Detail

Complaint Number: 164 **Immigration Judge:** Cassidy, William A. **Complaint Date:** 05/04/10

Current ACIJ	Base City	Status	Final Action	Final Action Date
Smith, Gary W.	(b)	CLOSED	Written counseling	05/18/10

A-Number(s)	Complaint Nature(s)	Complaint Source(s)
(b) (6)	In-court conduct	BIA

Complaint Narrative: In (b) (6), the record reflects the the ij disclosed information pertaining to the R's asylum application to a private bar attorney who was not representing the the R, without written consent, and prepared a complete written decision before the hearing.

Complaint History	
12/10/09	Alleged conduct occurred
05/04/10	
05/04/10	ACIJ requests explaination from IJ
05/05/10	Database entry created
05/05/10	IJ provides explaination to ACIJ
05/06/10	Initial complaint processing completed - ACIJ reviewed case and determined no intemperate conduct, draft counseling letter being prepared
05/18/10	Written counseling

Cassidy

Memorandum

Subject	Date
(b) (6) (BIA April 29, 2010)	May 4, 2010

To	From
Brian O'Leary, Chief Immigration Judge MaryBeth Keller, Assistant Chief Immigration Judge	David L. Neal, Acting Chairman

Pursuant to a previous understanding that the Board would bring to the attention of the Chief Immigration Judge any Board decision which remands a case to a different Immigration Judge, you will find attached a copy of the Board's decision dated April 29, 2010, and relevant portions of the record of proceedings, in the above-referenced matter. Please take the necessary steps to ensure that this matter is assigned to a different Immigration Judge on remand.

Further, the Board anticipates returning the record of proceedings for this remanded case to the Immigration Court in two weeks. If you wish to review the record prior to its return to the Immigration Court, please contact Terry Smith (Tower 24).

Thank you for your attention to this matter.

Attachments

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)

Office of the Chief Counsel A (b)(6) & (b)(7)
(b)(6) & (b)(7)

Name: (b) (6)

A (b) (6)

Date of this notice: 4/29/2010

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
King, Jean C.

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)

Office of the Chief Counsel (b)(6) & (b)(7)

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

Name: (b) (6)

A (b) (6)

Date of this notice: 4/29/2010

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
King, Jean C.

File: A(b) (6)

Date: APR 29 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

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

ON BEHALF OF DHS: (b)(6) & (b)(7)
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; cancellation of removal; adjustment of status

The respondent, a native and citizen of Belize, has appealed from written and oral decisions of the Immigration Judge, both dated December 10, 2009. The Immigration Judge found the respondent removable and pretermitted his application for cancellation of removal, under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. 1229b(b), and for adjustment of status. The Immigration Judge also pretermitted his application for asylum, under section 208 of the Act, 8 U.S.C. § 1158, pretermitted his application for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and denied his request for protection under the Convention Against Torture, under 8 C.F.R. §§ 1208.16 through 1208.18 (CAT).[1] The respondent argues that the Immigration Judge erred in denying him relief.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii). *See also Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

In a written decision prepared *prior to* the respondent's December 10, 2009, hearing, the Immigration Judge pretermitted the respondent's applications for cancellation of removal, adjustment of status, asylum, withholding of removal, and protection under CAT. In an oral decision rendered after the conclusion of the respondent's December 10, 2009, hearing, the Immigration Judge denied the respondent's request for CAT protection in the form of deferral of removal.

[1] Because the applications were filed after May 11, 2005, the provisions of the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 231 (effective May 11, 2005), are applicable here. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

In the written decision prepared prior to the respondent's December 10, 2009, hearing, the Immigration Judge explained that "in order to minimize the Respondent's length of detention, the court will issue the following decision to identify and potentially resolve all issues as expeditiously as possible" (I.J. at 2). In that decision, the Immigration Judge correctly concluded that the respondent was statutorily ineligible for cancellation of removal and adjustment of status. However, in this written decision, the Immigration Judge did not find that the respondent was statutorily ineligible for asylum or withholding of removal.

