
Tab C - Respondent's Appeal Brief and Accompanying Exhibits
Tab D - E-27 of [redacted] filed March 15, 2011
Tab E - Proof of Service

Please contact me directly if you should have any questions or require additional information.

[redacted]

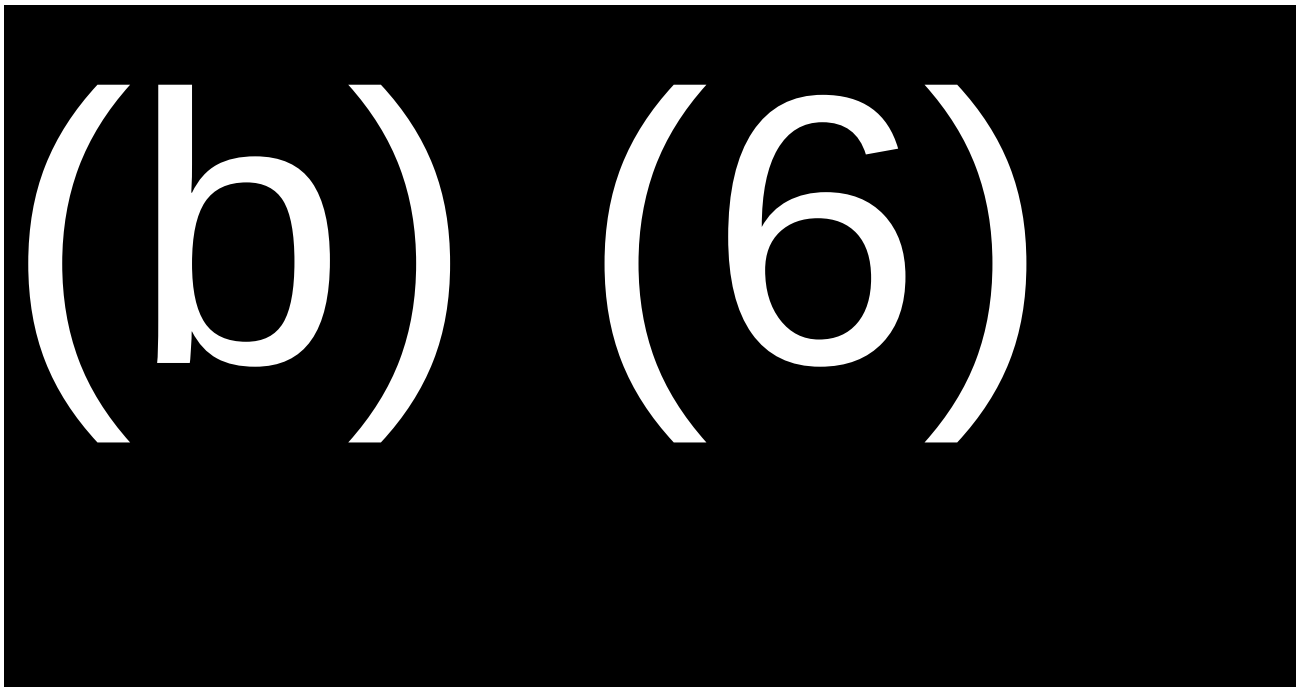
Attachment

DOC ID-15836651.1

9172

Writer's Direct Number

Writer's E-mail Address



U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b) (6)

In Removal Proceedings

Detained

File No.: A(b) (6)

RESPONDENT'S APPEAL BRIEF

(b) (6)

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	Detained
(b) (6)	File No.: A(b) (6)
In Removal Proceedings	In Removal Proceedings

RESPONDENT'S APPEAL BRIEF IN SUPPORT OF WITHHOLDING OR DEFERRAL OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE FROM AFGHANISTAN

PRELIMINARY STATEMENT

(b) (6) was born in Kabul, Afghanistan on (b) (6) 1989. (Hearing Transcript ("Tr.") at 57, a true a correct copy of which is attached hereto as Ex. 1.) On September 2, 2000 at 8:00 A.M., three members of the Northern Alliance, including (b) (6)

(b) (6) came to the (b) (6) home and took (b) (6) father from his house at gunpoint. Affidavit of (b) (6) ("Aff."), a true and correct copy of which is attached hereto as Ex. 2.) The family learned of (b) (6) father's murder the next day. (Aff.; Tr. at 66.) At the funeral, (b) (6) brother, (b) (6) was shot and nearly killed. (Aff.)

After his father's murder in 2000 (b) (6) was kidnapped, brutally beaten, and anally raped by his captors. (Aff.) After escaping, for months (b) (6) hid in a neighbor's basement and his entire family lived in fear of their lives. (Aff.) In December 2000, the (b) (6) family escaped via the Pakistani border and lived in a refugee camp for nearly two years. (Aff.) (b) (6) has lived in the United States since arriving on May 24, 2002 at the age of 13 as a refugee. (Tr. at 57.) He was granted legal permanent resident status on account of his mother's refugee status. (Form I-213: Record of Deportable/Inadmissable Alien ("Form I-213"), a true and correct copy of which is attached hereto as Ex. 3). Since 2002, he has not returned to Afghanistan. (b) (6) is currently in detention in (b) (6) has considered himself Christian since he was about thirteen or fourteen and is currently a practicing Christian. (Tr. at 89, 108-109.)

(b) (6) contests the Immigration Judge's ("IJ's") denial of his claim for relief under the Convention Against Torture ("CAT") because (b) (6) will be tortured or killed in Afghanistan on account of being Christian and refusing to work with the Northern Alliance in the past. Furthermore, he has no protection in Afghanistan from the Northern Alliance and those that kidnapped him because he no longer has any family there. As an unprotected young Christian male in Afghanistan, it is more likely than not that (b) (6) will be tortured and/or killed for apostasy. (b) (6) meets the preponderance of the evidence standard for CAT under Section 241 of the Immigration and Nationality Act ("INA").

STATEMENT OF FACTS

A. The (b) (6) Family's Escape from Afghanistan and the Taliban

(b) (6) was born in Kabul, Afghanistan on (b) (6) 1989. (Aff.; Tr. at 57.) On September 2, 2000 at 8:00 A.M., three members of the Northern Alliance, including a powerful man named (b) (6), came to the (b) (6) home and took (b) (6) father from his house at gunpoint; the family learned of his murder the next day. (Aff.; Tr. at 59-67.) At the funeral, (b) (6) (b) (6) brother (b) (6) was shot and nearly killed. (Aff.; Tr. at 67-68.) On September 10, 2000, (b) (6) was kidnapped by the same men who took his father. (Aff.; Tr. at 68.) For eleven days, his captors brutally and repeatedly beat him and anally raped him. (Aff.; Tr. at 70-71.) When he tried to resist his captors, they would starve him. (Tr. at 72.) At one point his finger was severed with a knife when he struggled to resist his captors while they anally raped him. (Tr. at 72.)

On September 22, 2000, (b) (6) and another boy escaped from their captors during a prayer session. They found refuge in an abandoned school where (b) (6) was unable to sleep from the pain, blood, starvation, and fear of being recaptured and killed. (Aff.; Tr. at 76-77.) When he finally arrived back in his town, (b) (6) went to a neighbor's house rather than returning to his own house and jeopardizing his family's safety. At the neighbor's house he found the remaining members of his family hiding in their basement. (Aff.; Tr. at 78-79.) His mother had escaped with his siblings when the men came back for (b) (6) sisters, and his mother had used her jewelry and some cash to survive in a neighbor's basement for two months. (Aff.; Tr. at 79-81.)

When the (b) (6) family discovered the Taliban were searching people's homes for electronics and books, the neighbor they were staying with, (b) (6), and his son, (b) (6) became afraid for their own family's safety. (Aff.; Tr. at 80-81.) (b) (6) secured a van to smuggle

the family to the (b) (6) Province in Afghanistan in the middle of the night in December 2000, and the family escaped into Pakistan, arriving there two nights and three days later. (Aff.; Tr. at 81-82.)

On the journey to Pakistan, (b) (6) and his sister fell ill, and the family sought refuge with an Imam and his wife at a nearby Mosque. (Aff.; Tr. at 82-83.) Once the Imam heard the family's story, he told (b) (6) that the family must leave immediately because (b) (6) associates frequently came to the mosque for Islamic studies and to collect money, and word might get back to (b) (6) regarding the family's location. (Aff.; Tr. at 83-84.) The Imam took the family to an Afghan refugee camp. (Aff.; Tr. at 84-86.)

B. The (b) (6) Family's Relocation to the United States as Refugees

While at the refugee camp, (b) (6) got a job with an engineer who was half-Pakistani, half-Afghan. (Aff.; Tr. at 85-86.) She would babysit his children while he and his wife were at work. (Aff.; Tr. at 85-87.) With the money she earned, the family of six moved out of the camps into a small apartment, which was only 200 square feet. (Aff.; Tr. at 87-88.) Because the Taliban was created by the ISI (the Pakistani secret service) and funded by the Saudi government, (b) (6) feared that (b) (6) had Taliban connections in Pakistan and did not allow any of the children to leave the apartment. (Aff.; Tr. at 87-88.) One day, (b) (6) (b) (6) employer took the family to the United Nations High Commissioner for Refugees where they were granted refugee status. (Aff.)

The first time (b) (6) slept after 20 months was on the flights to the United States. (Aff.) He did not worry that he would be recaptured, raped, or killed for escaping. (Aff.) He swore he would never return to Afghanistan or Pakistan. (Aff.) (b) (6) arrived in the United States on May 24, 2002. (Aff.; Tr. at 57.) Because of his refugee status, (b) (6) was a Legal Permanent Resident. (Form I-213.)

C. (b) (6) Criminal Problems and Subsequent Removal Proceedings

Tragedy struck the (b) (6) family again on March 13, 2007, when (b) (6) was in a major car accident that left her a quadriplegic. (Aff.) The accident put a lot of stress on (b) (6) (b) (6) and he did not know where to go for help. (Aff.) At the age of 19, (b) (6) was involved in an incident where he allegedly approached someone, pulled a toy gun on them and demanded money. (Tr. at 109.) He obtained a small amount of marijuana as a result. (Tr. at 109.) On June 16, 2009 in the Court of Common Pleas of (b) (6) (b) (6) pled guilty to a misdemeanor marijuana offense and was convicted of second degree robbery. (Form I-213.) He was sentenced to 18-48 months imprisonment but was released early. (Tr. at 19.). After he was let out he was transferred to the custody of the Immigration and Customs Enforcement ("ICE") where he remains today.

D. (b) (6) Conversion to Christianity

Although (b) (6) was born a Muslim, he began to question his faith in September 2000, around the time that his dad was killed, his brother was shot, and he was kidnapped and raped Muslims. (Tr. at 88.) His former pride in his religion was replaced with deep doubt. (Tr. at 89.) At the age of about 13 or 14, he was introduced to Christianity by a friend in the United States. (Tr. at 89, 127, 130, 133.) (b) (6) initially found his new faith difficult to accept, but she understood the change was a result of what (b) (6) had gone through in Afghanistan. (Tr. at 127-128.) In his own words, (b) (6) first considered himself a Christian, rather than a Muslim, at the age of thirteen or fourteen, and in high school, (b) (6) began to wear a cross to symbolize his Christianity. (Tr. at 89.) He gradually "got really into [Christianity]," especially after he was incarcerated and "got time to actually study it and comprehend what the message is." (Tr. at 89.) He regularly attends a Protestant church in detention, where he meets personally with a chaplain and reads scripture. (Tr. at 108-109.)

E. (b) (6) Fear of Returning to Afghanistan Was Deemed Credible by the IJ

(b) (6) is afraid of returning to Afghanistan for two reasons. First, he is Christian and fears being punished for the crime of apostasy, which is against some interpretations of Islamic law. (U.S. Dept. of State, International Religious Freedom Report 2010 for Afghanistan, Nov. 17, 2010 ("Religious Freedom Report") a true and correct copy of which is attached hereto as Ex. 4.) Christians are not accepted in Afghan society. (Tr. at 94, 128.) They are not allowed to practice their faith in Afghanistan, and, as a result, there are no churches or priests or means by which to practice Christianity. (Tr. at 93-94.) (b) (6) fears that her son will be killed if he returns to Afghanistan because Afghans are not accepting of Christians. (Tr. at 128.) The U.S. Department of State has even acknowledged that in Afghanistan, respect for religious freedom in is so far deteriorated, "especially for Christian groups and individuals," as to be nonexistent. (Religious Freedom Report at 1.)

Not only is practicing Christianity a problem in Afghanistan, but Christians are the target of harassment, violence, inflammatory public statements, negative opinions, and unwarranted suspicion, and this is made worse by the lack of government responsiveness and protection to non-Muslims. (*Id.*) As the U.S. Department of State points out, the violence against Christian groups may be attributable to the fact that many Afghans consider conversion from Islam, or apostasy, to contravene the tenets of Islam. (*Id.*) Even though the constitution of Afghanistan proclaims religious freedom, it also states that Islam is the "religion of the state" and that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam." (*Id.*) On the crime of apostasy, the constitution and penal code are silent, but courts may rely on their interpretation of Islamic law (Sharia). (*Id.* at 2.) As the U.S. Dept. of State has pointed out, "some [courts'] interpretations [of Islamic law] conflict with the Universal Declaration of Human

Rights, which the country has signed." (*Id.*) Conversion from Islam, or apostasy, is punishable by death under some interpretations of Islamic law. (*Id.* at 3.)

Even the Taliban has publicly admitted responsibility for killing Christians in Afghanistan. ("Eight Christian Medics Killed in Afghanistan," Cathnewsasia, Sept. 9, 2010 ("Christian Medics Article") a true and correct copy is attached hereto as Ex. 6.). (b) (6) as a Christian in a country that is hostile to both Christians and the crime of apostasy fears for his life if he returns.

(b) (6) also fears returning to Afghanistan because he fears the men from the Northern Alliance who kidnapped him, including (b) (6), a very powerful man, will find him and kill him. (Tr. at 93.) (b) (6) fears that the members of the Northern Alliance who kidnapped him will remember him, and now that they are in power, they will find him and punish him brutally for escaping. (*Id.*) With no family living in Afghanistan to protect him, he fears for his safety if he should have to return alone. (Tr. at 94.)

The IJ found (b) (6)'s descriptions of his kidnappers and the violent events that transpired before, during, and after his kidnapping to be credible. (Tr. at 141.)

STATEMENT OF CASE

(b) (6) was issued a Notice to Appear on April 29, 2010. (b) (6) first Master Calendar Hearing occurred on May 5, 2010. Pleadings were taken at this time. (Tr. at 19-21.) Respondent admitted to all allegations and conceded removability. (*Id.*) (b) (6) submitted his relief under CAT at the subsequent Master Calendar Hearing on June 8, 2010.

On December 16, 2010, Respondent appeared for his Individual Hearing (the "December 16th Hearing"). Respondent testified as did his mother, (b) (6) (Tr. at 122-132) and his older sister, (b) (6) (Tr. at 132-135). At the end of the hearing, Immigration Judge

(b) (6) denied Respondent's relief under the Convention Against Torture. (Tr. at 141-142.)

(b) (6) did not reserve his right to file an appeal of this decision at the December 16th Hearing. (Tr. at 142.) As discussed infra, this waiver was not "considered and intelligent." This brief now timely follows.

STATEMENT OF ISSUES

I. Whether the IJ erred in not finding that (b) (6) met the standard for relief under the Convention Against Torture on account of his status in Afghanistan as a young Christian man who converted from Islam with no family.

STANDARD FOR REVIEW

The Board of Immigration Appeals standard of review, as of September 25, 2002:

> 1. The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous;
>
> 2. The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo;
>
> 3. The Board may review questions arising in appeals from decisions issued by Service officers de novo;
>
> 4. Except for taking administrative notice of commonly known facts, such as current events or the contents of official documents, the Board will not engage in fact-finding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further fact-finding must file a motion for remand. If further fact-finding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.
>
> 8 C.F.R §1003.1(d)(3).

Under 8 C.F.R §1003.1(d)(3), the Board reviews factual determinations under the "clearly erroneous" standard. *Matter of S-H-*, 23 I&N Dec. 462, 464 (BIA 2002). The regulatory

change adds significant force to the decisions of the IJs; they must make "clear and complete" findings of fact that are supported by the record in compliance with controlling law. *Id.* at 465. If the IJ enters incomplete findings of fact, not just findings of fact pertinent to one issue that the IJ deems dispositive of the case, the Board may remand the case for further fact-finding. *Id.*

ARGUMENT

I. THE IJ ERRED IN NOT GRANTING (b) (6) RELIEF UNDER THE CONVENTION AGAINST TORTURE

The IJ erred in not granting (b) (6) relief under CAT. (b) (6) warrants protection because he will face torture and/or murder in Afghanistan for the following reasons. First, the men who destroyed his family and raped him repeatedly will remember him, and they have a network that will make it easier to find him. Second, (b) (6) will be even more conspicuous—and an even greater target—because of his conversion and devotion to Christianity. Third, (b) (6) has no family in Afghanistan to protect him.

A. Standard of Relief Under the Convention Against Torture

The IJ erred by failing to adequately apply the correct standard for relief under CAT. To obtain relief under CAT, two elements must be satisfied. (1) Element one requires a showing that the respondent will "more likely than not" be tortured if removed to his home country. 8 C.F.R. Sec. 208.16(c)(2). (2) Element two requires a showing that the torture will result "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. Sec.208.18(a)(1).

1. *The Record Shows That (b) (6) Will "More Likely Than Not" Be Tortured If Removed to Afghanistan.*

To satisfy the first element under CAT protection, the applicant must show that it is more likely than not that he would be tortured if returned to the proposed country of removal. 8 C.F.R. Sec. 208.16(c)(2). This element can be established without corroboration if the

applicant's testimony is credible. *See Matter of Y-B-*, 21 I&N 1136 (BIA 1998). 8 C.F.R. Sec.208.16(c)(3) states that the court must consider all evidence relevant to the possibility of future torture, including evidence of past torture inflicted on the applicant, evidence of gross, flagrant, or mass violations of human rights within the country of removal. While an asylum applicant must demonstrate persecution on account of certain characteristics such as race or religion, a CAT claim (b) (6) (b) (6) .

"Torture is defined as "any act in which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R 208.18(a)(1). This severe pain or suffering must be inflicted on the applicant, or a third person, for one of four purposes: (1) to obtain information or a confession, (2) to punish for an act committed or suspected of having been committed, (3) to intimidate or coerce, or (4) for any reason based on discrimination of any kind. *Id.* Additionally, the act of torture must be directed against a person in the torturer's custody or physical control. 8 C.F.R. Sec. 208.18(a)(6).

(b) (6) clearly meets the required showing under element one for relief under CAT. His testimony in front of the IJ demonstrates that he would be tortured if sent back to Afghanistan. Because the IJ found him to be credible, his testimony does not require corroborating evidence. (Tr. at 141.) *See Matter of Y-B-*, Interim Decision 3337 (BIA 1998) (stating that the more specific, detailed, and credible the applicant's testimony is, the less corroborative background evidence is necessary to prove a case for relief). (b) (6) was previously tortured, under the statutory definition of torture, for being his father's son. Now he fears being tortured for recognizing his captors and escaping. He also fears being tortured for being a Christian in a society that is intolerant of Christians, where apostasy is against Sharia law

and punishable by death, and where people have been executed by the Taliban for being Christian. Religious Freedom Report at 1-3; Christian Medics Article. The IJ erred in not giving the sufficient weight to the overwhelming evidence on the record that supports (b) (6)'s claim that he will be tortured or killed in Afghanistan if he returns.

2. (b) (6) *Torture Will Result "By Or at the Instigation of Or with the Consent Or Acquiescence of a Public Official Or Other Person Acting in an Official Capacity."*

To satisfy the second element under CAT protection, the applicant must show that the pain and suffering will be inflicted by, or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. 208.18(a)(1). To show "acquiescence," the public official must have prior awareness of the activity and thereafter breach his legal responsibility to intervene and prevent torture. 8 C.F.R. Sec.208.18(a)(7).

In the (b) (6) Circuit, whose case law is controlling, the applicant does not need to show actual knowledge on the part of the government, only that the government is "willfully blind" to the abuse. (b) (6) ; (b) (6) (b) (6) . In (b) (6) , the (b) (6) Circuit Court adopted the (b) (6) rationale to hold that the government's "willful blindness" constitutes "government acquiescence." (b) (6) (b) (6)). In following the (b) (6) decision, the (b) (6) Circuit joined its sister courts around the nation. *See, e.g.,* (b) (6) (b) (6) (b) (6) . Prior to this holding, one had to demonstrate "willful acceptance" by the government. Now, the government's blind eye is sufficient to elicit relief under CAT.

The record shows that in (b) (6) case, he satisfies element two for relief under CAT because the government will turn a blind eye to his torture. (b) (6) was in the Northern Alliance, which is currently the ruling party of Afghanistan. His associates in the Northern Alliance were involved in the kidnapping of (b) (6) If deported to Afghanistan, (b) (6) (b) (6) will be placed directly in the hands of the Northern Alliance, who will likely flag his return for his captors. (b) (6) may also have defected into the Taliban. (Omar Samad, "Afghanistan Opposition Questions Defector Identity and Denies False Allegations," Afghanistan News Center, Nov. 16, 2000, a true and correct copy is attached hereto as Ex. 5.) If (b) (6) has indeed defected to the Taliban, it is clear that the government cannot control the Taliban. In fact, Pakistan and two other Arab countries have even recognized the Taliban as the controlling government in Afghanistan. *Id.* Significantly, the Imam near Pakistan who aided the (b) (6) family in their escape was so concerned about (b) (6) network, even near the Pakistani border, that he urged the family to leave immediately, showing that (b) (6) would not be safe anywhere in Afghanistan.

Moreover, even if (b) (6) is tortured or killed for being Christian or for converting to Christianity from Islam, he can satisfy element two for relief under CAT because of the evidence on the record that the Afghanistan government is unable or unwilling to protect Christian groups in Afghanistan. Religious Freedom Report at 1. Additionally, as the U.S. Department of State noted in its 2010 Report, where the constitution and penal code are silent (*i.e.*, on the issue of conversion from Islam), courts are allowed to rely on their own interpretation of Islamic law. *Id.* at 2. Conversion from Islam is punishable under death by some interpretations of Islamic law in the country. *Id.* at 3. The Afghanistan government's failure to

protect Christian groups from violence and failure to legalize apostasy constitute the government's willful blindness.

Thus both factors needed to establish a prima facie case for relief under CAT are present in (b) (6) case, and for this reason the IJ incorrectly denied relief under CAT.

B. No Mandatory Bar Applies in This Case

Once an applicant has demonstrated to the court that he is more likely than not to be tortured in the country of removal, the application for deferral of removal under CAT shall be granted because no mandatory bars apply in deferral of removal relief. 8 C.F.R. Sec.208.17. The IJ found that (b) (6) crime constituted a particularly serious crime, and previous counsel did not appeal this decision. (Respondent's Appeal Application, dated December 22, 2010 ("Notice of Appeal"), a true and correct copy of which is attached hereto at Tab A.). But, (b) (6) is not still eligible for deferral of removal under CAT because there are no mandatory bars that apply under deferral. *See, e.g., Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

C. Respondent's Waiver of Appeal Was Not "Considered and Intelligent"

Normally, a Notice of Appeal may not be filed by an applicant who has waived his appeal under 8 C.F.R. § 1003.39. 8 C.F.R. § 1003.3. If a Notice of Appeal is filed even though the applicant has waived her appeal, it could be dismissed for lack of jurisdiction. *See* (b) (6) (b) (6) overruling BIA's dismissal of the appeal for lack of jurisdiction). But a waiver will not stand if it was not "considered and intelligent," thus violating the applicant's Fifth Amendment due process rights. *Matter of L-V_K*, 22 I&N Dec. 976 (BIA 1999); (b) (6) (b) (6) An applicant's waiver of appeal is not "considered and intelligent" if the IJ did not advise the applicant she has the right to seek relief from removal. (b) (6) (b) (6) Determining whether a waiver is "considered and intelligent" is

a fact-specific inquiry. *See, e.g.,* (b) (6) (engaging in factual analysis of alien's waiver of right to appeal); *In re Rodriguez-Diaz*, 22 I. & N. Dec. at 1323 ("[T]he precise articulation of appeal rights required in any given case will necessarily depend on the circumstances of that case.")

In (b) (6) the (b) (6) Circuit found that the colloquy between the applicant's counsel and the IJ was inadequate to fully apprise the applicant of his right to appeal and to effectuate a knowing and voluntary waiver of his right. In (b) (6) neither the applicant nor his counsel evinced an understanding that the IJ's reference to the finality of the order related to the aliens' right to appeal the order and the IJ did not take any steps to clarify. *Id.* at 174. While IJ's do not need to ask applicants whether they fully understand their right to appeal, they are required to ask the parties whether they accept a decision as "final," which can stand in a shorthand for a considered and intelligent waiver. "Those who understand the meaning of this shorthand expression, such as aliens represented by attorneys, may effectively waive appeal in response to this simple question." *In re Rodriguez-Diaz*, 22 I. & N. Dec. 1320, 1322 (BIA 2000).

Here, (b) (6) waiver was not "considered and intelligent." Not only did (b) (6) (b) (6) fail to understand the finality of waiving his right to appeal at the hearing, but the record supports the contention that the IJ did not ask the parties whether they accepted (b) (6) decision as "final." (Tr. at 142.). In fact the only discussion of the right to appeal on the record is the following:

> **Judge to** (b) (6) I'm sorry, sir, I couldn't do anything for you, but you'll appeal it to the Board, and maybe they don't agree with me and they'll send it back.
>
> (b) (6) (b) (6) prior lawyer]: We don't want to reserve our right to appeal.

Judge to (b) (6) Oh, you don't?

Judge to (b) (6) Ok, sir.

(Tr. at 142.) (b) (6) he believed that he could still appeal the IJ's decision at a later time. (Affidavit of (b) (6) in Support of His Appeal Brief, dated March 14, 2011 ("(b) (6) Waiver Aff."), a true and correct copy of which is attached hereto as Ex. 7.) The IJ did not clarify with either counsel or (b) (6) that declining to appeal at the IJ hearing constituted his final chance to appeal. Instead, the IJ accepted the waiver without questioning his understanding of the finality of the waiver. In fact, the IJ never even spoke to (b) (6) about the waiver. (Tr. at 142.) Consistent with such a misunderstanding, counsel and appellant filed a Notice of Appeal that was received by the BIA on December 27, 2010.

RELIEF REQUESTED

Respondent respectfully requests this court to find that the IJ erred in failing to grant him relief under CAT. Accordingly, Respondent urges this court to grant him relief on appeal because his waiver was not "considered and intelligent," or, in the alternative, remand to the IJ for further proceedings to determine his eligibility for relief under CAT.

PROOF OF SERVICE

Case Name: (b) (6)

Alien No: A(b) (6)

On March 16, I, (b) (6), Esq., mailed a copy of this Respondent's Appeal Brief and any attached pages via overnight mail to

Office of Chief Counsel
ICE/Dep't of Homeland Security

(b) (6)

(b) (6)

March 16, 2011
Date

ATTORNEY FOR RESPONDENT

9190

DOC ID-15836651.1

IMMIGRATION COURT

[redacted]

In the Matter of

Case No.: A[redacted]

[redacted]
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 5/19/11.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to ISRAEL (Pr. many) or in the alternative to AFGHANISTAN (Secondary); Spain (if possible 3rd Country)
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .
[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:
[✓] Asylum was ( )granted (✓)denied( )withdrawn.
[✓] Withholding of removal was ( )granted (✓)denied ( )withdrawn.
[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.
[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:
[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[✓] Respondent's application of (✓) withholding of removal (✓) deferral of removal under Article III of the Convention Against Torture was ( ) granted (✓) denied ( ) withdrawn.
[ ] Respondent's status was rescinded under section 246.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $ _____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[✓] Other: Aggravated Felony

Date: May 19, 2011

[redacted]

Appeal: Waived/Reserved [redacted]

Both

9191

ALIEN NUMBER: (b) (6) [redacted]

ALIEN NAME: (b) (6) [redacted]

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [redacted]

DATE: 5/19/11 BY: COURT STAFF IJ (b) (6) [redacted]

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q6

9192

IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

Respondent

Case No.: A(b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 12/16/10.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to ISRAEL or in the alternative to AFGHANISTAN or SPAIN

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[✓] Asylum was ( )granted (✓)denied( )withdrawn.

[✓] Withholding of removal was ( )granted (✓)denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[✓] Respondent's application of (✓) withholding of removal (✓) deferral of removal under Article III of the Convention Against Torture was ( ) granted (✓) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

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

[ ] Proceedings were terminated.

[✓] Other: Aggravated Felony

Date: Dec 16, 2010

(b) (6)

Appeal: Waived/Reserved B.A.

Appeal Due

9193

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

DHS LIT. (b) (6)
(b) (6)

Name: (b) (6)

A (b) (6)

Date of this notice: 5/3/2011

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:
Pauley, Roger

9194

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

DHS LIT (b) (6)
(b) (6)

Name: (b) (6)

A (b) (6)

Date of this notice: 5/3/2011

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

9195

File: A(b) (6) [redacted] Date:

MAY - 3 2011

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

IN REMOVAL PROCEEDINGS

APPEAL

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

ON BEHALF OF DHS: (b) (6) [redacted]
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Convention Against Torture

The respondent, a native and citizen of Afghanistan, has appealed the December 16, 2010, decision of the Immigration Judge. To the extent the respondent argues that the waiver of appeal in this case was not knowing and intelligent, we agree. Respondent's Br. at 14-16. *See Matter of Patino*, 23 I&N Dec. 74 (BIA 2001) (en banc); *see also* 8 C.F.R. § 1003.39 (2011).

Turning to the merits of the respondent's appeal, we observe that the record does not contain an oral or written decision explaining the Immigration Judge's reasons for denying the respondent's request for deferral of removal under the Convention Against Torture (CAT). *See* 8 C.F.R. § 1208.17; *Matter of A-P-*, 22 I&N Dec. 468, 476 (BIA 1999) (stating that an Immigration Judge's decision is a separate and distinct part of the record from the transcript of the testimony). Additionally, the respondent has filed a motion to remand with updated country conditions materials attached. As a result, we find remand warranted for the Immigration Judge to issue a decision in this case and to consider the respondent's materials. On remand, the parties shall be given the opportunity to file briefs and evidence, and further testimony may be taken, if necessary.

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

FOR THE BOARD

9196

he has to prove that somebody is going to torture him if he's returned. I'm sure you know what the standard is. So I really grappled with this. I was, I was hoping to try to find something more I can -- more I can do for him, but I can't, I can't create a form of relief that doesn't exist. I'm sure you understand, [redacted]

[redacted]

I'm sorry, sir, I couldn't do anything for you, but you'll appeal it to the Board, and maybe they don't agree with me and they'll send it back.

(b) (6) TO JUDGE

[redacted]

[redacted]

[redacted]

[redacted]

JUDGE TO (b) (6)

Is [redacted] that you -- why don't we do that: I'll send him to, to an alternate country. That's always the best thing to do, and I try to do that whenever I can because I do have a heart, although it doesn't show. What alternate country, ma'am, do you want?

(b) (6) TO JUDGE

Israel.

JUDGE TO (b) (6)

Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Thursday, September 22, 2011 2:28 PM
To: Moutinho, Deborah (EOIR)
Subject: FW: Incident in (b) (6)
(b) (6)

From: Dean, Larry R. (EOIR)
Sent: Thursday, September 22, 2011 2:17 PM
To: (b) (6) (EOIR); (b) (6) (EOIR)
Subject: RE: Incident in (b) (6)

Thanks for bringing this to my attention.

LRD

From: (b) (6) (EOIR)
Sent: Thursday, September 22, 2011 1:15 PM
To: Dean, Larry R. (EOIR); (b) (6) (EOIR)
Subject: Incident in (b) (6)
Importance: High

Judge Dean,

I feel compelled to forward to you and (b) (6) the below information I received this morning. I have not questioned anyone about the below information.

(b) (6) appeared in my court on a bond motion. After appearing in my court, she went to IJ (b) (6) court to appear via televideo. Upon the conclusion of my morning docket, she came back into my courtroom and it appeared she was either on the verge of tears or just over tears. She related that IJ (b) (6) refused to let her appear in the bond hearing and gave her client a zero bond. She also said (b) (6) instructed the Bailiffs to escort her from the courtroom.

I do not know any other information, the history of the case before IJ (b) (6) and whether proper E-28s were filed.

Non-Responsive

Again, I emphasize I am not assessing the validity of the information I received as to what happened in IJ (b) (6) court. Non-Responsive
Non-Responsive

(b) (6)

9208

9/22/2011

Dean, Larry R. (EOIR)

From: Dean, Larry R. (EOIR)
Sent: Tuesday, October 04, 2011 6:06 PM
To: (b) (6) (EOIR)
Subject: (b) (6)
(b) (6)

I wanted to get back with you regarding your e-mail about the ... Non-responsive

Non-Responsive

As to the case, the issue was not whether the attorney could appear by VTC. There was another attorney of record, and I... (b) (6) determined that the subject attorney could not appear without submitting a 28. For reference, when an attorney wants to submit a complaint about an IJ, a good approach is to refer the attorney to the EOIR webpage to make the complaint. That places the decision on the attorney to make a complaint or not; he or she decides, hopefully keeping you out of the mix.

Non-responsive

LRD

9213

10/4/2011

EOIR FOIA Processing (EOIR)

From: Weisel, Robert (EOIR)
Sent: Tuesday, January 10, 2012 9:01 AM
To: Keller, Mary Beth (EOIR)
Subject: FW: Open Complaints in the IJ Conduct Database

This is what I sent to Deborah, regarding (b) (6) and (b) (6) Considering your e mail, I need to find out when Sarah counseled them.
Bob

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

From: Weisel, Robert (EOIR)
Sent: Friday, January 06, 2012 12:03 PM
To: Moutinho, Deborah (EOIR)
Subject: RE: Open Complaints in the IJ Conduct Database

I will be faxing you an IJ complaint intake form for Judge (b) (6) We can close this out as per discussion with Mary Beth. The correct event for closure in this case is complaint dismissed. Because it was disproven. Regarding complaint 553 (b) (6) and 554 (b) (6) , you can close these out as well with the event for both being ,oral counseling.
Robert D. Weisel
Assistant Chief Immigration Judge
26 Federal Plaza- Suite 1237
NY, NY 10278

From: Moutinho, Deborah (EOIR)
Sent: Thursday, January 05, 2012 8:35 AM
To: Weisel, Robert (EOIR)
Subject: RE: Open Complaints in the IJ Conduct Database

Perfect!!! Thanks
Deborah

From: Weisel, Robert (EOIR)
Sent: Wednesday, January 04, 2012 4:48 PM
To: Moutinho, Deborah (EOIR)
Subject: RE: Open Complaints in the IJ Conduct Database

Regarding complaint #590 (b) (6)
This complaint was closed today, January 4, 2012. Corrective action was already taken – an intervening event.

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

From: Moutinho, Deborah (EOIR)
Sent: Wednesday, January 04, 2012 4:02 PM
To: Weisel, Robert (EOIR)

9221

EOIR FOIA Processing (EOIR)

From: Sukkar, Elisa (EOIR)
Sent: Thursday, July 14, 2011 12:23 PM
To: Keller, Mary Beth (EOIR)
Cc: O'Leary, Brian (EOIR); McGoings, Michael (EOIR)
Subject: FW: Time to Talk

Importance: High

Dear Mary Beth:

I spoke to the IJ. (b) (6) said no problem at all. (b) (6) will call them today and have them convert (b) (6) to active status.

He indicated that (b) (6) told the (b) (6) Bar (b) (6) was an IJ and only wanted to be exempted for CLE credits (b) (6) understands that under DOJ guidelines we need to have an active license as an attorney.

I asked (b) (6) for confirmation from the (b) (6) Bar as to the change in (b) (6) status (b) (6) said (b) (6) will get it done right away.

I also asked (b) (6) if (b) (6) had served in the military and (b) (6) indicated (b) (6) did not.

As soon as I receive confirmation, I will forward it to you.

Thank you,

EMS

From: (b) (6) (EOIR)
Sent: Thursday, July 14, 2011 12:12 PM
To: Sukkar, Elisa (EOIR)
Subject: RE: Time to Talk

I can talk now. I think they made me a member of the judiciary so I would be CLE exempt.

From: Sukkar, Elisa (EOIR)
Sent: Thursday, July 14, 2011 12:10 PM
To: (b) (6) (EOIR)
Subject: Time to Talk
Importance: High

Dear Judge (b) (6)

I need to speak to you about your (b) (6) Bar status. It seems you have been classified under judiciary and possibly in inactive status.

We need for you to correct this ASAP and convert your status to that of an active attorney. This is a requirement under DOJ rules.

Please let me know when you are available so we can discuss this.

Thank you,

EMS

9243

(b) (6)
Clinical Psychologist
(b) (6)

January 23, 2009

To Whom it May Concern:

(b) (6) has been a patient of mine for the past two years. Very early on I diagnosed (b) (6) with severe Post Traumatic Stress Disorder and Panic Disorder. She displays symptoms of Major Depression as well.

(b) (6) has survived a history of repeated childhood sexual assault. Her family shunned her and she went on to sustain more sexual and physical trauma as an adolescent and young adult. During her marriage to an American G.I., she was brutalized by years of domestic violence, including severe physical assault by her husband, witnessing the physical abuse of her children by his hand and eventually learning that her husband sexually assaulted several of their children as well as victims outside the family.

Currently (b) (6) lives under the care of her son (b) (6) and disabled veteran of the U.S. Armed Forces. Under his care, she lives in a stable environment surrounded by loving family. She has been an eager participant in treatment. She has responded favorably, displaying periods of improved mental health. (b) (6) emotional stability remains fragile, however.

It is my opinion that (b) (6) repeated appearances in the court proceedings have resulted in setbacks. Her panic and depression symptoms have escalated to levels previously unseen. The thought of returning to Germany leaves her overwhelmed by fears, flashbacks, severe sleep disturbance and debilitating panic attacks.