The Immigration Judge pretermitted, without a hearing, the respondent's asylum, withholding of removal, and CAT claims. However, he did not find that the respondent's convictions included an aggravated felony or a particularly serious crime.[2] Moreover, we conclude that the Immigration Judge could not find the respondent statutorily barred from asylum on the ground that one or more of his convictions constitute an aggravated felony relating to theft or a crime of violence. In either case, a 1-year sentence is required. *See* 8 U.S.C. § 101(a)(43)(F), (G). However, the respondent was not sentenced to 1 year for any of his convictions. Nor did the Immigration Judge indicate whether he found the respondent statutorily barred from asylum or withholding of removal on the grounds that one or more of his convictions is a particularly serious crime. None of the convictions resulted in a 5-year sentence. *See* 8 U.S.C. § 1231(b)(3)(B); *Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999). None of the convictions constituted a drug trafficking crime. *See Matter of Y-L-, A-G-, Y-S-R-*, 23 I&N Dec. 270 (AG 2002). Moreover, the record lacks additional fact finding by the Immigration Judge to determine whether the seriousness of the crimes establish that any of the convictions involved particularly serious crimes. *See Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) (an offense need not be an aggravated felony in order to be a particularly serious crime); *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

Rather, in the written decision prepared prior to the respondent's December 10, 2009, hearing, the Immigration Judge only found that the respondent failed to file an application for asylum within 1 year of last entry, and failed to show extraordinary circumstances relating to the delay, or changes in country conditions or the respondent's circumstances that materially affected his eligibility for asylum. *See* 8 U.S.C. § 1158(a)(2); 8 C.F.R. § 1208.4. In addition, the Immigration Judge found that the respondent did not establish a clear probability that his life or freedom would be threatened on account of a protected ground (I.J. at 3). *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16; *INS v. Stevic*, 467 U.S. 407 (1984). These findings are problematic because both of these issues require a combination of factual findings and legal conclusions, and the Immigration Judge made these factual findings without considering the evidence offered at the removal hearing.

The record reflects that, at the hearing, the Immigration Judge stated that, based on the court's written decision, only the respondent's request for deferral of removal under CAT would be reviewed (Tr. at 49-50, 52). The record further reflects that testimony was taken from the respondent, his mother, and his sister with regard only to the respondent's CAT claim, and that the

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[2] An alien who has been convicted of an aggravated felony or a particularly serious crime is statutorily ineligible for asylum. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); 8 C.F.R. § 1208.13(c). In addition, an alien who has been convicted of a particularly serious crime is statutorily ineligible for withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B)(ii); 8 C.F.R. § 1208.16(d)(2).

respondent and his 2 witnesses were not given an opportunity to testify regarding any changed or extraordinary circumstances or changes in the respondent's circumstances that materially affected his eligibility for asylum sufficient to excuse the respondent's delay in filing his asylum application, and were not given the opportunity to testify regarding the respondent's claimed past persecution and fear of future persecution on account of his membership in a particular social group, homosexuals (Tr. at 55-80).

A respondent has the right to present evidence at his removal hearing. *See* section 240(b)(4)(B) of the Act, 8 C.F.R. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(4). An alien who faces removal is entitled under the constitution to a full and fair removal hearing. *See Matter of D-*, 20 I&N Dec. 827, 831 (BIA 1994); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Exilus*, 18 I&N Dec. 276 (BIA 1982). In order to establish that his due process rights were violated, the respondent must prove (1) that there was an error and (2) that he was prejudiced by the error.