(b) (6) has one of the most tragic life stories of any patient I have worked with in my fifteen years as a clinical psychologist, and I have worked with many trauma survivors. I appeal to the court to consider the detrimental impact on (b) (6) emotional well being as you determine the course of her court appearances, and indeed, her ultimate fate.

Sincerely,

(b) (6)
Clinical Psychologist

Cc: Client Record

9306

EOIR FOIA Processing (EOIR)

From: Maggard, Print (EOIR)
Sent: Monday, January 09, 2012 5:22 PM
To: Keller, Mary Beth (EOIR)
Subject: RE: IJC Memo -(b) (6) December 27, 2011)

That sounds good, I talked to Jack a while about this one last week. I am trying to find time to go through the file and look for other discipline or training in the past. Thank you!

Print

PRINT MAGGARD
Assistant Chief Immigration Judge
United States Immigration Court
Executive Office for Immigration Review
120 Montgomery Street, Suite 800
San Francisco, CA 94104
(b) (6)

From: Keller, Mary Beth (EOIR)
Sent: Monday, January 09, 2012 1:36 PM
To: Maggard, Print (EOIR)
Subject: RE: IJC Memo - (b) (6) (December 27, 2011)

Print,
I have not forgotten you! Will give you a call this week – maybe after out ACIJ mtg tomorrow? Since this one came in in 2012, it's not going to be part of this last quarter's (Oct 1.2011 – Dec 31. 2011) report in terms of statistics, so, we have time.
Mtk

From: Maggard, Print (EOIR)
Sent: Wednesday, January 04, 2012 11:43 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: IJC Memo - (b) (6) (December 27, 2011)

Mary Beth, I have reviewed the documents, I had already read this decision last week and knew this was coming. Whenever is a good time for you to talk to me about these just let me know, Non-Responsive
Non-Responsive

Thank you!

Print

PRINT MAGGARD
Assistant Chief Immigration Judge
United States Immigration Court
Executive Office of Immigration Review
120 Montgomery Street, Suite 800
San Francisco, CA 94104
(b) (6)

From: Moutinho, Deborah (EOIR)
Sent: Tuesday, January 03, 2012 8:15 AM

9314

EOIR FOIA Processing (EOIR)

From: Davis, John (EOIR)
Sent: Thursday, August 30, 2012 5:03 PM
To: Keller, Mary Beth (EOIR)
Cc: Rosenblum, Jeff (EOIR); Elliot, Nina (EOIR); McGoings, Michael (EOIR); O'Leary, Brian (EOIR); Weil, Jack (EOIR)
Subject: (b) (6) Training

Importance: High
Sensitivity: Private

Mary Beth and all,

Judge Weil and I have completed IJ (b) (6) remedial training. Jack departed (b) (6) this morning heading back to Falls Church! The news he is bringing with him is not good at all! As you may recall the three of us had discussions regarding IJ (b) (6) performance. I was optimistic that Judge (b) (6) was simply being lazy and that the training may serve to motivate (b) (6) back into performing well. My concern now is IJ (b) (6) lack of mastery of the most basic skills of an IJ is jeopardizing the cases (b) (6) is completing.

Let me start by discussing the training regimen that IJ Weil developed and used in teaching IJ (b) (6). I have been an attorney for 25 years, and have participated in and received training in the military, at INS, the Judicial Law College and 2 bar associations, nothing I have seen in that time compares to the professionalism and thoroughness of the plan that ACIJ Weil put together for Judge (b) (6). ACIJ Weil provided me with a copy of the Training Plan for Judge (b) (6) a week before the training began. The training plan integrated no less than 15 cases that the BIA had remanded to IJ (b) (6) had and Judge Weil used them exceeding well as teaching points! In addition to integrating remanded cases Judge Weil incorporated numerous other teaching aides to assist IJ (b) (6) in the training. I cannot speak highly enough about the job Judge Weil did in preparing and executing the remedial plan for IJ (b) (6)

While ACIJ Weil did an outstanding job in the planning and execution of IJ (b) (6) remedial training I could hope that Judge (b) (6) would have been nearly as well prepared. Despite the fact that I had sat down with Judge (b) (6) on two occasions (totaling nearly 5 hours) to discuss some of (b) (6) deficiencies I do not believe that (b) (6) understood the depth of (b) (6) performance problems until the beginning of the second day of training! I know that I was utterly amazed at how lacking Judge (b) (6) performance is! During the course of the first training day Judge (b) (6) did at least five oral decisions, only one, where Judge (b) (6) was using a script prepared by Judge Weil was (b) (6) marginally successful, and then only until (b) (6) reached the analysis portion of the decision. Judge (b) (6) failed to take any notes during the training and was simply not assimilating the information that Judge Weil and I were providing to (b) (6).

Perhaps nothing more clearly illustrates the magnitude of the deficiencies then the first hearing on day two of the training. The second training day Judge (b) (6) normal calendar was left in place and Judge Weil and I observed Judge (b) (6) In court. The first hearing was scheduled to be a 240(a)(B) non LPR Cancelation of Removal. However, no application had been filed. DHS counsel and Respondent's counsel talked and the parties agreed to post conclusion voluntary departure. Judge (b) (6) proceeded with that hearing but (b) (6) misstated the burden of proof on removability, using the old clear, convincing and unequivocal standard burden from the Woodby case, and then for voluntary departure used the clear and convincing standard rather than the preponderance of the evidence standard. Next Judge (b) (6) indicated that (b) (6), "had looked at the file," (as opposed to the evidence of record) and concluded voluntary departure was appropriate. Judge (b) (6) then stated that (b) (6) was going to grant voluntary departure until November 5, 2012 and that if the respondent did not depart the United States by then, "it would be taken away," At no point did (b) (6) enter an alternative order of removal from the United States to the respondents country of nativity! (b) (6) then concluded the hearing, but it quickly it occurred to (b) (6) that (b) (6) had forgotten to set a bond. Judge (b) (6) went back on

9357

the record and said that there we be no bond so that respondent could use the money to go back, (b) (6) then again concluded the hearing without asking DHs if they had any objections to the "No Bond."

Judge (b) (6) second case of the day was also a 10 year cancellation and it went very quickly due to the fact that Respondent has a United States citizen daughter who will turn 21 years old in November and will be able to petition for her mother. While never determining if the mother was prima facie eligible to adjust Judge (b) (6) did "find good reason to continue the hearing" (as opposed to finding good cause) to continue the hearing. I missed the third hearing due to problems IJ (b) (6) was causing (that's a wholly different e-mail) but I'm sure that Judge Weil may have comments on how it went.

While all of these errors, and wrong burdens are really not significant in the cases as they were not appealed, they are indicative of Judge (b) (6) failure to master the most basic skills of being an IJ and of Judge (b) (6) inability to adequately recognize issues. The depth of Judge (b) (6) ineptitude frightens me!

Judge Weil provided a homework assignment for Judge (b) (6) and that was to watch a 42A LPR COR videotaped hearing and then do another oral decision, the decision may be oral or written and the decision will go to Judge Weil for his review. I instructed the JLC's to not accept an assignment from Judge (b) (6) on a 42A case that did not have an A number. Despite the fact that Judge Weil has provided Judge (b) (6) with more than enough tools to succeed, Judge (b) (6) simply cannot master the basic skills. I am hopefully but not optimistic that Judge (b) (6) will succeed in this assignment. If (b) (6) does fail this assignment as I believe (b) (6) will, then the only option that I have will be to place (b) (6) on a Performance Improvement Plan (PIP). Prior to doing that I want to let (b) (6) attempt to successfully complete Judge Weil's homework assignment and I want to ask some additional questions. The (b) (6) Court clerk, (b) (6) had previously indicated to me, and reiterated to Judge Weil and me that it seemed as though Judge (b) (6) was having some memory problems lately. In one instance it took Judge (b) (6) three attempts to schedule an expedited asylum hearing within 180 days, in another (b) (6) cancelled all of (b) (6) cases for a Friday, then came in on that Friday and asked why (b) (6) had no cases on (b) (6) docket, when reminded that (b) (6) had cancelled the docket Judge (b) (6) could not remember why, in the final instance Judge (b) (6) attempted to schedule case into the open day that was scheduled for training. Judge (b) (6), and (b) (6) memory problems might have a medical reason which would explain (b) (6) deficient performance. I do not believe that is the case but I would like to confidentially talk with Judge (b) (6) clerk and see if there are other examples of memory lapses.

I would like to rule out any medical caused before placing Judge (b) (6) on a PIP. If, and when (b) (6) fails the homework assignment and medical causes have been excluded I believe that we will need to place Judge (b) (6) on a PIP. I understand the ramifications of that and know the work that it will entail; I simply do not see any other viable options at this point. Judge (b) (6) has told some of the other IJ's in the (b) (6) court that (b) (6) intends to retire in (b) (6) which is the earliest that (b) (6) can retire. However, Judge (b) (6) has not informed the CA (b) (6) or me of that. Again just because (b) (6) may retire that is not a reason not to take appropriate action.

I apologize for the lengthiness of this email but I believe that the stellar efforts by Judge Weil in attempting to retrain Judge (b) (6) coupled with Judge (b) (6) miserable performance based either on a medical condition or utter lack of skills merited it.

I know that the creation and implementation of a performance implementation plan takes time, with your concurrence Mary Beth I would like the ELR folks to start work of the PIP so that we may implement when necessary.

Warmest Regards,

John W. Davis
Assistant Chief Immigration Judge
3130 North Oakland Street
Aurora, CO 80010
(b) (6)

9358

EOIR FOIA Processing (EOIR)

From: Dean, Larry R. (EOIR)
Sent: Tuesday, November 13, 2012 2:55 PM
To: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

I prefer to leave it open and note that performance counseling occurred on 10/31/2012. I would like to have the BIA decision before going further. Does that work?

LRD

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, November 13, 2012 1:05 PM
To: Dean, Larry R. (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Hey Larry,
All I actually needed was (b) (6) if I follow you, you actually addressed it with performance counseling, then we can close it that way, either counseling, or, corrective action already taken (that would be the performance counseling). We'd just need the date. Or, we can leave it open per your comments below.
Let me know -
Thanks.
Mtk

From: Dean, Larry R. (EOIR)
Sent: Tuesday, November 13, 2012 1:55 PM
To: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Regarding:

1. (b) (6)

   Also, raised at the same time were: (b) (6), (b) (6), and (b) (6)

   I concluded that the last three (b) (6) raised legal issues, not conduct or performance issues, and did not take action regarding those.

   Regarding (b) (6) based on my examination and after receiving Paul's input, I decided that DHS's conduct, though probably not deliberate, created an appearance that prevented me from taking any further action against the IJ. The IJ and I had some exchanges of e-mails, and I considered the matter closed when (b) (6) apologized for what (b) (6) said to the CA regarding the CA's involvement.

2. (b) (6)

   Issued written counseling on 8/21/12 for intemperate conduct in hearing

3. (b) (6)

9365

Issued written counseling on 8/27/12 for conducting contentious hearing

4. (b) (6)

I have not taken final action in this case. I did, however, consider this as a performance issue when writing IJ (b) (6) progress review, regarding conducting contentious hearings. If it is acceptable, I would like to leave this matter open regarding conduct. The case has been appealed, and I believe the BIA will address this further. OK?

Have I addressed the ones that are open at this time, or are there others that I need to update?

LRD

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, November 13, 2012 8:51 AM
To: Dean, Larry R. (EOIR)
Subject: RE: BIA Decisions of the last 6 months

LRD –
IF you are feeling any better and can confirm this today, I will take it off the "open" list for the yearly stats.
Tx.
mtk

From: Dean, Larry R. (EOIR)
Sent: Thursday, November 08, 2012 9:06 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Mary Beth,

It may be early next week before I close the loop on this. Non-Responsive
Non-Responsive

LRD

From: Keller, Mary Beth (EOIR)
Sent: Wednesday, November 07, 2012 11:48 AM
To: Dean, Larry R. (EOIR)
Subject: FW: BIA Decisions of the last 6 months

Larry,

Trying to parse out what you did with one complaint regarding Judge (b) (6) – number 648 in the db, and was the one involving (b) (6) from att (b) (6) I think that was the one that prompted our 6 month review of (b) (6) cases by Paul, which didn't turn much up (see below) and per your July 24 email (below) you were inclined to counsel. In your Aug 27 email it sounds like you may have in fact counsele (b) (6) as one of the "two other matters."
Did you, and if so, what date? If not, we need another disposition.

I know that (b) (6) had several matters swirling at the same time, but I think this is the last one that remains of that group that we need clarification on.

9366

Thanks!

Mtk

From: Dean, Larry R. (EOIR)
Sent: Tuesday, August 28, 2012 9:56 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Agree. IJ did make allegations without knowledge of the facts. (b) (6) apologized—somewhat reluctantly—to the CA. I think that closing this based on the apology is the right way to conclude this. DHS' intent aside, DHS should have communicated with the IJ about what they did and why.

I am FAXing some e-mails and a close out of the intake sheet.

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Ok – I think we could put it in the db, and then track it as concluded (corrective action already taken). What do you think?
Mtk

From: Dean, Larry R. (EOIR)
Sent: Monday, August 27, 2012 3:24 PM
To: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

I think that I am going to let this one go away.

I have counseled (b) (6) n two other matters and have another issue to decide, and this is not one that I would want to appear to defend DHS.

That said, I think that DHS did not intend the outcome or the perception they created in (b) (6) I also agree with you that the perception is not good and I would not want to create the impression that I agreed with their precise actions. Even with that, if seeing the respondent in (b) (6) face-to-face was an issue, IJ (b) (6) could have gone to (b) (6) o complete the case. That's an option that I have offered in the past and that, on occasion, (b) (6) has used.

LRD.

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, August 21, 2012 3:52 PM
To: Dean, Larry R. (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Larry,

9367

Just checking in on this --- and the one attached.

I did in fact just listen to (b) (6) and, have to say that in the part where the judge is most irritated, I kind of have to agree that that whole scene with the mentally challenged respondent being moved by DHS is problematic. However, in the later hearings, the judge remains a little too deliberate, sanguine, and condescending, putting emphasis on certain words for effect, and almost mocking of the respondent's mother..."Perhaps your love wasn't enough..."

I know that the judge also just got another decision back from BIA last week.

Aaargh. Multiple counselings? Or?

Mtk

From: Dean, Larry R. (EOIR)
Sent: Tuesday, July 24, 2012 12:42 PM
To: Keller, Mary Beth (EOIR); Monsky, Paul (EOIR)
Subject: RE: BIA Decisions of the last 6 months

I'm inclined in that same direction, based on the couple of things that I have.

LRD

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This sounds like "good news" – At least up to this point. Short of looking further into Judge (b) (6) hearings via auditory review of DAR, which I'm not sure is warranted yet, I think counseling on the item of concern makes sense. Thoughts?
mtk

From: Dean, Larry R. (EOIR)
Sent: Tuesday, July 24, 2012 10:32 AM
To: Monsky, Paul (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Paul,

Thanks for the help and the report back.

LRD

From: Monsky, Paul (EOIR)
Sent: Tuesday, July 24, 2012 9:30 AM
To: Dean, Larry R. (EOIR)

9368

Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, November 13, 2012 3:03 PM
To: Moutinho, Deborah (EOIR)
Subject: FW: BIA Decisions of the last 6 months

D –
Ok, this one stays open, but please add a that performance counseling was done on 10/31/2012 –
Thanks.
Mtk

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Sent: Tuesday, November 13, 2012 2:55 PM
To: Keller, Mary Beth (EOIR)
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9405

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9406

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LRD.

9407

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Sent: Tuesday, July 24, 2012 10:32 AM
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Cc: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Paul,

9408

Thanks for the help and the report back.

LRD

From: Monsky, Paul (EOIR)
Sent: Tuesday, July 24, 2012 9:30 AM
To: Dean, Larry R. (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: RE: BIA Decisions of the last 6 months

Hi, Judge Dean,
I've looked through all the Board decisions in matters that have been returned Judge (b) (6) over the last year (remands, BCR, and sustained appeals). There weren't a substantial number of appeals overall, and the percentage of remands is not alarming. None of the BIA decisions expresses a problem with Judge (b) (6) demeanor or tone. In one instance, the subtext of the Board decision on appeal from the denial of reopening an in absentia case based on IAC is that Judge (b) (6) was too rigid in requiring counsel's compliance with rules. IJ conduct isn't even tangentially related to the reasons for the other remands on the face of those decisions, which are typical remands based on differing opinions regarding burden of proof where (b) (6) decision may have been upheld had another panel reviewed the matter.
Paul

From: Keller, Mary Beth (EOIR)
Sent: Thursday, July 12, 2012 2:27 PM
To: Monsky, Paul (EOIR)
Subject: BIA Decisions of the last 6 months

Paul,
I spoke w/ Judge Dean, and, his request was simply that you review all the BIA decisions that have come out in the last six months relating to Judge (b) (6) to see if there is anything in there of concern.
Shouldn't be a lot there, but, presumably a few.
Let me know if you have a problem getting those from the VLL –
Mtk

9409

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. We also discussed generally the motor vehicle accident in which you were involved on Monday, September 17. You told me that you had been prescribed (b) (6) but that those prescriptions had been provided over the phone and without examination by a physician. I restated my concern, expressed on Monday, that it was essential that you hear cases only when you are fit for duty and that you notify me of any adverse effects of your medication(s). You expressed concern about sitting for prolonged periods and asked my views on whether you might take additional breaks or stand for portions of hearings. I said that I would be happy to discuss appropriate accommodations if you made such a request, but that requests for accommodations must be supported by medical or other documentation and that you had made no such requests of me. You referred to request(s) you may have made to a previous supervisor; I noted that you said your medications, sitting for prolonged periods, and taking breaks were related to your recent motor vehicle accident, for which you had not made any accommodation requests. You said you understood and would submit an accommodation request, with supporting documentation, should you feel an accommodation necessary after meeting with your physician.

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

9442

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.

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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

9448

(b) (6)

Pro Se Respondent
DETAINED since December 20, 2005

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In The Matter Of	)	IN BOND PROCEEDINGS
(b) (6)	)	File No. A(b) (6)
Respondent.	)	Date Submitted: March 27, 2013

MOTION AND REQUEST FOR ISSUANCE OF BRIEFING SCHEDULE ON TIMELY SUBMITTED BOND APPEAL FROM THE IMMIGRATION JUDGE'S BOND DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS, TIMELY RECEIVED AND TIMELY FILED BY THE BOARD MARCH 11, 2013

The Respondent, pro se, hereby respectfully moves this Honorable Board to acknowledge receipt and timely filing of the Respondent's timely submitted Notice of Appeal Form EOIR-26 from a decision of an Immigration Judge's bond decision dated February 11, 2013 in bond proceedings, timely delivered to the Board via USPS Certified Mail on March 11, 2013, mistakenly incorrectly entered by the Clerk in the Board's computer systems of records as a "motion", and to issue a briefing schedule.

Specifically, on February 11, 2013, the Immigration Judge granted the Respondent's request for bond redetermination in (b) (6) bond proceedings, in a startingly excessive amount of $65,000.00, without articulating any justification at all, effectively precluding the Respondent's release from constitutionally and statutorily unauthorized and totally unjustified prolonged detention of over seven years now, since December 20, 2005;

On March 6, 2013, the Respondent timely filed his original Notice of Appeal Form EOIR-26, on its face explicitly marked "IN BOND PROCEEDINGS", together with a copy of the IJ's bond decision and other documents attached thereto, appealing the unreasonable and totally unjustified excessive amount of the bond amount and claiming, *inter alia*, entitlement to release on his own recognizance. Please see Attachment 1 hereto (copy of Form EOIR-26).

On March 7, 2013 (the following day), in an abundance of caution, the Respondent again mailed to the Board a copy of the very same timely Notice of Appeal Form EOIR-26, explicitly marked "IN BOND PROCEEDINGS", with copies of all same attachments.

On March 11, 2013, both large manila envelopes with the Respondent's timely Notice of Appeal Form EOIR-26 explicitly marked "IN BOND PROCEEDINGS" on its face, together with all attachments, were delivered to the Board via USPS CertifiedMail. Please see Attachment 1 herein, copies of the USPS Certified Mail Receipts and USPS "Track & Confirm" e-mail print-outs confirming delivery.

On March 12, 2013, the Board's Clerk mistakenly incorrectly entered a "Filing Receipt for Motion" into the Board's computer systems of records, which should have been entered as a "Filing Receipt for Bond Appeal", and also mischaracterized the bond appeal as a "MTR BIA-REC" in "Removal Proceedings", when in fact it is a timely "**Notice of Appeal in Bond Proceedings**". Please see Attachment 2 hereto (copy of the 3/12/2013 Clerk's Receipt).

On March 18, 2013, to his dismay, Respondent received in the mail the Board's incorrectly entered "Filing Receipt for Motion" (an obvious mistake), when in fact the receipt should read "Filing Receipt for Timely Bond Appeal". Please see Attachment 2 hereto.

On March 19, 2013, the Respondent promptly wrote a letter to the Clerk, together with a copy of his timely Notice of Appeal Form EOIR-26 and of all documents submitted with the bond appeal, requesting correction of the obvious mistake, and to be provided with a "Filing Receipt for Bond Appeal", together with a briefing schedule. Please see Attachment 3 hereto.

On March 20, 2013, Respondent telephoned the BIA's Clerk's Office (703) 605-1007 and discussed the problem with Board Clerk Ms. Malhia, who instructed Respondent to resubmit copies of everything. Pursuant to Ms. Malhia's instructions, Respondent wrote another letter inquiring about his timely filed Bond Appeal and mailed it to the Board, together with copies of everything. Please see copy of the 3/20/2013 letter as Attachment 4 hereto.

On March 21, 2013, Respondent again mailed a copy of his March 20, 2013 letter to the Board, together with another copy of the timely filed Notice of Appeal Form EOIR-26.

THEREFORE, the Respondent respectfully moves this Honorable Board to acknowledge timely receipt and timely filing on March 11, 2013 of Respondent's Bond Appeal, and to issue a briefing schedule in this appeal for full briefing and consideration by the Board.

I declare under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

Date: March 27, 2013 (b) (6)

PROOF OF SERVICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In The Matter Of: (b) (6) File No. A(b) (6)
In Bond Proceedings

I, (b) (6) the undersigned pro se Respondent in this action, hereby declare and certify that a true copy of the enclosed documents entitled:

MOTION AND REQUEST FOR ISSUANCE OF BRIEFING SCHEDULE ON TIMELY SUBMITTED BOND APPEAL FROM THE IMMIGRATION JUDGE'S BOND DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS, TIMELY RECEIVED AND FILED BY THE BOARD ON MARCH 11, 2013

in the above entitled case, was served by institutional internal mail and United States mail on 3-27-2013 in sealed envelope(s) with fully prepaid first-class postage affixed thereon, and dropped in the designated U.S. Mail institutional mailbox for forwarding to the Court and the Department, addressed as follows:

Board of Immigration Appeals
Clerk's Office
P. O. Box 8530
Falls Church, Virginia 22041

ICE District Counsel
US Dept. of Homeland Security
(b) (6)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability pursuant to 28 U.S.C. § 1746.

Date: March 27, 2013

March 27, 2013

(b) (6)

(b) (6)

ATTACHMENT

1

9564

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

OMB# 1125-0002

Notice of Appeal from a Decision of an Immigration Judge

1. List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s):

Staple Check or Money Order Here. Include Name(s) and "A" Number(s) on the face of the check or money order.

(b) (6)

A(b) (6)

Detained Since December 20, 2005

IN(b) (6) BOND PROCEEDINGS

For Official Use Only

WARNING: Names and "A" Numbers of **everyone** appealing the Immigration Judge's decision must be written in item #1. The names and "A" numbers listed will be the only ones considered to be the subjects of the appeal.

2. I am ☑ the Respondent/Applicant ☐ DHS-ICE *(Mark only one box.)*

3. I am ☑ DETAINED ☐ NOT DETAINED *(Mark only one box.)*

4. My last hearing was at (b) (6) *(Location, City, State)*

5. **What decision are you appealing?**

Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26).

☐ I am filing an appeal from the Immigration Judge's decision *in **merits** proceedings* (example: removal, deportation, exclusion, asylum, etc.) dated _____.

☑ I am filing an appeal from the Immigration Judge's decision *in **bond** proceedings* dated FEBRUARY 11, 2013. (For DHS use only: Did DHS invoke the automatic stay provision before the Immigration Court? ☐ Yes. ☐ No.)

☐ I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

(Please attach a copy of the Immigration Judge's decision that you are appealing.)

PLEASE SEE COPY ATTACHED.

Form EOIR-26
Revised Mar. 2012

9565

U. S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court

(b) (6)

In the Matter of:
(b) (6)

Respondent

Case No. (b) (6)
Docket

In Bond Proceedings

ORDER OF THE IMMIGRATION JUDGE

Request having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. §1236.1(d)(1), and having considered the representations of Immigration and Customs Enforcement and the respondent, it is HEREBY ORDERED that:

[ ] The request for a change in the custody status of the respondent be denied.

[X] The request for a change in the custody status of the respondent be granted and that the respondent be:

(1) [ ] released from custody on respondent's own recognizance; or,

[X] released from custody upon posting a bond of $ 5,000 and

(2) the conditions of the bond:

[ ] remain unchanged; or,

[ ] are changed as follows: _____

_____

[ ] No Jurisdiction pursuant to 236 of the Act _____

_____

[ ] Other _____

(b) (6)

2/11/13
Date

Appeal: RESERVED/WAIVED (A / I / B)

due 3/13/13

9566

6. **State in detail the reason(s) for this appeal. Please refer to the General Instructions at item F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.**

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

Detained Since December 20, 2005

IN(b) (6)OND PROCEEDINGS, see (b) (6)

Please see attached copy of timely Motion to Reconsider pending before the Immigration Judge pursuant to 8 C.F.R. § 1003.23(b)(1) and *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A separate written brief will be filed after review to the IJ's Memorandum Decision.

MOTION FOR REVIEW AND RECONSIDERATION BY THREE-MEMBER PANEL

The Respondent respectfully submits that this case warrants review by a three-member panel because it presents compelling facts and circumstances of the most fundamental character of nationwide application that should be addressed, involving a decision that is not in conformity with non-discretionary substantive provisions and express prohibitions of the Constitution and Laws of the United States, and directly conflicts with applicable controlling precedents seriously affecting Respondent's substantial rights and equal protection fundamental liberty guarantees as a Lawful Permanent Resident ("LPR") subject to unjustified and unauthorized prolonged detention.

(Attach additional sheets if necessary)

WARNING: You must clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision. The Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing.

7. Do you desire oral argument before the Board of Immigration Appeals? ☑ Yes ☐ No

8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? ☑ Yes ☐ No

WARNING: If you mark "Yes" in item #7, you should also include in your statement above why you believe your case warrants review by a three-member panel. The Board ordinarily will not grant a request for oral argument unless you also file a brief.

If you mark "Yes" in item #8, you will be expected to file a written brief or statement after you receive a briefing schedule from the Board. The Board may summarily dismiss your appeal if you do not file a brief or statement within the time set in the briefing schedule.

9. SIGN HERE (b) (6) 3/6/2013
Date

Form EOIR-26
Revised Mar. 2012

9567

10. Mailing Address of Respondent(s)/Applicant(s)

(b) (6)

(Telephone Number)

11. Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)

(Name)

(Street Address)

(Suite or Room Number)

(City, State, Zip Code)

(Telephone Number)

NOTE: You must notify the Board within five (5) working days if you move to a new address or change your telephone number. You must use the Change of Address Form/Board of Immigration Appeals (Form EOIR-33/BIA).

NOTE: If an attorney or representative signs this appeal for you, he or she must file *with this appeal*, a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27).

12. **PROOF OF SERVICE (You Must Complete This)**

I (b) (6) mailed or delivered a copy of this Notice of Appeal

on MARCH 6, 2013 (Date) to DHS/ICE DISTRICT COUNSEL (Opposing Party)

at (b) (6)

SIGN HERE (b) (6) 3/6/2013

NOTE: If you are the Respondent or Applicant, the "Opposing Party" is the Assistant Chief Counsel of DHS - ICE.

WARNING: If you do not complete this section properly, your appeal will be rejected or dismissed.

WARNING: If you do not attach the fee or a completed Fee Waiver Request (Form EOIR-26A) to this appeal, your appeal may be rejected or dismissed.

HAVE YOU?

- ☑ Read all of the General Instructions
- ☑ Provided all of the requested information
- ☑ Completed this form in English
- ☑ Provided a certified English translation for all non-English attachments
- ☑ Signed the form
- ☑ Served a copy of this form and all attachments on the opposing party
- ☑ Completed and signed the Proof of Service
- ☑ Attached the required fee or Fee Waiver Request
- ☐ If represented by attorney or representative, attach a completed and signed EOIR-27 N/A

9568

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

OMB# 1125-0003

Fee Waiver Request

(b) (6)
Name:

A(b) (6)
Alien Number ("A" Number):

If more than one alien is included in your appeal or motion, only the lead alien need file this form. This form is to be signed by the alien, not the alien's attorney or representative of record.

I, (b) (6), declare under penalty of perjury, pursuant to 28 U.S.C. section 1746, that I am the person above and that I am unable to pay the fee. I believe that my appeal/motion is valid, and I declare that the following information is true and correct to the best of my knowledge:

Assets

Wages, Salary	$ 0 /month
Other Income (business, professional services, self-employed/independent contracting, rental payments, etc.)	0 /month
Cash	0
Checking and/or Savings	0
Property (real estate, automobile(s), stocks, bonds, etc.)	0
Other Financial Support (public assistance, alimony, child support, gift, parent, spouse, other family members, etc.)	0 /month

Expenses (including dependents)

Housing (rent, mortgage, etc.)	$ 0 /month
Food	0 /month
Medical/Health	0 /month
Utilities (phone, electric, gas, water, etc.)	0 /month
Transportation	0 /month
Debts, Liabilities	0 /month
Other (specify) 0	$ 0 /month

(b) (6)

MARCH 6, 2013
Date

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is one (1) hour. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

Privacy Act Notice
The information on this form is requested to determine if you have established eligibility for the fee waiver you are seeking. The legal right to ask for this information is located at 8 C.F.R. § 1003.8(a)(3). EOIR may provide this information to other Government agencies. Failure to provide this information may result in denial of your request.

Track & Confirm

GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
(9) (g)		Delivered	March 11, 2013, 8:32 am	FALLS CHURCH, VA 22041	Certified Mail™
		Notice Left (No Authorized Recipient Available)	March 09, 2013, 11:57 am	FALLS CHURCH, VA 22041	

Initial Mail Information

Received/Sent	OUTGOING-LEGAL/CERTIFIED
Reason Returned	7011 0470 0000 4946 2111
Date Received/Sent	03/06/2013 08:31
Sent To/Received From	U S DOJ / EOIR
Address To/From	PO BOX 8530 FALLS CHURCH VA 22041

Mail Contents Information

Cash Received/Disbursed	
Amount Received/Disbursed	.00
Receipt Number	
Money Order/Check Number	
Officer Logging Mail	(9) (g)

(9) (g)

U.S. Postal Service
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com.
OFFICIAL USE

Postage	$ 2.32
Certified Fee	3.10
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 5.42

(9) (g)

Here

MAR 0 6 2013

Sent To
BOARD OF IMMIGRATION APPEALS
Street, Apt. No.; or PO Box No.
CLERK'S OFFICE, P.O.BOX 8530
City, State, ZIP+4
FALLS CHURCH, VA 22041

See Reverse for Instructions

9570

Track & Confirm

GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
[redacted] (b) (6)		Delivered	March 11, 2013, 10:53 am	FALLS CHURCH, VA 22041	Certified Mail™
		Arrival at Unit	March 11, 2013, 10:28 am	FALLS CHURCH, VA 22041	

Initial Mail Information

Received/Sent	OUTGOING-LEGAL/CERTIFIED
Reason Returned	7011 0470 0000 4946 2128
Date Received/Sent	03/07/2013 09:08
Sent To/Received From	U S DOJ / EOIR
Address To/From	PO BOX 8530 FALLS CHURCH VA 22041

Mail Contents Information

Cash Received/Disbursed	
Amount Received/Disbursed	.00
Receipt Number	
Money Order/Check Number	
Officer Logging Mail	[redacted] (b) (6)

(b) (6)

U.S. Postal Service
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

Postage	$ 2.32
Certified Fee	3.10
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 5.42

[redacted] (b) (6)

Postmark Here

MAR 07 2013

Sent To
BOARD OF IMMIGRATION APPEALS
Street, Apt. No., or PO Box No. CLERK'S OFFICE, P.O. BOX 8530 EOIR
City, State, ZIP+4 FALLS CHURCH, VA. 22041

PS Form 3800, August 2006 See Reverse for Instructions

9571

ATTACHMENT

2

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

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

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

Type of Proceeding: ~~Removal~~ BOND

Date of this notice: 3/12/2013

Type of Appeal or Motion: ~~MTR-BIA-REC~~ NOTICE OF APPEAL, FORM EOIR-26

Filed By: Alien

FILING RECEIPT FOR ~~MOTION~~ APPEAL

The above-referenced case is presently pending before the Board of Immigration Appeals. The following document, which was filed by the alien on 3/11/2013 will be placed with the record of proceedings:

FILING INSTRUCTIONS

Use of an over-night courier service is strongly encouraged to ensure timely filing.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals -- including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the District Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

9573

To mail by regular first class mail:

Board of Immigration Appeals
Clerk's Office
Post Office Box 8530
Falls Church, VA 22041

hawkinsE
Userteam: Motions

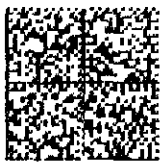
9574

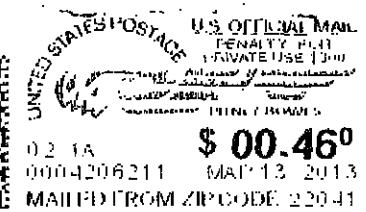
U.S. Department of Justice
Executive Office for Immigration Review
Office of the Clerk
Board of Immigration Appeals

P.O. Box 8530
Falls Church, Virginia 22041

Official Business
Penalty for Private Use $300

MOT





(2)

MAR 18 2013

A 4 20

(9) (9)

ATTACHMENT

3

9576

(b) (6)

March 19, 2013

Board of Immigration Appeals
Clerk's Office
P. O. Box 8530
Falls Church, VA 22041

VIA USPS CERTIFIED MAIL

Re: REQUEST FOR CONFIRMATION AND FILING RECEIPT OF TIMELY SUBMITTED FORM EOIR-26 NOTICE OF APPEAL FROM THE IMMIGRATION JUDGE'S DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS, TIMELY FILED WITH THE BOARD MARCH 11, 2013.

Dear Sir or Madam Clerk,

On March 6, 2013, I timely mailed to the Board, and properly served, my Notice of Appeal (Form EOIR-26) from the Immigration Judge's bond decision of February 11, 2013, in (b) (6) Bond Proceedings. I attached a copy of the February 11, 2013 bond decision to the 3-page Notice of Appeal and a Fee Waiver request form (which actually was not required for a bond appeal), as well as a copy of my then-pending March 1, 2013 37-page Motion to Reconsider the February 11, 2013 Bond Decision, addressed and submitted to the Immigration Judge, as a partial "statement" and partial basis in supporrt of my bond appeal. Please see a copy of my Notice of Appeal and attached Motion to Reconsider to the Immigration Judge, enclosed herewith.

The following day, March 7, 2013, in an abundance of caution in case of delay, I mailed a copy of the same Notice of Appeal with all same attachments to the Board. Both large manila envelopes were timely deklivered to the Board's Clerk's Office on Monday, March 11, 2013. Please see copies of the USPS Certified Mail receipts and USPS "Track & Confirm" print-outs attached to this letter.

Yesterday, March 18, 2013, I received from the Clerk's Office a "Filing Receipt for Motion" stating that my appeal (mischaracterized as a "motion") was "filed" March 11, 2013. Please see copy attached hereto. However, my March 11, 2013 timely filing is not a "motion" in "removal proceedings" as stated on the receipt, but a timely filed "Notice of Appeal" as of right from the Immigration Judge's bond decision dated February 11, 2013, in *Diouf* bond proceedings, as clearly and explicitly shown on the face of the Notice of Appeal Form EOIR-26. This receipt is incorrect and is clearly a mistake by the Clerk who entered the receipt. Please see copy enclosed.

9577

Would you please be so kind as to correct this apparent mistake by the Clerk and kindly correct my March 11, 2013 filing as a timely filed bond appeal as of right from the Immigration Judge's bond decision dated February 11, 2013 in (b) (6) bond proceedings, as clearly and explicitly shown on the face of my Notice of Appeal Form EOIR-26, and kindly provide me with confirmation and timely filing receipt of my bond appeal? Would you also please kindly provide me with the transcripts of the entire bond proceedings, which are necessary in order for me to adequately and properly prepare by bond appeal brief, as well as the briefing schedule?

Thank you for your courtesy and assistance.

3-19-13

(b) (6)

Proof of Service attached.

9578

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

OMB# 1125-0002

Notice of Appeal from a Decision of an Immigration Judge

Staple Check or Money Order Here. Include Name(s) and "A" Number(s) on the face of the check or money order.

1. List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s):

(b) (6)

A(b) (6)

Detained Since December 20, 2005

IN (b) (6) BOND PROCEEDINGS

For Official Use Only

WARNING: Names and "A" Numbers of **everyone** appealing the Immigration Judge's decision must be written in item #1. The names and "A" numbers listed will be the only ones considered to be the subjects of the appeal.

2. I am ☑ the Respondent/Applicant ☐ DHS-ICE *(Mark only one box.)*

3. I am ☑ DETAINED ☐ NOT DETAINED *(Mark only one box.)*

4. My last hearing was at (b) (6) *(Location, City, State)*

5. **What decision are you appealing?**

Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26).

☐ I am filing an appeal from the Immigration Judge's decision *in **merits** proceedings* (example: removal, deportation, exclusion, asylum, etc.) dated _____.