In this case, the pre-hearing written decision was not limited to legal issues exclusive of fact and discretion. Rather, the pre-hearing decision includes findings that require fact-finding and discretion prior to the respondent testifying on the points at issue. Therefore, upon de novo review, we find that the Immigration Judge erred when preparing and relying upon the written pre-hearing decision before considering any testimony regarding the respondent's asylum and withholding of removal claims. We further find that, because of this error, the respondent was prejudiced. *See Matter of Santos*, *supra*; *Matter of Exilus*, *supra*.[3]

Therefore, under the circumstances of this case, we find that a remand to the Immigration Court is warranted for a new hearing before a new Immigration Judge. On remand, both parties shall have the opportunity to present additional evidence, including testimony, related to the respondent's eligibility for asylum and withholding of removal.[4]

Finally, regarding the respondent's request for CAT protection, we agree with the Immigration Judge's determination in his oral decision that the respondent has not established eligibility for protection under CAT because he failed to show that he is "more likely than not" to be tortured in

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[3] We also note that the record reflects that the Immigration Judge disclosed information pertaining to the respondent's asylum application to a private bar attorney, who was not representing the respondent, without the written consent of the respondent (Tr. at 49-50). *See* 8 C.F.R. § 1208.6(a). We caution the Immigration Judge regarding the use of this practice without obtaining the proper consent from a respondent.

[4] The respondent filed a motion to reopen before the Immigration Court and an appeal of the Immigration Judge's decisions with the Board. Therefore, the Board has jurisdiction over the motion. Given the foregoing decision to remand the record to the Immigration Judge, we need not address the respondent's motion. Even if we were to deem the motion to be a motion to remand, the respondent has not submitted any evidence that was not available and could not have been presented at his hearing. 8 C.F.R. § 1003.2(c)(4). However, in light of the remand, the respondent may submit additional evidence at his new hearing.

Belize, by or with the acquiescence (to include the concept of willful blindness) of a government official upon return. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1). [5]

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal of the Immigration Jude's denial of CAT protection is dismissed.

FURTHER ORDER: The record is remanded to the Immigration Court for a new hearing before a different Immigration Judge on the respondent's asylum and withholding of removal claims and for entry of a new decision.

FOR THE BOARD

[5] We note that the respondent has not raised any arguments on appeal regarding the Immigration Judge's decision to deny cancellation of removal or adjustment of status.

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

File A (b) (6) December 10, 2009

In the Matter of

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

CHARGE:

APPLICATION:

ON BEHALF OF THE RESPONDENT: ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Pro se (b)(6) & (b)(7), Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

Pursuant to the written decision of the Court, today's date December 10th 2009, the Court finds removability has been established by clear, convincing, unequivocal evidence. Respondent has requested protection under the Convention Against Torture.

Under the Convention Against Torture, the respondent is entitled to protection, deferral of removal if he establishes that more likely than not he would be tortured upon a return to his country of removal. Torture is defined as an extreme form of cruel and inhuman treatment that does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment. For an

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act to constitute torture it must satisfy each of the five elements in that definition of torture in 8 C.F.R. 208.18a. The act must cause severe physical or mental pain and suffering, the act must be intentionally inflicted, the act must be inflicted for a prescribed purpose, the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has physical control or custody of the victim, and the act cannot arise from legal or lawful sanctions. Indefinite detention does not constitute torture where there is no evidence the authorities intentionally or deliberately detained the parties in order to inflict torture. Substandard prison conditions in a country do not constitute torture within the meaning of the Act, where there is no evidence that the authorities intentionally create or maintain such conditions in order to inflict torture. Evidence of occurrences of isolated incidents of mistreatment that may rise to the level of torture as defined in the Convention Against Torture are likewise insufficient to establish that more likely than not that a specific respondent would be tortured if he returned to his home country.

An alien's eligibility for deferral of removal under the Convention Against Torture cannot be established by stringing together a string of suppositions in order to show that more likely than not that torture would result where the evidence does not establish that each step in the hypothetical chain of events

LH

is more likely than not to happen. See In re J-F-F-, 23 I&N Dec. 912 (A.G. 2006), previously citing J-E-, 23 I&N Dec. 291 (BIA 2002).

In this particular case, the respondent has presented a claim of an openly gay male, that he feels that upon his return to Belize that he would be subject to mistreatment. While the Court understands and appreciates the respondent has submitted evidence of mistreatment of homosexuals in Belize, the Court does not find that the respondent has established more likely than not that he would be tortured upon a return.