☑ I am filing an appeal from the Immigration Judge's decision *in **bond** proceedings* dated FEBRUARY 11, 2013. (For DHS use only: Did DHS invoke the automatic stay provision before the Immigration Court? ☐ Yes. ☐ No.)

☐ I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

(Please attach a copy of the Immigration Judge's decision that you are appealing.)

PLEASE SEE COPY ATTACHED.

Form EOIR-26
Revised Mar. 2012

9579

U. S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court

(b) (6)

In the Matter of: (b) (6)	)	Case No.: (b) (6)
	)	Docket: (b) (6)
Respondent	)	In Bond Proceedings

ORDER OF THE IMMIGRATION JUDGE

Request having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. §1236.1(d)(1), and having considered the representations of Immigration and Customs Enforcement and the respondent, it is HEREBY ORDERED that:

[ ] The request for a change in the custody status of the respondent be denied.

[X] The request for a change in the custody status of the respondent be granted and that the respondent be:

(1) [ ] released from custody on respondent's own recognizance; or,

[X] released from custody upon posting a bond of $ 5,000 and

(2) the conditions of the bond:

[ ] remain unchanged; or,

[ ] are changed as follows: _____

_____

[ ] No Jurisdiction pursuant to 236 of the Act _____

_____

[ ] Other _____

(b) (6)

2/11/13
Date

Appeal: RESERVED/WAIVED (A / L / B)

ME 3/13/13

9580

6. **State in detail the reason(s) for this appeal. Please refer to the General Instructions at item F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.**

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

Detained Since December 20, 2005

IN (b) (6)BOND PROCEEDINGS, see (b) (6))

Please see attached copy of timely Motion to Reconsider pending before the Immigration Judge pursuant to 8 C.F.R. § 1003.23(b)(1) and *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A separate written brief will be filed after review to the IJ's Memorandum Decision.

MOTION FOR REVIEW AND RECONSIDERATION BY THREE-MEMBER PANEL

The Respondent respectfully submits that this case warrants review by a three-member panel because it presents compelling facts and circumstances of the most fundamental character of nationwide application that should be addressed, involving a decision that is not in conformity with non-discretionary substantive provisions and express prohibitions of the Constitution and Laws of the United States, and directly conflicts with applicable controlling precedents seriously affecting Respondent's substantial rights and equal protection fundamental liberty guarantees as a Lawful Permanent Resident ("LPR") subject to unjustified and unauthorized prolonged detention.

(Attach additional sheets if necessary)

WARNING: You must clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision. The Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing.

7. Do you desire oral argument before the Board of Immigration Appeals? ☑ Yes ☐ No

8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? ☑ Yes ☐ No

WARNING: If you mark "Yes" in item #7, you should also include in your statement above why you believe your case warrants review by a three-member panel. The Board ordinarily will not grant a request for oral argument unless you also file a brief.

If you mark "Yes" in item #8, you will be expected to file a written brief or statement after you receive a briefing schedule from the Board. The Board may summarily dismiss your appeal if you do not file a brief or statement within the time set in the briefing schedule.

9. SIGN HERE (b) (6) 3/6/2013
Date

Form EOIR-26
Revised Mar. 2012

9581

10. Mailing Address of Respondent(s)/Applicant(s)

(b) (6)

(Telephone Number)

11. Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)

(Name)

(Street Address)

(Suite or Room Number)

(City, State, Zip Code)

(Telephone Number)

NOTE: You must notify the Board within five (5) working days if you move to a new address or change your telephone number. You must use the Change of Address Form/Board of Immigration Appeals (Form EOIR-33/BIA).

NOTE: If an attorney or representative signs this appeal for you, he or she must file *with this appeal*, a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27).

12. **PROOF OF SERVICE (You Must Complete This)**

I (b) (6) (Name) mailed or delivered a copy of this Notice of Appeal

on MARCH 6, 2013 (Date) to DHS/ICE DISTRICT COUNSEL (Opposing Party)

at (b) (6)

SIGN HERE (b) (6) 3/6/2013

NOTE: If you are the Respondent or Applicant, the "Opposing Party" is the Assistant Chief Counsel of DHS - ICE.

WARNING: If you do not complete this section properly, your appeal will be rejected or dismissed.

WARNING: If you do not attach the fee or a completed Fee Waiver Request (Form EOIR-26A) to this appeal, your appeal may be rejected or dismissed.

HAVE YOU?

- ☑ Read all of the General Instructions
- ☑ Provided all of the requested information
- ☑ Completed this form in English
- ☑ Provided a certified English translation for all non-English attachments
- ☑ Signed the form
- ☑ Served a copy of this form and all attachments on the opposing party
- ☑ Completed and signed the Proof of Service
- ☑ Attached the required fee or Fee Waiver Request
- ☐ If represented by attorney or representative, attach a completed and signed EOIR-27 N/A

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

OMB# 1125-0003

Fee Waiver Request

(b) (6)
Name:

A(b) (6)
Alien Number ("A" Number):

If more than one alien is included in your appeal or motion, only the lead alien need file this form. This form is to be signed by the alien, not the alien's attorney or representative of record.

I, (b) (6), declare under penalty of perjury, pursuant to 28 U.S.C. section 1746, that I am the person above and that I am unable to pay the fee. I believe that my appeal/motion is valid, and I declare that the following information is true and correct to the best of my knowledge:

Assets

Wages, Salary	$ 0 /month
Other Income (business, professional services, self-employed/independent contracting, rental payments, etc.)	0 /month
Cash	0
Checking and/or Savings	0
Property (real estate, automobile(s), stocks, bonds, etc.)	0
Other Financial Support (public assistance, alimony, child support, gift, parent, spouse, other family members, etc.)	0 /month

Expenses (including dependents)

Housing (rent, mortgage, etc.)	$ 0 /month
Food	0 /month
Medical/Health	0 /month
Utilities (phone, electric, gas, water, etc.)	0 /month
Transportation	0 /month
Debts, Liabilities	0 /month
Other 0 (specify)	$ 0 /month

(b) (6)

MARCH 6, 2013
Date

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is one (1) hour. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

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The information on this form is requested to determine if you have established eligibility for the fee waiver you are seeking. The legal right to ask for this information is located at 8 C.F.R. § 1003.8(a)(3). EOIR may provide this information to other Government agencies. Failure to provide this information may result in denial of your request.

Track & Confirm

GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
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Receipt Number	
Money Order/Check Number	
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City, State, ZIP+4
FALLS CHURCH, VA 22041

PS Form 3800, August 2006 See Reverse for Instructions

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Receipt Number	
Money Order/Check Number	
Officer Logging M	[redacted] (b) (6)

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9585

PROOF OF SERVICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In The Matter Of: (b) (6)
In Removal Proceedings

File No. A(b) (6)

I, (b) (6) the undersigned pro se Respondent in this action, hereby declare and certify that a true copy of the enclosed documents entitled:

REQUEST FOR CONFIRMATION AND FILING RECEIPT OF TIMELY SUBMITTED FORM EOIR-26 NOTICE OF APPEAL FROM THE IMMIGRATION JUDGE'S DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS, TIMELY FILED WITH THE BOARD MARCH 11, 2013; ENCLOSED COPY OF MARCH 11, 2013 TIMELY FILED NOTICE OF APPEAL FORM EOIR-26 WITH ATTACHMENTS.

in the above entitled case, was served by institutional internal mail and United States mail on 3-19-13 in sealed envelope(s) with fully prepaid first-class postage affixed thereon, and Internal Legal Mailocedures, and dropped in the designated U.S. Mail institutional mailbox for forwarding to the Court and the Department, addressed as follows:

Board of Immigration Appeals
Clerk's Office
P. O. Box 8530
Falls Church, Virginia 22041

ICE District Counsel
US Dept. of Homeland Security
(b) (6)

The Honorable (b) (6)
U.S. Immigration Judge
Executive Office for Immigeration Review
(b) (6)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability pursuant to 28 U.S.C. § 1746.

Date: 3-19-13

March 19, 2013

(b) (6)

9586

Track & Confirm

GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
[redacted] (9) (g)		Delivered	March 25, 2013, 8:32 am	FALLS CHURCH, VA 22041	Certified Mail™
		Available for Pickup	March 23, 2013, 11:47 am	FALLS CHURCH, VA 22041	

Mail Event Information

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Reason Returned	7011 0470 0000 4946 2371
Date Received/Sent	03/20/2013 00:50
Sent To/Received From	US BD APPEALS P O BX 8530
Address To/From	FALLS CHURCH VA 22041

Mail Content Information

Cash Received/Disbursed	
Amount Received/Disbursed	.00
Receipt Number	
Money Order/Check Number	
Officer Logging Mail	[redacted] (9) (g)

(9) (g)

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Return Receipt Fee (Endorsement Required)	—
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[redacted] (9) (g)

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Street, Apt. No.; or PO Box No.: PO Box 8530
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9587

ATTACHMENT

4

9588

(b) (6)

March 20, 2013

Board of Immigration Appeals
Clerk's Office
P. O. Box 8530
Falls Church, VA 22041

VIA USPS CERTIFIED MAIL

Re: **In The Matter of** (b) (6) **File No** (b) (6)

IN BOND PROCEEDINGS:
REQUEST FOR PROCESSING AND CONSIDERATION OF TIMELY FILED BOND APPEAL AS OF RIGHT FROM THE IMMIGRATION JUDGE'S DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS; NOTICE OF APPEAL FORM EOIR-26 TIMELY FILED WITH THE BOARD ON MARCH 11, 2013.

Dear Sir or Madam Clerk,

On March 6 and 7, 2013, I timely submitted my Notice of Appeal Form EOIR-26, with attachments, from the Immigration Judge's bond decision dated February 11, 2013 in bond proceedings, mailed to the Board via USPS Certified Mail, timely delivered to the Board and "filed" March 11, 2013. Please see copy of my timely filed EOIR-26 Form, together with copies of the USPS Certified Mail Receipts and the USPS "Track & Confirm" printouts, showing delivery on March 11, 2013, attached hereto.

However, the Clerk who entered my Notice of Appeal in the Board's computer system on March 11, 2013, mistakenly listed my Notice of Appeal Form EOIR-26 as a "Motion" in "Removal Proceedings" ("MTR BIA-REC"), and mailed me a "FILING RECEIPT FOR MOTION", which I received on Monday, March 18, 2013. This was a mistake, as the receipt should read "Filing Receipt for Bond Appeal". Please see copy attached hereto. Yesterday, I wrote a letter to the Clerk asking for a correction of the record and for acknowledgment that my bond appeal was timely filed on March 11, 2013.

9589

a letter to the Clerk asking for a correction of the record and for acknowledgment that my bond appeal was timely filed on March 11, 2013.

This morning, at approximately 10:30 am, I was able to telephone the Clerk's Office at (703) 605-1007, and discussed the discrepancy with Clerk Malhia. Ms. Malhia stated that the Board received my "Motion to Reconsider" on March 11, 2013, and that it was denied on March 19, 2013. I explained to Ms. Malhia that the March 11, 2013 filing was not a "Motion to reconsider", but a timely filed Notice of Appeal Form EOIR-26 from the Immigration Judge's bond decision dated February 11, 2013, in bond proceedings. Ms. Malhia stated she did not have access to the actual documents I filed, and that she was only getting her information from the entries in the system. Ms. Malhia then suggested that I write a letter with copies of my Notice of Appeal Form EOIR-26 together with copies of the mail receipts to resolve the apparent mistake.

Accordingly, I am again enclosing an exact copy of my timely filed Notice of Appeal Form EOIR-26 from the Immigration Judge's bond decision dated February 11, 2013, in bond proceedings, timely received and filed by the Board on March 11, 2013. I am also enclosing copies of the USPS Certified Mail Receipts and the "Track & Confirm" printouts.

I am therefore respectfully request that my timely filed bond appeal as of right from the Immigration Judge's bond decision be processed, and a briefing schedule issued, for full consideration by the Board.

Thank you for your courtesy and assistance in this matter.

3-20-13

(b) (6)

Proof of Service attached.

9590

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

OMB# 1125-0002

Notice of Appeal from a Decision of an Immigration Judge

1. List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s):

(b) (6)

A(b) (6)

Detained Since December 20, 2005

IN(b) (6) BOND PROCEEDINGS

Staple Check or Money Order Here. Include Name(s) and "A" Number(s) on the face of the check or money order.

WARNING: Names and "A" Numbers of **everyone** appealing the Immigration Judge's decision must be written in item #1. The names and "A" numbers listed will be the only ones considered to be the subjects of the appeal.

For Official Use Only

2. I am ☑ the Respondent/Applicant ☐ DHS-ICE *(Mark only one box.)*

3. I am ☑ DETAINED ☐ NOT DETAINED *(Mark only one box.)*

4. My last hearing was at (b) (6) *(Location, City, State)*

5. **What decision are you appealing?**

Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26).

☐ I am filing an appeal from the Immigration Judge's decision *in **merits** proceedings* (example: removal, deportation, exclusion, asylum, etc.) dated _____.

☑ I am filing an appeal from the Immigration Judge's decision *in **bond** proceedings* dated FEBRUARY 11, 2013. (For DHS use only: Did DHS invoke the automatic stay provision before the Immigration Court? ☐ Yes. ☐ No.)

☐ I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

(Please attach a copy of the Immigration Judge's decision that you are appealing.)

PLEASE SEE COPY ATTACHED.

Form EOIR-26
Revised Mar. 2012

9591

U. S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court

(b) (6)

In the Matter of:
(b) (6)

Respondent

Case No. (b) (6)
Docket: (b) (6)

In Bond Proceedings

ORDER OF THE IMMIGRATION JUDGE

Request having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. §1236.1(d)(1), and having considered the representations of Immigration and Customs Enforcement and the respondent, it is HEREBY ORDERED that:

[ ] The request for a change in the custody status of the respondent be denied.

[X] The request for a change in the custody status of the respondent be granted and that the respondent be:

(1) [ ] released from custody on respondent's own recognizance; or,

[X] released from custody upon posting a bond of $ 5,000 and

(2) the conditions of the bond:

[ ] remain unchanged; or,

[ ] are changed as follows: _____

_____

[ ] No Jurisdiction pursuant to 236 of the Act _____

_____

[ ] Other _____

(b) (6)

2/11/13
Date

Appeal: RESERVED/WAIVED (A / L / B)

due 3/13/13

9592

6. ***State in detail the reason(s) for this appeal. Please refer to the General Instructions at item F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.***

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

Detained Since December 20, 2005

IN (b) (6) BOND PROCEEDINGS, see (b) (6)

Please see attached copy of timely Motion to Reconsider pending before the Immigration Judge pursuant to 8 C.F.R. § 1003.23(b)(1) and *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A separate written brief will be filed after review to the IJ's Memorandum Decision.

MOTION FOR REVIEW AND RECONSIDERATION BY THREE-MEMBER PANEL

The Respondent respectfully submits that this case warrants review by a three-member panel because it presents compelling facts and circumstances of the most fundamental character of nationwide application that should be addressed, involving a decision that is not in conformity with non-discretionary substantive provisions and express prohibitions of the Constitution and Laws of the United States, and directly conflicts with applicable controlling precedents seriously affecting Respondent's substantial rights and equal protection fundamental liberty guarantees as a Lawful Permanent Resident ("LPR") subject to unjustified and unauthorized prolonged detention.

(Attach additional sheets if necessary)

WARNING: You must clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision. The Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing.

7. Do you desire oral argument before the Board of Immigration Appeals? ☑ Yes ☐ No

8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? ☑ Yes ☐ No

WARNING: If you mark "Yes" in item #7, you should also include in your statement above why you believe your case warrants review by a three-member panel. The Board ordinarily will not grant a request for oral argument unless you also file a brief.

If you mark "Yes" in item #8, you will be expected to file a written brief or statement after you receive a briefing schedule from the Board. The Board may summarily dismiss your appeal if you do not file a brief or statement within the time set in the briefing schedule.

9. SIGN HERE → (b) (6) 3/6/2013
Date

Form EOIR-26
Revised Mar. 2012

9593

10. Mailing Address of Respondent(s)/Applicant(s)

(b) (6)

(Telephone Number)

11. Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)

(Name)

(Street Address)

(Suite or Room Number)

(City, State, Zip Code)

(Telephone Number)

NOTE: You must notify the Board within five (5) working days if you move to a new address or change your telephone number. You must use the Change of Address Form/Board of Immigration Appeals (Form EOIR-33/BIA).

NOTE: If an attorney or representative signs this appeal for you, he or she must file *with this appeal*, a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27).

12. **PROOF OF SERVICE (You Must Complete This)**

I (b) (6) (Name) mailed or delivered a copy of this Notice of Appeal

on MARCH 6, 2013 (Date) to DHS/ICE DISTRICT COUNSEL (Opposing Party)

at (b) (6)

SIGN HERE → (b) (6) 3/6/2013

NOTE: If you are the Respondent or Applicant, the "Opposing Party" is the Assistant Chief Counsel of DHS - ICE.

WARNING: If you do not complete this section properly, your appeal will be rejected or dismissed.

WARNING: If you do not attach the fee or a completed Fee Waiver Request (Form EOIR-26A) to this appeal, your appeal may be rejected or dismissed.

HAVE YOU?

- ☑ Read all of the General Instructions
- ☑ Provided all of the requested information
- ☑ Completed this form in English
- ☑ Provided a certified English translation for all non-English attachments
- ☑ Signed the form
- ☑ Served a copy of this form and all attachments on the opposing party
- ☑ Completed and signed the Proof of Service
- ☑ Attached the required fee or Fee Waiver Request
- ☐ If represented by attorney or representative, attach a completed and signed EOIR-27 N/A

9594

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

OMB# 1125-0003

Fee Waiver Request

(b) (6)
Name:

A (b) (6)
Alien Number ("A" Number):

If more than one alien is included in your appeal or motion, only the lead alien need file this form. This form is to be signed by the alien, not the alien's attorney or representative of record.

I (b) (6), declare under penalty of perjury, pursuant to 28 U.S.C. section 1746, that I am the person above and that I am unable to pay the fee. I believe that my appeal/motion is valid, and I declare that the following information is true and correct to the best of my knowledge:

Assets

Wages, Salary	$ 0 /month
Other Income (business, professional services, self-employed/independent contracting, rental payments, etc.)	0 /month
Cash	0
Checking and/or Savings	0
Property (real estate, automobile(s), stocks, bonds, etc.)	0
Other Financial Support (public assistance, alimony, child support, gift, parent, spouse, other family members, etc.)	0 /month

Expenses (including dependents)

Housing (rent, mortgage, etc.)	$ 0 /month
Food	0 /month
Medical/Health	0 /month
Utilities (phone, electric, gas, water, etc.)	0 /month
Transportation	0 /month
Debts, Liabilities	0 /month
Other (specify) 0	$ 0 /month

(b) (6)

MARCH 6, 2013
Date

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is one (1) hour. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

Privacy Act Notice
The information on this form is requested to determine if you have established eligibility for the fee waiver you are seeking. The legal right to ask for this information is located at 8 C.F.R. § 1003.8(a)(3). EOIR may provide this information to other Government agencies. Failure to provide this information may result in denial of your request.