In order to establish that the government acquiesce to torture, the respondent must demonstrate that the government officials are willfully accepting of a non-governmental force's torturous conduct. A public official's acquiescence of torture require that he have an awareness of the activity prior to its commencement, and a breach of legal responsibility to intervene to prevent such activity. Consequently, the definition of torture includes only acts that occur in the context of governmental authorities. Article 3 of the Convention Against Torture does not extend protection to persons who fear entities that the government is unable to control. To demonstrate acquiescence, the respondent must show more than the fact that the government officials are aware of such activity constituting torture, but are powerless to stop it.

The Court acknowledges and accepts the respondent is an

openly gay male. The Court also accepts that the respondent does have concerns regarding discrimination of gay individuals in Belize. While the government of Belize has a ways to go to improve the conditions of homosexual males, as well as transgendereds, lesbians and individuals, the Court cannot find by the documents that are submitted and the testimony of the respondent that the government has taken any affirmative action encouraging or supporting the torture of gay males in Belize.

Accordingly, the Court does not find that the respondent has met his burden of showing more likely than not that he would be tortured upon a return. As previously stated in the prior order, the Court has denied his other applications.

ORDER

HE IS HEREBY ORDERED removed, returned to Belize, country of nativity and citizenship, on the charges contained in the Notice to Appear.

WILLIAM A. CASSIDY
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before WILLIAM A. CASSIDY in the matter of:

(b) (6)

A (b) (6)

(b) (6)

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Lori Hodo Hoffman

Lori Hodo Hoffman (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

January 28, 2010
(Completion Date)

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

IN THE MATTER OF:	**IN REMOVAL PROCEEDINGS**
(b) (6)	**File No.: A** (b) (6)
Respondent	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "Act"), in that at any time after admission as a nonimmigrant under section 101(a)(15) of the Act, Respondent has remained in the United States for a time longer than permitted, in violation of the Act or any other law of the United States.

APPLICATIONS: Respondent's Eligibility for Relief

APPEARANCES

ON BEHALF OF THE RESPONDENT:	**ON BEHALF OF THE GOVERNMENT:**
Pro Se	Assistant Chief Counsel Department of Homeland Security (b)(6) & (b)(7)

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent is a male native and citizen of Belize. The Department of Homeland Security ("Department" or "DHS") placed Respondent in removal proceedings through the filing of a Notice to Appear ("NTA") with the (b) (6) Immigration Court on May 5, 2009.

The NTA alleged that Respondent was admitted to the United States on or about July 5, 1997 as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed one year. Respondent remained in the United States for a time longer than authorized. Respondent is charged with removability pursuant to section 237(a)(1)(B), in that he has remained in the United States for a time longer than permitted.

On May 5, 2009, the Department also filed Respondent's Record of Deportable/Inadmissible Alien ("Form I-213"). The I-213 indicated that Respondent had charges pending for the following offenses: (1) (b) (6)

(b) (6)

At a master calendar hearing, Respondent admitted the allegations contained in the NTA and conceded removability. Respondent indicated that he has an approved Petition for Alien Relative ("Form I-130") filed on his behalf by his U.S. citizen brother. Respondent has requested relief in the form of a waiver of inadmissibility and adjustment of status under section 245 of the Act. Respondent also has filed applications for relief in the form of cancellation of removal for non-lawful permanent residents under section 240A(b) of the Act, asylum under section 208 of the Act, withholding of removal under section 241(b) of the Act, and withholding of removal under the Convention Against Torture.

The court has scheduled Respondent's merits hearing for December 10, 2009.[1] At this hearing, the parties may present any and all witnesses, documents and testimony in support of their claims. The parties will also have the opportunity to cross examine witnesses. However, in order to minimize Respondent's length of detention, the court will issue the following decision to identify and potentially resolve all issues as expeditiously as possible.

II. DISCUSSION

Respondent's conviction record (b) (6) See Resp't Record of Conviction. On November 20, 2001, Respondent was convicted (b) (6) Misdemeanor Larceny, in violation of (b) (6) for which he was sentenced to 45 days confinement and 36 months probation. On (b) (6) 2008, Respondent was convicted of the offense of Driving While Intoxicated, in violation of (b) (6) for which he was sentenced to 60 days confinement and 12 months probation. On (b) (6) 2008, Respondent was convicted (b) (6)

(b) (6)

(b) (6) For these offenses, Respondent was sentenced to 4 to 5 months confinement.

Based upon these convictions, Respondent is ineligible for cancellation of removal under section 240A(b)(1) of the Act. This section of the Act provides that the Attorney General may cancel removal and adjust the status of an alien who is inadmissible or deportable from the United States to that of a lawful permanent resident if the alien can demonstrate that he or she: 1) has been

[1] The court notes that it has continued proceedings several times in order to allow Respondent to obtain counsel.

continuously present in the U.S. for not less than ten years immediately preceding the date of such application; 2) has been a person of good moral character during that ten-year period; 3) has not been convicted of an offense under 212(a)(2), 237(a)(2), or 237(a)(3), except if a waiver is granted for a victim of domestic violence under 237(a)(7); and 4) establishes that his or her removal would result in exceptional and extremely unusual hardship to the alien's U.S. citizen or lawful permanent resident spouse, parent, or child.

Respondent was convicted (b) (6) Based upon this conviction, the court finds that Respondent has been convicted of crime involving moral turpitude. See Matter of Logan, 17 I. & N. Dec. 367 (BIA 1980) (assault with deadly weapon a crime involving moral turpitude). Moreover, Respondent's convictions for larceny, larceny of a motor vehicle, and breaking and entering also are crimes involving moral turpitude. See Matter of Kim, 17 I. & N. Dec. 144 (BIA 1979) (larceny offenses are crimes involving moral turpitude); see also Matter of Moore, 13 I. & N. Dec. 711 (BIA 1971) (breaking and entering is a crime involving moral turpitude where the intent to commit larceny is an element). Given that Respondent has been convicted of a crime involving moral turpitude under section 212(a)(2) of the Act, he is ineligible for cancellation of removal for non-lawful permanent resident. INA § 240A(b)(1)(C). Moreover, given Respondent's criminal history, the court is unlikely to find that he is a person of good moral character. INA § 240A(b)(1)(B).

Further, Respondent is ineligible for asylum because his asylum application was not filed within one year of his entry and he does not claim changed or extraordinary circumstances. INA §§ 208(a)(2)(B),(D); 8 C.F.R. §§ 1208.4(a)(4)-(5). Even if Respondent were to establish eligibility for asylum, he has not suffered past persecution and it does not appear that he has a well-founded fear of future persecution based upon his sexual orientation. See INA § 101(a)(42)(A). Thus, the court will likely deny his application for asylum, withholding of removal under the Act, and withholding of removal under the Convention Against Torture.

Respondent claims that he suffered past persecution based upon his sexual orientation, namely, he claims that he was sexually abused by his priest. Historically, personal problems of this nature do not provide a basis upon which this court can grant asylum. See Molina-Morales, v. INS 237 (9th Cir. 2001)(no evidence to support the nexus between rape and a protected ground); see also Matter of Pierre, 15 I. & N. Dec. 461 (BIA 1975). The sexual abuse perpetuated on him by his priest who may have been a pedophile, although unfortunate, is not a showing of persecution based on a protected ground and is, in fact, a crime.

Respondent also claims that he fears returning to Belize because he will be harmed based upon his sexual orientation. The Board has determined that homosexuals are a particular social group and sexual orientation may be a basis for asylum. See Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990). However, Respondent was never persecuted as a homosexual in Belize, nor was he known as a homosexual when he lived there.