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Mail Contents Information

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[redacted]		Delivered	March 11, 2013, 10:53 am	FALLS CHURCH, VA 22041	Certified Mail™
		Arrival at Unit	March 11, 2013, 10:28 am	FALLS CHURCH, VA 22041	

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Address To/From	PO BOX 8530 FALLS CHURCH VA 22041

Mail Contents Information

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Amount Received/Disbursed	.00
Receipt Number	
Money Order/Check Number	
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(6) (6)

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[redacted] (6) (6)

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City, State, ZIP+4 FALLS CHURCH, VA 22041

PS Form 3800, August 2006 See Reverse for Instructions

9597

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

DHS/ICE Office of Chief Counsel (b) (6)
(b) (6)

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

Type of Proceeding: ~~Removal~~ BOND **Date of this notice: 3/12/2013**

Type of Appeal or Motion: ~~MTR-BIA-REC~~ NOTICE OF APPEAL, FORM EOIR-26 **Filed By:** Alien

FILING RECEIPT FOR ~~MOTION~~ APPEAL,

The above-referenced case is presently pending before the Board of Immigration Appeals. The following document, which was filed by the alien on 3/11/2013 will be placed with the record of proceedings:

FILING INSTRUCTIONS

Use of an over-night courier service is strongly encouraged to ensure timely filing.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals -- including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the District Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

9598

To mail by regular first class mail:

Board of Immigration Appeals
Clerk's Office
Post Office Box 8530
Falls Church, VA 22041

hawkinsE
Userteam: Motions

9599

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

P.O. Box 8530
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A 4 20

(9) (q)

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9600

PROOF OF SERVICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In The Matter Of: (b) (6)
In Bond Proceedings

File No. A(b) (6)

I, (b) (6) the undersigned pro se Respondent in this action, hereby declare and certify that a true copy of the enclosed documents entitled:

REQUEST FOR PROCESSING AND CONSIDERATION OF TIMELY APPEAL AS OF RIGHT FROM THE IMMIGRATION JUDGE'S DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS; NOTICE OF APPEAL FORM EOIR-26 TIMELY FILED WITH THE BOARD ON MARCH 11, 2013.

in the above entitled case, was served by institutional internal mail and United States mail on 3-20-13 in sealed envelope(s) with fully prepaid first-class postage affixed thereon, and dropped in the designated U.S. Mail institutional mailbox for forwarding to the Court and the Department, addressed as follows:

Board of Immigration Appeals
Clerk's Office
P. O. Box 8530
Falls Church. Virginia 22041

ICE District Counsel
US Dept. of Homeland Security
(b) (6)

The Honorable (b) (6)
U.S. Immigration Judge
Executive Office for Immigeration Review
(b) (6)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability pursuant to 28 U.S.C. § 1746.

Date: March 20, 2013

March 20, 2013

(b) (6)

9601

Track & Confirm

GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
(9) (g)		Delivered	March 25, 2013, 10:58 am	FALLS CHURCH, VA 22041	Certified Mail™
		Arrival at Unit	March 25, 2013, 10:29 am	FALLS CHURCH, VA 22041	

Postal Mail Information

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03/21/2013 08:32

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Total Postage & Fees	$ 5.82

(9) (g)

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GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
[redacted]		Delivered	March 25, 2013, 10:58 am	FALLS CHURCH, VA 22041	Certified Mail™
		Arrival at Unit	March 25, 2013, 10:32 am	FALLS CHURCH, VA 22041	

Initial Information

Received/Sent: OUTGOING-LEGAL/CERTIFIED

Reason Returned: 7011 470 0000 4946 2272

Date Received/Sent: 03/22/2013 09:15

Sent To/Received From: BD IMM APPEALS P O BX 8530

Address To/From: FALLS CHURCH VA 22041

Mail Contents Information

Cash Received/Disbursed:

Amount Received/Disbursed: .00

Receipt Number:

Money Order/Check Number:

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(b) (6)

A 420
3/22/13

Sent To: CLERK, BOARD OF IMMIGRATION APPEALS
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City, State, ZIP+4: FALLS CHURCH, VA 22041

PS Form 3800, August 2006 See Reverse for Instructions

9603

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

OMB# 1125-0002

Notice of Appeal from a Decision of an Immigration Judge

1. List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s):

(b) (6)

A(b) (6)

Detained Since December 20, 2005

IN (b) (6) BOND PROCEEDINGS

Staple Check or Money Order Here. Include Name(s) and "A" Number(s) on the face of the check or money order.

For Official Use Only

WARNING: Names and "A" Numbers of **everyone** appealing the Immigration Judge's decision must be written in item #1. The names and "A" numbers listed will be the only ones considered to be the subjects of the appeal.

2. I am ☑ the Respondent/Applicant ☐ DHS-ICE *(Mark only one box.)*

3. I am ☑ DETAINED ☐ NOT DETAINED *(Mark only one box.)*

4. My last hearing was at (b) (6) *(Location, City, State)*

5. **What decision are you appealing?**

Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26).

☐ I am filing an appeal from the Immigration Judge's decision *in **merits** proceedings* (example: removal, deportation, exclusion, asylum, etc.) dated _____.

☑ I am filing an appeal from the Immigration Judge's decision *in **bond** proceedings* dated FEBRUARY 11, 2013. (For DHS use only: Did DHS invoke the automatic stay provision before the Immigration Court? ☐ Yes. ☐ No.)

☐ I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

(Please attach a copy of the Immigration Judge's decision that you are appealing.)

PLEASE SEE COPY ATTACHED.

Form EOIR-26
Revised Mar. 2012

9604

U. S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court
(b) (6)

In the Matter of:
(b) (6)
Respondent

Case No. (b) (6)
Docket: (b) (6)

In Bond Proceedings

ORDER OF THE IMMIGRATION JUDGE

Request having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. §1236.1(d)(1), and having considered the representations of Immigration and Customs Enforcement and the respondent, it is HEREBY ORDERED that:

[ ] The request for a change in the custody status of the respondent be denied.

[X] The request for a change in the custody status of the respondent be granted and that the respondent be:

(1) [ ] released from custody on respondent's own recognizance; or,

[X] released from custody upon posting a bond of $ 5,000 and

(2) the conditions of the bond:

[ ] remain unchanged; or,

[ ] are changed as follows: _____

_____

[ ] No Jurisdiction pursuant to 236 of the Act _____

_____

[ ] Other _____

(b) (6)

2/11/13
Date

Appeal: RESERVED/WAIVED (A / I / B)

due 3/13/13

9605

6. **State in detail the reason(s) for this appeal. Please refer to the General Instructions at item F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.**

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

Detained Since December 20, 2005

IN(b) (6) BOND PROCEEDINGS, see(b) (6)

Please see attached copy of timely Motion to Reconsider pending before the Immigration Judge pursuant to 8 C.F.R. § 1003.23(b)(1) and *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A separate written brief will be filed after review to the IJ's Memorandum Decision.

MOTION FOR REVIEW AND RECONSIDERATION BY THREE-MEMBER PANEL

The Respondent respectfully submits that this case warrants review by a three-member panel because it presents compelling facts and circumstances of the most fundamental character of nationwide application that should be addressed, involving a decision that is not in conformity with non-discretionary substantive provisions and express prohibitions of the Constitution and Laws of the United States, and directly conflicts with applicable controlling precedents seriously affecting Respondent's substantial rights and equal protection fundamental liberty guarantees as a Lawful Permanent Resident ("LPR") subject to unjustified and unauthorized prolonged detention.

(Attach additional sheets if necessary)

WARNING: You must clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision. The Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing.

7. Do you desire oral argument before the Board of Immigration Appeals? ☑ Yes ☐ No

8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? ☑ Yes ☐ No

WARNING: If you mark "Yes" in item #7, you should also include in your statement above why you believe your case warrants review by a three-member panel. The Board ordinarily will not grant a request for oral argument unless you also file a brief.

If you mark "Yes" in item #8, you will be expected to file a written brief or statement after you receive a briefing schedule from the Board. The Board may summarily dismiss your appeal if you do not file a brief or statement within the time set in the briefing schedule.

9. SIGN HERE → (b) (6) 3/6/2013 Date

Form EOIR-26
Revised Mar. 2012

9606

10. Mailing Address of Respondent(s)/Applicant(s)

(b) (6)

(Telephone Number)

11. Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)

(Name)

(Street Address)

(Suite or Room Number)

(City, State. Zip Code)

(Telephone Number)

NOTE: You must notify the Board within five (5) working days if you move to a new address or change your telephone number. You must use the Change of Address Form/Board of Immigration Appeals (Form EOIR-33/BIA).

NOTE: If an attorney or representative signs this appeal for you, he or she must file *with this appeal*, a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27).

12. **PROOF OF SERVICE (You Must Complete This)**

I (b) (6) (Name) mailed or delivered a copy of this Notice of Appeal

on MARCH 6, 2013 (Date) to DHS/ICE DISTRICT COUNSEL (Opposing Party)

at (b) (6)

SIGN HERE X (b) (6) 3/6/2013

NOTE: If you are the Respondent or Applicant, the "Opposing Party" is the Assistant Chief Counsel of DHS - ICE.

WARNING: If you do not complete this section properly, your appeal will be rejected or dismissed.

WARNING: If you do not attach the fee or a completed Fee Waiver Request (Form EOIR-26A) to this appeal, your appeal may be rejected or dismissed.

HAVE YOU?

- ☑ Read all of the General Instructions
- ☑ Provided all of the requested information
- ☑ Completed this form in English
- ☑ Provided a certified English translation for all non-English attachments
- ☑ Signed the form
- ☑ Served a copy of this form and all attachments on the opposing party
- ☑ Completed and signed the Proof of Service
- ☑ Attached the required fee or Fee Waiver Request
- ☐ If represented by attorney or representative, attach a completed and signed EOIR-27 N/A

(b) (6)

Pro Se Respondent
DETAINED since December 20, 2005

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

In The Matter Of	)	
	)	
(b) (6)	)	File No. (b) (6)
	)	
	)	The Honorable (b) (6)
Respondent.	)	U.S. Immigration Judge
	)	
IN (b) (6) OND PROCEEDINGS	)	Date Submitted: March 1, 2013

MOTION TO RECONSIDER BOND DECISION ENTERED FEBRUARY 11, 2013; 8 C.F.R. § 1003.23(b)(1)

The Respondent, pro se, pursuant to 8 C.F.R. § 1003.23(b)(1) and Matter of Cerna, 20 I&N Dec. 399 (BIA 1991), hereby respectfully moves this Honorable Court to reconsider its plainly unreasonable bond decision in an excessively high amount, entered February 11, 2013, without giving due consideration of all the facts presented and applicable law in these bond proceedings, seriously affecting Respondent's substantial rights, please see (b) (6) (b) (6).

(b) (6)

Respondent respectfully and in good faith contends that this Court overlooked substantive issues of material fact and made legal errors in setting bond at an unreasonably high amount of $65,000 (please see Attachment B), which is so excessive as to effectively preclude the Respondent's release from totally unjustified prolonged detention of over seven years now, since December 20, 2005, that is constitutionally and statutorily unauthorized. Please see (b) (6) ("(b) (6) (b) (6) (b) (6) (b) (6) (b) (6) "). Release from prolonged detention is not entirely discretionary, but guided by legal standards and restricted by the Constitution. Please see *Kucana v. Holder*, 130 S.Ct. 827 (2010).

The Respondent respectfully claims that this Court has failed to articulate any reason at all justifying the unreasonably high amount of bond, which is totally unjustified by the facts and the record of this case. The Respondent is a 63-year old man and long-time legal resident of the United States for over 47 years, who has been gainfully employed all of his life with no history of criminality at all whatsoever, notwithstanding the current disputed allegations of a purported "conviction", which in fact is not what it purports to be, because it was obtained, *inter alia*, in violation of the right to appointed counsel and without actual adjudication of guilt, in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), thereby precluding the state trial court from entering judgment and imposing sentence, rendering the judgment void *ab initio* and a legal nullity for all purposes, including detention and removal purposes. The Department has thus completely failed in its burden to prove by clear and convincing evidence, *or any evidence at all*, that the Respondent would be a danger to the community or a flight risk, therefore entitling the Respondent to be released on his own recognizance, and that any amount of bond would be excessive, and thus impermissibly punitive seriously affecting Respondent's substantial rights, because the bond amount would not serve the purpose of ensuring removal if all pending judicial remedies prove unsuccessful.

In *United States v.* (b) (6), the (b) (6) Circuit Court of Appeals noted that "(b) (6)

(b) (6)

(b) (6).

Furthermore, Respondent believes that the Court has completely failed to take in consideration the fact that the (b) (6) Circuit Court of Appeals has granted Respondent a stay of removal, pending consideration of his Petitions for Review currently pending, case nos. (b) (6) (b) (6) and (b) (6) as well as his timely Motion to Reconsider still pending with the BIA. Please see Attachment C. This means that Petitioner's cases may not get resolved for many more months, possibly taking an additional two to three years for a final decision on Respondent's removability. To the extent that the Respondent's wholly unjustified prolonged detention with no prospects of removal in the reasonably foreseeable future no longer meets the government's objectives of speedy removal, Respondent's continued prolonged detention has become punitive, and therefore, illegal and unconstitutional. Please see INA § 243(a)(2), 8 U.S.C. § 1253(a)(2) (an alien may not be penalized or punished or incarcerated on account of his failure or refusal to depart, or denied his request for a stay of removal, which constitutes a an additional penalty and imposition of an undue burden during the alien's continuing legal challenge to removability as of right).

THE DEPARTMENT HAS AFFIRMATIVELY CONCEDED THE FACT THAT THE PREDICATE ALLEGED CONVICTION WAS UNCONSTITUTIONALLY OBTAINED IN VIOLATION OF *Gideon v. Wainwright*, 372 U.S. 335 (1963)

As herein relevant in these bond proceedings and collateral attack before the Immigration Judge, in which the Respondent has moved for release from wholly unjustified and unauthorized

prolonged detention pursuant to [redacted] see *Gideon v. Wainwright*, 373 U.S. 335 (1963)) (please see Attachment D) the Department ("DHS") has affirmatively conceded the indisputable fact that the instant predicate alleged "conviction" was obtained without appointment or waiver of counsel and without actual adjudication of guilt, in violation of *Gideon v. Wainwright*, supra, thus precluding its use for detention and removal purposes.

Specifically, at the bond hearing just held February 11, 2013, counsel for the Department affirmatively declined to object to the admission of the Respondent's "Sworn Affidavit Re *Gideon* Claim", based on his own direct personal knowledge, attesting to the fact that the trial court completely failed in its duty to appoint counsel for Petitioner as an indigent criminal defendant, as evidence in support of the Respondent's application for release from prolonged and unauthorized detention on bond (admitted Bond Exhibit 33), copy of which is attached hereto as Attachment A. In this affidavit, Respondent declares, affirms, and attests under penalty of perjury based on his own direct personal knowledge, *inter alia*, that the 1995 predicate alleged "conviction" was obtained by the state trial court's complete failure to appoint counsel in the underlying criminal proceeding, despite the Respondent's repeated requests for the assistance of counsel, in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). By failing to submit any response in opposition, and by expressly declining to contest the veracity and substance of Respondent's sworn affidavit, and affirmatively failing to object to its admissibility into the record as an undisputed fact, after *twice* being asked by the Immigration Judge as to whether the Department objected to the admission of the affidavit into evidence, the Respondent contends that the Department ("DHS") has affirmatively conceded the factual truthfulness of Respondent's verified dispositive *Gideon* jurisdictional claim and factual challenge to the very existence of the predicate alleged "conviction" as a matter of law and fact, which is improperly and impermissibly serving as factual and legal bases for the detention and removal of the Respondent, and therefore constituting an undisputed issue of material fact that this Court is also bound to accept as true. Please see [redacted]

Respondent is informed and believes that the Department has already conducted a thorough investigation of Respondent's *Gideon* claim, including a full review of the state court records retrieved from the State Records Center ("SRC") two years ago, from March 22, 2011 to April 22, 2011, as recorded in the (b) (6) record, and has confirmed that Respondent's verified *Gideon* claim is truthful and legitimate. Therefore, the Respondent here respectfully contends that the DHS' affirmative failure to contest the truth of the facts stated in the Respondent's sworn affidavit submitted to this Court January 29, 2013, by expressly declining to object to its admission as relevant, competent, material, and dispositive evidence in the instant bond proceedings and collateral attack before the Immigration Judge, on *Gideon* grounds, constitutes an affirmative concession and express recognition of the truthfulness of the facts stated in the Respondent's verified *Gideon* jurisdictional claim and factual challenge, that the predicate 1995 alleged "conviction" is not, in fact and in law, what it purports to be, because it was illegally and unconstitutionally obtained through the state trial court complete failure to appoint counsel for the Respondent, hence resulting in the complete denial of the right to appointed counsel, without waiver, in the underlying state criminal proceeding without judicial power to adjudicate, thus rendering the judgment *coram non judice per se* void *ab initio* and a legal nullity for all purposes, and precluding its use as factual or legal bases for the detention and removal of the Respondent as a long-time non-convicted, non-criminal, and non-removable Lawful Permanent Resident. As such, Respondent contends that this Court is likewise obligated to accept the Respondent's uncontested and unopposed verified *Gideon* claim as dispositive of this entire case, and grant his request for release on his own recognizance and order his prompt release from custody.

RESPONDENT IS ENTITLED TO RELEASE ON HIS OWN RECOGNIZANCE

Respondent thus seeks this Court's reconsideration and reversal of its clearly erroneous decision in denying his request for release on his own recognizance and collateral attack based on the 2006 order of removal, the entry and execution of which Respondent respectfully contends is prohibited as a *self-executing* mandatory matter of law and judicially enforceable right, even in the absence of implementing legislation, and otherwise in failing to recognize, to give effect to, and to *enforce* Respondent's uncontested and unopposed verified *Gideon* claim

of the total denial of appointed counsel in the 1994-95 underlying state criminal proceeding, in violation of the Sixth and Fourteenth Amendments and the *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the "*Gideon Decree*") *self-executing* Mandatory Injunction and absolute prohibition against the entry and *use* of judgments of disputed alleged "convictions" obtained without appointment or waiver of counsel in violation of the *Gideon Decree*, as factual predicates or legal basis for immigration detention and removal purposes against the Respondent here, constituting a gross miscarriage of justice and in direct conflict with the (b) (6) Circuit Court of Appeals' clearly established precedent and herein controlling authority of (b) (6) (b) (6) and thus subject to collateral attack. See also (b) (6) (b) (6) (b) (6)

In (b) (6) the (b) (6) Circuit recognized the Supreme Court precedent decision of *Custis v. United States*, 511 U.S. 485, 494-96 (1994), which established the *Gideon* jurisdictional claim *exception* to the general prohibition on collateral attacks to the fact or validity of the disputed alleged prior convictions *used* in sentencing enhancement proceedings, and likewise adopted the *Custis' Gideon* claim *exception* to apply in immigration detention and removal proceedings by allowing collateral attacks based on an alien's claim of the state trial court's complete failure to appoint counsel in the underlying criminal proceeding, such as in the Respondent's case here, resulting in the entry of not a "formal judgment of guilt" but a purported judgment of an alleged "conviction" that does not in fact exist because it was obtained without appointment of counsel and actual adjudication of guilt of the Respondent, in violation of the Sixth and Fourteenth Amendments and *Gideon v. Wainwright*, 372 U.S. 335 (1963), and which is therefore deemed presumed void *ab initio* and a legal nullity for all purposes by *self-executing* automatic operation of law.