The court notes that homosexuals are discriminated against in Belize. However, the U.S. Department of State Country Reports on Human Rights Practices for Belize indicates that while there were incidents of discrimination based upon sexual orientation, human rights are generally respected in Belize. Other documents suggest that Belize rescinded its anti-homosexuality laws in the 1990s and that gay tourists are welcomed in the country. Further, while homosexuals may be discriminated against in Belize, there is no evidence that Respondent's fear of persecution is country wide. See Matter of C-A-L-, 21 I. & N. Dec. 754 (BIA 1997). Belize has a population of 315,000 and Respondent is not a political activist or someone identified by the community as gay.

Homosexuals, sadly enough, are stigmatized or discriminated against in many countries, including the United States. While the court finds that Respondent genuinely believes that he might be discriminated against because of his sexual orientation, Respondent will likely be unable to show that this discrimination is so extreme as to amount to persecution. Thus, Respondent has not established a well-founded fear of persecution in Belize on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987); 8 C.F.R. § 1208.16(b)(2).

Lastly, Respondent has failed to establish eligibility for adjustment of status. INA § 245(a). Respondent has an approved Petition for Alien Relative ("Form I-130") filed on his behalf by his U.S. citizen brother. However, there is no evidence that Respondent filed an application for adjustment of status ("Form I-485"). Id. Moreover, the priority date for Respondent's visa is April 24, 2001. The State Department Visa Bulletin indicates that the visa priority date for Respondent's preference category is currently September 8, 1999. Respondent does not have a visa readily available to him and, thus, he cannot demonstrate eligibility for adjustment of status under section 245 of the Act. Id.

As such, the court will pretermit Respondent's applications for cancellation of removal, asylum, withholding of removal under the Act, protection under the Convention Against Torture, and adjustment of status. Accordingly, the court enters the following orders:

ORDER

It is ordered that: Respondent's application for cancellation of removal pursuant to section 240A(b)(1) of the Act be **PRETERMITED**;

It is further ordered that: Respondent's application for asylum under section 208 of the Act be **PRETERMITED**;

It is further ordered that: Respondent's application for withholding of removal under section 241(b)(3) of the Act be **PRETERMITED**;

It is further ordered that: Respondent's application for withholding of removal under the Convention Against Torture be **PRETERMITED**;

It is further ordered that: Respondent's application for adjustment of status pursuant to section 245 of the Act be **PRETERMITED.**

12/10/09
Date

William A. Cassidy
United States Immigration Judge
(b) (6)

JUDGE FOR THE RECORD

All right. We're on the record. 08 --

JUDGE TO (b)(6) & (b)(7)

Q. Several documents I --

A. Sorry?

Q. The respondent handed me several documents. I'm assuming he wants me to give these to the Court.

A. Yes. That's fine.

JUDGE FOR THE RECORD

Case number (b) (6), in the matter of (b) (6) (b) (6). Present in court without counsel. Government is represented by (b)(6) & (b)(7) This is Judge (b) (6). December 10, 2009.

JUDGE TO (b) (6)

Q. Before we begin, (b) (6), I told you that I would prepare a written decision explaining why you're not eligible for the majority of the reliefs that, that are available. I have done so and pretermitted all but your application under the Convention Against Torture. To further assist you and your family members with a better understanding of my limitations and my ability to allow you to remain, I engaged the services of Carolina Collin Antonini (phonetic sp.), who is a private attorney who does, who's area of expertise is Immigration law. She's a former city Judge herself and her practice is devoted to Immigration matters. And she's a member of the American

Immigration Lawyers Association. She had an opportunity to review and read, I gave, I gave her your file that you submitted to the Court. And I also gave her a copy of my decision. Suffice it to say that I'm happy to go forward with any claim that you wish to make and you are not required to accept any decision I make. You have a right to appeal any decision and have it reviewed by the Board of Immigration Appeals. I will never take that away from you. However, it appears you're limited in your request that would allow you to remain and my preliminary review doesn't appear that you have a claim that I could grant and at the end of it, even if what you, even if I accept what you say as true, it's unlikely that I could grant you the right to remain. Now, you're family took the time and wanted to talk to you. But it's not their decision, it's your decision. They said you had some questions of me. I'll be happy, as best I can, to answer them. But I have to advise you, I'm not your attorney. Do you understand that?