The Court's denial of the Respondent's request for release on his own recognizance or nominal bond amount, and collateral attack to the 2006 order of removal, also directly conflicts with the BIA's own precedent *en banc* decision of *In re Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (*en banc*) (Holding that when the proceeding in which the judgment was entered did not

afford the alien many of the constitutional safeguards generally required for criminal prosecutions, such judgment does not qualify as a "conviction" for a "crime" that could give rise to immigration consequences within the meaning of INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (INA definition of "conviction") and that *when the proceedings do not provide for the appointment of counsel*, trial by jury, or proof beyond a reasonable doubt, it is not a conviction entered in a "genuine criminal proceeding") (emphasis added).

Respondent respectfully contends that, in accord with *Gideon*, *Custis*, *Contreras*, as well as under INA § 101(a)(48)(A) and *In re Eslamizar*, he has a personal judicially enforceable constitutional right to be free from wholly unjustified constitutionally and stautorily unauthorized prolonged and indefinite detention directly under the substantive provisions of the First, Fifth, Sixth and Fourteenth Amendments and the *Gideon Decree*'s *self-executing* Mandatory Permanent Injunction and absolute prohibition against the entry and *use* in immigration detention and removal proceedings of disputed predicate alleged "convictions" improperly obtained without appointment or waiver of his right to the assistance of appointed counsel at all *critical stages* of the underlying 1994-95 criminal proceeding, such as in this instant case, where the Respondent was not even given the opportunity to consult with counsel, let alone being assisted by counsel, and without being allowed to testify personally under oath in his own defense at trial, among many other serious irregularities, and was thus obtained without actual adjudication of guilt in a court of competent jurisdiction.

The complete failure of the state trial court to appoint counsel for the Respondent as an indigent criminal defendant, is a fundamental jurisdictional defect that *ipso facto* automatically affirmatively divested the state trial court of all adjudicatory authority to find guilt, enter judgment, and impose sentence, i.e., *coram non judice* (before a person not a judge), thus precluding the entry and *use* of the 1995 presumptively void judgment of the purported "conviction" so obtained as factual or legal predicates for immigration detention and removal purposes against Respondent. A *Gideon* jurisdictional defect operates from the very outset to nullify the trial proceeding *ab initio* by *self-nullification*, and to negate the very "existence" of a "conviction" *ab initio*, and therefore does not implicate the alleged "finality" of the alleged "conviction" that never existed in the first place. Here, because the 1994-95 *coram*

non judice proceeding could not have produced a judgment of "conviction" to begin with, Respondent has never, in fact and in law, been actually adjudged "guilty" of any criminal offense under any definition or standard, which is an immutable fact that cannot be cured, and can never ripen or mutate into a "conviction" with the passage of time. In sum, Respondent has not "committed" any criminal offense and does not, in fact and in law, stand "convicted" of any crime in a court of law of competent jurisdiction, and is therefore not amenable to immigration detention or removable as a matter of law.

Respondent's verified *Gideon* jurisdictional claim is an *antecedent threshold jurisdictional-fact question*, and a genuine issue of material fact which the Department has failed to dispute, going to the very power of the Immigration Court and the BIA to adjudicate the charge of removability seriously affecting Respondent's substantial rights, which is a *sine qua non* that must be established first in this case as a mandatory matter of law and *self-executing* enforceable right that will vindicate Respondent's *Gideon* claim and naturally change the outcome of the proceedings, which the Board has failed to do. Please see *Custis v. United States*, 511 U.S. 485, 496 (1994) (Holding that a *Gideon* defect is *jurisdictional* and going to the very power of the court to adjudicate, and that the Constitution *requires* that collateral attacks be allowed against disputed predicate "convictions" obtained in violation of the right to appointed counsel in the underlying criminal proceeding), even in the absence of implementing legislation. *Custis* explicitly held that "[T]he failure to appoint counsel for an indigent defendant [is] a unique constitutional defect" that justifies the exception allowing for collateral challenges alleging a violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), i.e., the *Gideon* claim *exception*, citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

In the (b) (6) Circuit's herein controlling precedent decision of (b) (6) (b) (6) copy attached hereto as Attachment D) the Court expressly discussed the *Custis* holding and recognized the *self-executing* jurisdictional nature and fundamental scope and reach of the *Gideon Decree*'s absolute prohibition against the entry and *use*, in sentencing enhancement proceedings, of disputed alleged prior "convictions" obtained without the appointment or waiver of counsel in the prior criminal proceedings, and hence justifying the *Gideon* claim *exception* to the general prohibition on

collateral attacks. The (b) (6) Court thus expressly held that the *Custis'* *Gideon* claim *exception* also applies to allow collateral attacks, on *Gideon* grounds, in immigration detention and removal proceedings. Following *Custis v. United States*, 511 U.S. 485, 496 (1994), th(b) (6) Court explained: "(b) (6)
(b) (6)
(b) (6)
(b) (6) (emphasis added).

Respondent thus respectfully contends that this Court has no discretion to overlook the Constitution's "requirement" that collateral attacks be allowed and to overlook the *Gideon Decree*'s Mandatory Permanent Injunction and absolute prohibition against the entry and *use*, for detention and removal purposes, of disputed predicate alleged "convictions" obtained without appointment or waiver of counsel and actual adjudication of guilt, in violation of the *Gideon Decree*, and to disregard Respondent's own sworn affidavit and collateral attack in this *Gideon* enforcement action as a *self-executing* matter of law and protected right based on his verified *Gideon* jurisdictional claim and manifest gross miscarriage of justice, attested by his own sworn affidavit made under penalty of perjury based on his own direct personal knowledge, of the uncontrovertable fact that the state trial court completely failed in its clear duty, under *Gideon*, to appoint counsel for the Respondent at all critical stages of the proceedings, despite Respondent's repeated requests for the assistance of counsel, and wholly unjustified refusal to allow Respondent to testify personally under oath in his own defense at trial despite Respondent's requests to testify, and therefore that the underlying predicate 1995 judgment of alleged "conviction" in dispute here is not, in fact and in law, a criminal "conviction" at all under any definition or standard, because it was obtained in violation of the Respondent's fundamental right to appointed counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and thus obtained without actual adjudication of guilt in a court of competent jurisdiction, hence not a "formal judgment of guilt". Therefore a legal nullity for all purposes, precluding its use for immigration detention and removal purposes by *self-executing* automatic operation of law.

Moreover, in accord with the (b) (6) Circuit well settled controlling precedent, Respondent respectfully contends that "*the BIA and th[e* (b) (6) *Circuit] are under an*

[independent] affirmative obligation to "accept as true the facts stated in Petitioner's [sworn] affidavit [made under penalty of perjury based on personal knowledge] in ruling upon his motion to reopen, unless [we find] those facts to be inherently unbelievable", see (b) (6) , in which case the BIA is also under an *independent* affirmative clear legal duty and binding obligation owed to Respondent, under *Gideon*, to conduct a special jurisdictional fact inquiry and to make explicit findings whether the facts stated in Respondent's sworn affidavit are true or not, so as to subject Respondent liable to criminal charges and prosecution for perjury if his *Gideon* claim is proven false, which it is not. Here, the Court has made no such findings that the factual statements included in Respondent's sworn affidavit were untrue or unbelievable. This is even more pertinent and evident now that the Department has expressly declined to dispute the factual statements made in the Respondent's own sworn affidavit, thus affirmatively conceding the indisputable and uncontrovertable fact that the predicate judgment of alleged "conviction" was obtained in violation of the *Gideon Decree* mandatory injunction and prohibition against removal, *ipso facto* requiring reversal as a *self-executing* matter of law, not a matter of discretion. Please see (b) (6) and (b) (6) .

Respondent therefore respectfully contends that this Court is *independently* obligated as a mandatory matter of law and affirmative duty under the INA, the Sixth Amendment, and the *Gideon Decree*, to give effect to, and to *enforce* the *Gideon Decree's self-executing* Mandatory Injunction and peremptory prohibition against the entry and *use* of convictions obtained without appointment of counsel and actual adjudication of guilt, and to ascertain whether or not the proffered "conviction" so obtained is, in fact, a criminal "conviction" within the meaning of the INA and the Sixth Amendment, which this Court has failed to do, i.e., *per se* error. Please see *In re Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (*en banc*) and 8 U.S.C. § 1101(a)(48)(A) (INA definition of "conviction" depends on whether the proceeding affords basic constitutional safeguards). Respondent thus argues that the Department and this Court are therefore *peremptorily prohibited as a self-executing mandatory matter of law* in this instant case, under *Gideon* and the INA, from admitting, relying on, and *using* the predicate judgment of the alleged "conviction" in dispute here against the Respondent as factual or legal

bases for detention and removal purposes as a *self-executing* mandatory matter of law, not discretion, regardless of whether the disputed predicate alleged "conviction" has yet been vacated or not, because, under the *self-executing* *Gideon Decree*, any conviction obtained in violation of *Gideon* is *self-nullifying* by automatic operation of law without the need for judicial intervention, and is thus *presumed factually inexistent* and a legal nullity for all purposes, whenever and wherever it may appear, thus entitling Petitioner to a *mandatory* stay of removal and released from prolonged detention pursuant to the *Gideon* injunction, during the resolution of Respondent's *Gideon* claim.

In an analogous context, the (b) (6) Circuit has previously held in (b) (6) (b) (6) that "(b) (6) (b) (6)". And in (b) (6) the Court extended (b) (6) by holding that a deportation based on an invalid conviction could not be deemed "legally executed". Similarly, in this instant case, because Respondent's order of removal is based on a *presumptively* void, and *factually inexistent*, predicate alleged "conviction" obtained in violation of the *Gideon Decree*, it cannot be "legally executed" without also violating the INA and the Constitution, because the underlying *Gideon* jurisdictional defect and presumption of invalidity "(b) (6) Therefore, the Department is legally precluded from executing the instant order of removal here by *self-executing* automatic operation of law because the order of removal cannot be "legally executed" pursuant to the herein applicable *Gideon Decree*'s mandatory injunction and peremptory prohibition against the entry and execution of orders of removal obtained in violation of *Gideon v. Wainwright*, supra. Please see 8 U.S.C. § 1252(f)(2) (the statutory *exception* to the jurisdictional limitations on injunctive relief applies in individual cases when *"the alien shows by clear and convincing evidence that the entry and execution of [the order of removal] is prohibited as a matter of law"*). Under the uncontrovertable facts and circumstances of this case, Respondent has clearly shown, indisputably, that he meets the criteria for *mandatory prospective injunctive relief* under 8 U.S.C. § 1252(f)(2)'s exception by having demonstrated that the entry and execution of such order of removal is absolutely prohibited by the INA and the Constitution as a *self-executing* mandatory matter of law and

judicially enforceable substantial right as a Lawful Permanent Resident under the INA § 101(a)(48)(A) and the *Gideon Decree* and the substantive provisions of the Fifth, Sixth and Fourteenth Amendments, thus entitling Respondent to a mandatory stay of removal and release from prolonged detention pending full litigation and resolution of his *Gideon* claim and factual challenge against removability.

Respondent further respectfully asserts that under the *Gideon Decree* he has a fundamental constitutional right and equal protection liberty guarantee to reopen to collateral attack the propriety of the removal order and the underlying factual and legal basis for detention and removal, in immigration custody and bond proceedings, to enforce his Sixth and Fourteenth Amendments *Gideon* jurisdictional claim and factual challenge against detention and removal, based on his verified claim of the total denial of appointed counsel without waiver at all *critical stages* of the underlying 1994-95 criminal process, despite Respondent's repeated requests for the assistance of counsel, and without even being allowed to testify personally under oath in his own defense at trial, wholly without justification (among many other serious irregularities), and therefore without actual adjudication of guilt in a court of competent jurisdiction, i.e., *coram non judice* (before a person not a judge). Respondent's *Gideon* claim does not involve an "alien" right conferred by the INA subject to "rational basis" review, but a *self-executing* fundamental right subject to "strict scrutiny" analysis guaranteed by the Sixth and Fourteenth Amendments, which is not a matter of discretion or subject to statutory restrictions, procedural barriers, or time limitations. In other words, Respondent contends he has a substantive right to reopen to enforce and vindicate his *self-executing* *Gideon* right. Please see (b) (6)
(b) (6)
(b) (6)
(b) (6)

Respondent respectfully disputes the BIA's clearly erroneous assertion that the Petition to Reopen is "untimely", citing statutory and regulatory provisions to that effect. The Board overlooks the fact that Respondent timely presented his Sixth Amendment *Gideon* claim and factual challenge in his timely appeal from the order of removal entered February 10, 2006.

and timely filed appeal brief received by the Board June 2, 2006, but which the Board inexplicably failed to address, or choose to ignore, in its decision entered June 21, 2006, in violation of its affirmative enforcement duty and special obligation under the *self-executing Gideon Decree* to conduct a formal inquiry and make explicit findings. Please see *Kucana v. Holder*, 130 S.Ct. 827, 837 (2010) ("The motion to reopen is a procedural device serving to ensure 'that aliens [a]re getting a fair chance to have their claims heard'"). Here, Respondent was never given any chance to have his *Gideon* jurisdictional claim and factual challenge considered, which is an antecedent threshold matter going to the very power of the Board to adjudicate the merits that must be resolved first, i.e., *sine qua non* ("That without which the thing cannot be"). The Board thus commits per se reversible error when it fails to consider dispositive claims, such as Respondent's *Gideon* claim and factual challenge at issue here. Therefore, Respondent's Motion to Reopen is clearly not "untimely" or "out-of-time" at all. Rather, it falls squarely under the (b) (6) *Gideon* claim *exception* to the general prohibition on collateral attacks that arise whenever and wherever the alleged "conviction" obtained in violation of *Gideon* may appear, not subject to temporal limitations,

The Board's failure to address Respondent's Sixth Amendment *Gideon* claim also falls squarely under that other "rare exception" that arises where "[a] court, without justification, refuse[s] to rule on a constitutional claim that has been properly presented to it". This is precisely what occurred in this instant case where Respondent properly and explicitly presented his *Gideon* jurisdictional claim and factual challenge to the Board in his timely filed appeal brief in 2006, as well as under INA § 101(a)(48)(A) and *In re Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (*en banc*) but which the Board "without justification refuse[d] to rule on [it]". Please see *Lackawana County Dist. Atty. v. Coss*, 532 U.S. 394, 405 (2001) (*"[A] defendant can[not] be faulted for failing to obtain timely review of a constitutional claim [when a court], without justification, refuse[s] to rule on a constitutional claim that has been properly presented to it"*). Therefore, the BIA's claim of "untimeliness" is totally unfounded and clearly erroneous. Assuming arguendo that the "timeliness" requirement would have any application here, which it does not, the very fact that the Board completely failed to address Respondent's *Gideon* claim under the Sixth Amendment and INA § 101(a)(48)(A) as a

jurisdictional threshold matter, itself justifies equitable tolling, and Respondent would accordingly be entitled to equitable tolling.

Furthermore, Respondent respectfully argues that both the statutory "timeliness" requirement as well as the BIA's condition that the *coram non judice* void judgment of alleged "conviction" be vacated before nullification of the order of removal and termination of proceedings cannot, under *Gideon*, be applied in this case in any event, because they operate as *unconstitutional conditions* upon Respondent's constitutional right to collateral challenge the use of the alleged "conviction" obtained in violation of the Sixth Amendment fundamental right to appointed counsel as a *self-executing* matter of law, substantive due process and equal protection liberty guarantee, and absolute entitlement to reopen to *enforce* his *Gideon* claim as applied in this case as a *self-executing* matter of law and judicially enforceable personal right and are not permissible or valid reasons to deny reopening. The constitutionally derived *Gideon* claim *exception* is *self-executing* in that by its own unaided force and legal effect trumps the statutory and regulatory "timeliness" requirement and all other bars. A *Gideon* jurisdictional defect is fatal from the very outset and runs with the case from its inception (*ab initio*) and does not abate with time, and therefore cannot be made subject to conditions of "timeliness" or dependent on the actions or inactions of other courts, which Respondent respectfully contends operate as unconstitutional conditions impermissibly imposed here by the BIA.

The "unconstitutional conditions" doctrine, cf. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), limit the government's ability to erect barriers to exact waivers of rights as a condition of benefits, even when those rights are fully discretionary. Here, the constitutional enforceable right and liberty guarantee denied is fundamental, mandatory, jurisdictional, and *self-executing*, going to the very power of the Board to adjudicate, and involving a protected class, thus subject to *strict scrutiny* equal protection analysis, *ipso facto* precluding execution of the presumptively void order of removal as a non-discretionary *self-executing* matter of law under the Sixth Amendment and the *Gideon Decree*, before all avenues of legal redress and affirmative relief are exhausted . In other words, Respondent respectfully and in good faith contends he is absolutely entitled to a stay of removal, unconditional reopening, and termination

of proceedings as a *self-executing* matter of law on *Gideon* grounds, not discretion, as expressly provided for under the Act. Please see INA § 243(a)(2), 8 U.S.C. § 1253(a)(2) (an alien may not be penalized or punished or incarcerated on account of his failure or refusal to depart, or denied his request for a stay of removal, which constitutes an additional penalty and imposition of an undue burden seriously affecting his substantial rights during the alien's continuing legal challenge to removability as of right).

Respondent also respectfully argues that his constitutional right to reopen to *enforce* his *prima facie* Sixth Amendment *Gideon* jurisdictional claim and factual challenge in detention and removal proceedings is *self-executing*, meaning that it is mandatory and effective by its own unaided force and legal effect, even in the absence of implementing legislation, whenever and wherever it arises. As such, the BIA's clearly erroneous decision in question here, in failing in its independent affirmative clear legal duty and binding obligation owed to Respondent, in accord with INA § 101(a)(48)(A)'s definition of "conviction" as well as directly under the Sixth Amendment and the *Gideon Decree*, and (b) (6) (b) (6) to conduct a formal inquiry and make specific findings to give effect to, and enforce the *Gideon* injunction in Respondent's case, does not affect the *continuing* legal force and *self-executing* effect of the absolute prohibition against the Department's *use* of the disputed predicate judgment of the presumptive void "conviction" obtained in violation of the right to appointed counsel for detention and removal purposes against Respondent, entitling Respondent to judicial enforcement and mandatory enjoinment of the *continuing violation* as a matter of law, not discretion. Therefore, in light of Respondent's still unresolved verified *Gideon* jurisdictional claim and factual challenge, the administrative removal proceedings against Respondent have not yet been "proper[ly] and lawful[ly] dispos[ed]" of in full accordance with the INA and the Constitution, and hence are not "final", thus precluding the premature execution of the disputed order of removal and entitling Respondent to a judicial stay of removal as a matter of law and judicially enforceable personal right under the Sixth Amendment Right to Counsel and *Gideon v. Wainwright*, supra. Please see *Dada v. Mukasey*, 554 U.S. 1, 18 (2008) ("The motion to reopen is an important safeguard intended *to ensure a proper and lawful disposition*" of immigration proceedings) (emphasis added).

THE REPATRIATION AGREEMENT, INTERNATIONAL LAW, AND THE EXHAUSTION REQUIREMENT

The repatriation of Portuguese nationals from the United States to Portugal is governed by the *Protocol Between Portugal and the United States for Removal Procedures of Portuguese Nationals from the United States*, signed May 30, 2000, Lisbon, Portugal. The Repatriation Agreement ("Protocol") between Portugal and the United States is itself a *self-executing* international bilateral agreement that creates legal duties and imposes binding obligations under International Law, explicitly intended to protect the personal rights of individuals and to be given full force and effect, enforceable in the federal courts. The Repatriation Agreement ("Protocol") itself is a treaty that by its own terms affirms that the rules of customary international law and of the European Commission govern all matters not expressly regulated by its provisions in a manner *"that respects the rights of those individuals"*, such as Respondent here. Please see the Protocol's Preamble and Statement of Principles. One of those clearly established and well defined universally recognized rules of customary international law is the rule of *exhaustion*, which is "*a core principle of international law*". Please see (b) (6) (b) (6) (b) (6) (b) (6) .

Respondent thus contends that his involuntary premature removal as a non-criminal and non-removable long-time Lawful Permanent Resident without allowing exhaustion of all of his properly invoked judicial remedies still pending in the State and Federal courts in this case constitutes a clear violation of the Constitution and Laws and Treaties of the United States as well as core principles of International Law and violates Respondent's substantial rights and fundamental equal protection liberty guarantees as a long-time Lawful Permanent Resident, causing substantial injury and irreparable harm, and constitutes a gross miscarriage of justice, thus requiring a mandatory stay of removal as a matter of law and the Respondent's release from constitutionally and statutorily unauthorized prolonged detention on his own recognizance or nominal bond amount so that his family can afford to pay.

THEREFORE, the Respondent respectfully moves this Honorable Court to reconsider its bond decision, and order the Respondent released from custody from unjustified and unauthorized prolonged detention on his own recognizance or nominal bond amount

I declare under penalty of perjury that the foregoing is true and correct based on my own direct personal knowledge pursuant to 28 U.S. C. § 1746 and 18 U.S.C. § 1621.

Date: Mar. 1, 2013

March 1, 2013

(b) (6)

PROOF OF SERVICE and

Exhibits A, B, C, D attached

ATTACHMENT

A

(b) (6)

(b) (6)

Pro Se Respondent
DETAINED since December 20, 2005

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

In The Matter Of (b) (6) Respondent, IN *Diouf* BOND PROCEEDINGS	)	File No. (b) (6) The Honorable (b) (6) U.S. Immigration Judge Date of Hearing: January 29, 2013 Date Submitted : January 29, 2013

SWORN AFFIDAVIT RE *Gideon* CLAIM IN SUPPORT OF MOTION FOR RELEASE FROM PROLONGED DETENTION PURSUANT TO (b) (6)

I, (b) (6) being duly sworn, hereby depose, declare and say that I am the Petitioner in the above-entitled case and that I am competent to testify in this matter, that in support of my motion for stay or removal pending consideration of petition for review, I do hereby solemny swear, aver, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 and 18 U.S.C. § 1621, that the following is true and correct based on my own direct personal knowledge of all facts stated, and I do here and now depose and testify, as follows:

1. That on or about August 29, 1994, a criminal complaint was filed against me in the Superior Court of the State of (b) (6) In and For the County o(b) (6) in a criminal action entitled *The People v.* (b) (6), charging me with various alleged violations of (b) (6) Unemployment Insurance Code (b) (6) as well as under (b) (6) (b) (6)

2. That at all relevant times from the very outset of this action I categorically denied all allegations of wrongdoing and vigorously contested all criminal charges;

3. That at all relevant times and critical stages of the criminal proceeding I was completely deprived of my fundamental right to the assistance of appointed counsel due to the trial court's complete failure to appoint counsel for me without obtaining my waiver of my fundamental constitutional right to appointed counsel as an indigent criminal defendant, despite my repeated requests for the assistance of counsel nor did I ever sign any "waiver form" or "pro per waiver" purporting to waive my right to counsel, implicitly or explicitly, in violation of the Sixth Amendment Right to Counsel and *Gideon v. Wainwright*, 372 U.S. 335 (1963);

4. That at all relevant times I was completely deprived of my right to the assistance of counsel because the trial court completely failed to appoint counsel to assist me, and I never waived my right to the assitance of counsel, orally or in writing, implicitly or explicitly, nor did I sign any "waiver form" or "pro per waiver" purporting to waive my right to counsel or to proceed in propria persona, the so-called "*Faretta* waiver";

5. That from about October 29, 1994, through about June 8, 1995, a period of over seven months, I was subjected to an ostensible "jury trial" without the assistance of appointed counsel and without waiving my fundamental right to counsel, during which time I conducted myself in an exemplary manner with utmost respect, dignity, and decorum, and without any misconduct;

6. That at the end of the prosecutor's case-in-chief , surprisingly and without any advance notice, I was denied my right to testify personally under oath in my own defense at trial, wholly without justification and despite my repeated requests to testify personally under oath in my own defense;

7. That on or about June 8, 1995, a judgment of "guilt" was entered by the court without actual adjudication of guilt on account of the trial court's complete failure to appoint counsel without obtaining my waiver of my Sixth Amendment fundamental right to the assistance of counsel, in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and without allowing me to testify personally under oath in my own defense at trial, hence not a formal judgment of guilt entered by a court of competent jurisdiction in a "genuine criminal proceeding".

Executed at (b) (6), on Jan-29, 2013.

January 29, 2013

(b) (6)

Respondent

PROOF OF SERVICE

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

In The Matter Of: (b) (6) File No. A(b) (6)
IN (b) (6) BOND PROCEEDINGS

I, (b) (6) the undersigned pro se Respondent in this action, hereby declare and certify that a true copy of the enclosed documents entitled:

RESPONDENT'S AFFIDAVIT RE *Gideon* CLAIM
IN (b) (6) BOND PROCEEDINGS
JANUARY 29, 2013

in the above entitled case, was served by institutional internal mail and/or United States mail on 1-29-13 in sealed envelope(s), or securely folded and stapled together, and dropped in the designated U.S. Mail institutional mailbox for internal forwarding, addressed as follows:

[X] The Honorable (b) (6)
U.S. Immigration Judge
Executive Office of Immigration Review
(b) (6)

[X] ICE District Counsel
U.S. Dept.of Homeland Security
(b) (6)

[X] Served in Open Court

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability pursuant to 28 U.S.C. § 1746.

Date: Jan. 29, 2013

January 29, 2013

(b) (6)

(b) (6)

ATTACHMENT

B

(b) (6)

U. S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court

(b) (6)

In the Matter of:
(b) (6)

Respondent

Case No.: (b) (6)
Docket: (b) (6)

In Bond Proceedings

ORDER OF THE IMMIGRATION JUDGE

Request having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. §1236.1(d)(1), and having considered the representations of Immigration and Customs Enforcement and the respondent, it is HEREBY ORDERED that:

[ ] The request for a change in the custody status of the respondent be denied.

[X] The request for a change in the custody status of the respondent be granted and that the respondent be:

(1) [ ] released from custody on respondent's own recognizance; or,

[X] released from custody upon posting a bond of $ 5,000 and

(2) the conditions of the bond:

[ ] remain unchanged; or,

[ ] are changed as follows: _____

_____

[ ] No Jurisdiction pursuant to 236 of the Act _____

_____

[ ] Other _____

(b) (6)

Date 2/11/13

Appeal: RESERVED/WAIVED (A / I / B)

me 3/13/13

9631

ATTACHMENT

C

(b) (6)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

(b) (6)

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

Name: (b) (6)

A (b) (6)

Type of Proceeding: Removal

Date of this notice: 1/30/2013

Type of Motion: MTR BIA-REC

Filed By: Alien

FILING RECEIPT FOR MOTION

The Board of Immigration Appeals acknowledges receipt of your motion and fee or fee waiver request (where applicable) on 1/29/2013 in the above-referenced case.

PLEASE NOTE:

Filing a motion with the Board of Immigration Appeals DOES NOT automatically stop the Department of Homeland Security from executing an order of removal or deportation. If you are in DHS detention and are about to be deported, you may request the Board to stay your deportation on an emergency basis. For more information, call BIATIPS at (703) 605-1007.

In all future correspondence or filings with the Board, please list the name and alien registration number ("A" number) of the case (as indicated above), as well as all of the names and "A" numbers for each family member who is included in this motion.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals – including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the District Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

TruongC

Userteam: Motions

PROOF OF SERVICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In The Matter Of: (b) (6) File No. (b) (6)

In Bond Proceedings

I, (b) (6), the undersigned pro se Respondent in this action, hereby declare and certify that a true copy of the enclosed documents entitled:

MOTION AND REQUEST FOR ISSUANCE OF BRIEFING SCHEDULE ON TIMELY SUBMITTED BOND APPEAL FROM THE IMMIGRATION JUDGE'S BOND DECISION DATED FEBRUARY 11, 2013 IN BOND PROCEEDINGS, TIMELY RECEIVED AND FILED BY THE BOARD ON MARCH 11, 2013

in the above entitled case, was served by institutional internal mail and United States mail on 3-27-2013 in sealed envelope(s) with fully prepaid first-class postage affixed thereon, and dropped in the designated U.S. Mail institutional mailbox for forwarding to the Court and the Department, addressed as follows:

Board of Immigration Appeals
Clerk's Office
P O. Box 8530
Falls Church, Virginia 22041

ICE District Counsel
US Dept. of Homeland Security
(b) (6)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability pursuant to 28 U.S.C. § 1746.

Date: March 27, 2013

March 27, 2013

(b) (6)

(b) (6)

U.S. Department of Justice
Civil Division

DMM:LSM:gw
39-8-7775 .03

Washington, D.C. 20530

February 20, 2013

Rec'd 2/25/13

VIA FIRST CLASS MAIL

(b) (6)

RE: (b) (6) Pro Se v. Eric H. Holder, Jr.,
(b) (6)

Dear (b) (6)

Enclosed please find a paper copy of the Certified Administrative Record of Proceedings being filed in the above-referenced case. The Executive Office for Immigration Review (EOIR) will be filing a copy of this record with the (b) (6) Circuit Court of Appeals.

Sincerely,

DAVID M. MCCONNELL
Director
Office of Immigration Litigation

By:

GWENDOLYN WARREN
Paralegal Specialist
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

(b) (6)
Attorney for Respondent

9635

Enclosure

(b) (6)

Office of the Clerk

(b) (6)

January 18, 2013

No.:
Agency No.:
Short Title: (b) (6)

Dear Petitioner/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the (b) (6) Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition may be set by a future "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. (b) (6)

Petitioners who are filing pro se should refer to the accompanying information sheet regarding the filing of informal briefs.

(b) (6)

(b) (6)

9636

U.S. Department of Justice

Civil Division

DMM:LSM:gw

39-8-7729 .03

Washington, D.C. 20530

January 2, 2013

Rec'd MAN
JAN. 7, 2013

VIA FIRST CLASS MAIL

(b) (6)

RE: (b) (6) v. Eric H. Holder, Jr.,
(b) (6)

Dear (b) (6)

Enclosed please find a paper copy of the Certified Administrative Record of Proceedings being filed in the above-referenced case. The Executive Office for Immigration Review (EOIR) will be filing a copy of this record with the (b) (6) Circuit Court of Appeals.

Sincerely,

DAVID M. MCCONNELL
Director
Office of Immigration Litigation

By: Gwen Warren

GWENDOLYN WARREN
Paralegal Specialist
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

(b) (6)
Attorney for Respondent

Enclosure

9637

(b) (6)

Office of the Clerk

(b) (6)

November 26, 2012

No.:
Agency No.:
Short Title: (b) (6)

Dear Petitioner/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the (b) (6) Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition may be set by a future "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. (b) (6)

Petitioners who are filing pro se should refer to the accompanying information sheet regarding the filing of informal briefs.

(b) (6)

(b) (6)

9638

(b) (6) Case Information (b) (6)

(b) (6) District

Change court

Court data last updated: 11/15/2012 08:05 AM

Docket (Register of Actions)

The People v (b) (6)

Case Numbe (b) (6)

Date	Description	Notes
05/18/2012	Notice of appeal lodged/received (criminal).	
05/18/2012	Counsel appointment order filed.	
05/22/2012	Record on appeal filed.	C-1
05/31/2012	Recommendation of counsel by SDAP filed.	atty (b) (6)
06/14/2012	Motion filed.	by appellant to proceed in propria persona (tct)
06/29/2012	Motion filed.	Motion for production of the record on appeal by appellant (b) (6) (b) (6)
07/11/2012	Filed document entitled:	complaint re: (b) (6) Appellate program unable to contact attorney
07/11/2012	Received copy of	letter to State B (b) (6) re: compliant agains (b) (6) Appellate Program
07/13/2012	Order filed.	The motion of appellant (b) (6) (b) (6) for production of the record on appeal, considered a motion to vacate the appointment of the (b) (6) Appellate Program, is denied. The motion of appellant (b) (6) to proceed in propria persona on appeal is denied. The renewed motion to vacate order appointing counsel on appeal and to proceed pro per is denied. Time to file appellant's opening brief in this matter is extended to 15 days from the date of this order.
07/23/2012	Motion filed	renewed motion for production of the entire record on appeal and to proceed in propria persona by appellant (b) (6)

07/26/2012	Granted - extension of time.	Appellant's opening brief. Due on 08/29/2012 By 30 Day(s) 1st
07/30/2012	Order filed.	Appellant's renewed motion for production of the entire record on appeal and to proceed in propria persona is denied.
07/30/2012	Received copy of Supreme Court filing.	petition for writ of mandate
08/03/2012	Received copy of Supreme Court filing.	petition for writ of mandate
08/13/2012	Received copy of Supreme Court filing.	Supplemental memorandum in support of petition for writ of mandate
08/28/2012	Motion/application to augment record filed.	appellant's
08/31/2012	Motion filed.	Appellant's motion for suspension of appeal briefing schedule pending the supreme courts resolution
09/10/2012	Returned document for non-conformance.	appellant's pro per motion to augment
09/13/2012	Order filed.	The motion of (b) (6) (b) (6) for suspension of appeal briefing schedule is granted in part. Briefing in this matter is suspended for 30 days from the date of this order.
09/13/2012	Augmentation granted. (See order.)	plaintiff's exhibit 1 (pro per waiver) - AOB due 15 days after expiration of this court's briefing suspension order (45 days from 9/13/12 = 10/28/12)
09/12/2012	Received copy of Supreme Court filing.	Petition for writ of mandate is denied
11/07/2012	Telephone conversation with:	(b) (6) at Superior Court inquiring about status of augmentation record. She states she did not receive the order but will obtain People's Exhibit 1 immediately and prepare supplemental CT.
11/08/2012	Returned document for non-conformance.	appellant's pro per motion for continuing extension of time to file opening brief
11/08/2012	Certificate of county clerk filed.	County Clerk (b) (6) do certify the following: after due and diligent search, unable to locate people's Exhibit #1-"Pro Per Waiver"

9640

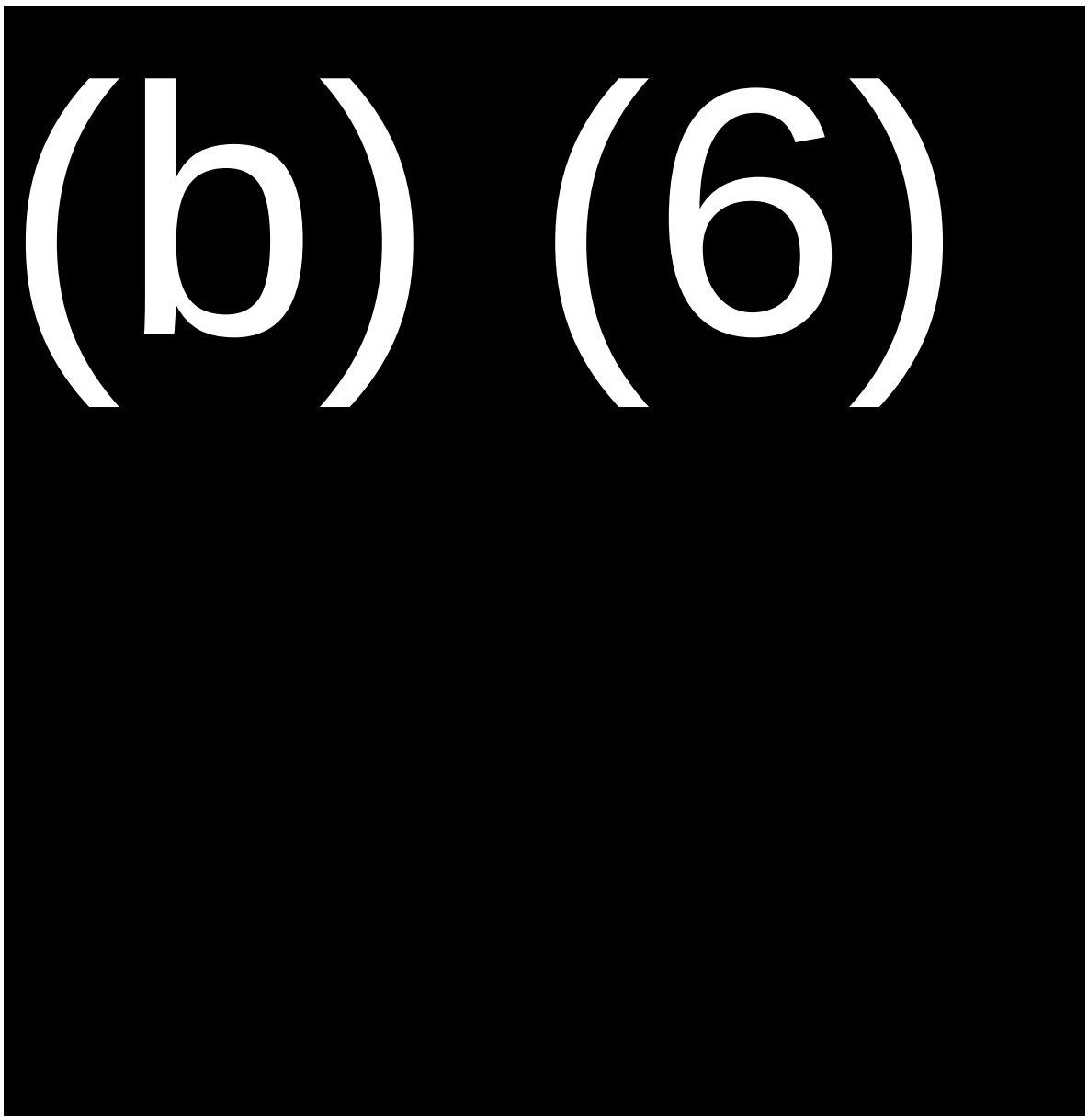
ATTACHMENT

D

(b) (6)

Westlaw

(b) (6)



9642

(b) (6)