A. Yes, Your Honor. I do.

Q. Okay. Now, if there's a question you have to ask that I can't answer, I'll tell you that I can't and I'll tell you why I can't. But, if you have some, if there's --

A. Well, I just wanted to see if you had received that evidence that I mailed out to the Court.

Q. Yes, I did. And I'll have them fax any additional evidence. However, if, I don't know that what you think is

May 18, 2010

William A. Cassidy
Immigration Judge
(b) (6)

SUBJECT: Letter of Advice and Counsel RE: (b) (6)

Dear Judge Cassidy:

This addresses your request for advice and counsel , as well as guidance, in regard to the Board of Immigration Appeals' (BIA) recent decision in (b) (6) (b) (6), issued by the BIA on April 29, 2010. I agree that counseling is needed and appropriate.

I have read: the BIA decision; your written decision dated December 10, 2009; your oral decision dated December 10, 2009; the transcript of the proceedings; the information in the CASE database pertaining to the case; and your six messages to me (attached). I also reviewed the entire Record of Proceedings.

My first guidance to you is that it is unhelpful to point a finger of blame at the law clerk, a new attorney assigned to the (b) (6) Immigration Court, by ascribing a failure to include a section on particularly serious crimes in your written decision, to try to blame staff attorneys or the BIA, or to indicate ignorance that your colleague, Judge (b) (6) has been responsible for the *pro bono* program within the (b) (6) Immigration Court for over three years. Any responsibility clearly lies with you as the Immigration Judge, and you should be able to professionally accept that without trying to shift responsibility to anyone else.

The BIA didn't mask their concerns or hide the ball in their decision. You issued a written decision in this respondent's case before he or his witnesses had an opportunity to testify and basically foreclosed virtually every form of relief without a hearing, except deferral of removal. You gave multiple continuances in this case, as many as seven, ostensibly to provide the respondent an opportunity to obtain counsel, but the actual hearing in December 2009 was relatively short. Rather than just referring the issue of a need for *pro bono* counsel to the American Immigration Lawyers Association Liaison Counsel, Ms. Caroline Antonini, or to

Catholic Charities through the law clerk or court administrator, you contacted the attorney (Ms. Antonini) directly and apparently disclosed in detail information about the case, another matter with which the BIA was concerned (see footnote 3 to the BIA decision). While your motivation, which I don't question was sincere, apparently was to help the respondent, you placed yourself in a position where you could be and were negatively criticized. That criticism could have come from the Department of Homeland Security, the respondent, or the BIA. When you finally gave the respondent an opportunity to be heard on any of his multiple claims for relief, his testimony and that of his witnesses (his mother and sister) altogether encompassed only 22 pages of the transcript (pp. 56-78). Much of that 22 pages was your talking on the record, rather than allowing the witnesses to testify. Although not mentioned anywhere, the record does not reflect that either the respondent's mother or sister were sworn in at any time when testifying.

Pretermission is a recognized procedure [*see* Matter of Moreno-Escoba, 25 I&N Dec. 114 (BIA 2009)], but the manner in which you did it in this case gave the respondent no meaningful opportunity to present his case and rendered the hearing a nullity. The BIA clearly viewed it that way. The BIA remanded for a new hearing before a different immigration judge.

If you read the 84 pages of this transcript objectively, as I did, you would come to the same conclusion as the BIA did, that is, that the respondent was precluded from presenting his claims for relief and didn't receive a fair hearing.

The addition of a fifth Immigration Judge at the (b) (6) Immigration Court and three new Immigration Judges at the (b) (6) Immigration Court will go a long way toward moderating the dockets at both Courts and should give you more time to be introspective in your decision-making, as well as providing some needed relief to both Courts. If you ever feel that you need additional guidance or training, contact me and I will assist you.

Sincerely,

Gary W. Smith
Assistant Chief Immigration Judge

Attachments (messages)