



Detail

Complaint Number: 741

Immigration Judge: (b)(6)

Complaint Received Date: 03/04/13

Current ACIJ
Davis, John W.

Base City
(b)(6)

Status
CLOSED

Final Action
Complaint concluded --
corrective action already taken

Final Action Date
03/04/13

Past ACJIS:

| A-Numbers(s) | Complaint Nature(s) | Complaint Source(s) |
|--------------|---------------------------|---------------------|
| (b)(6) | In-court conduct Legal | EOIR |

Complaint Narrative: IJ refused to hear the R's 240A (B) case because the biometrics were not up to date. The BIA stated the "IJ's frustration was understandable," but remanded the matter for a full hearing. Additionally the IJ issued an inappropriate order of removal that was not fully addressed by the Board.

Complaint History

| | |
|----------|--|
| 03/04/13 | Complaint concluded -- corrective action already taken - Discussed during IJ's PIP meeting |
| 03/04/13 | This will be discussed with the IJ as part of PIP |
| 04/09/13 | Database entry created |

Sep 11, 2013

1 of 1

Immigration Judge Complaint Intake Form

HQ Use Only:
complaint #: _____
source: first / subsequent

Date Received at OCIJ: 4 March 2013

| complaint source type | |
|---|---|
| <input type="checkbox"/> anonymous <input type="checkbox"/> respondent's attorney <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____ | <input checked="" type="checkbox"/> BIA <input type="checkbox"/> respondent <input type="checkbox"/> OIL <input type="checkbox"/> Circuit <input checked="" type="checkbox"/> EOIR <input type="checkbox"/> OPR <input type="checkbox"/> DHS <input type="checkbox"/> OIG <input type="checkbox"/> Main Justice <input type="checkbox"/> media |
| complaint receipt method | |
| <input type="checkbox"/> letter <input type="checkbox"/> fax | <input type="checkbox"/> IJC memo (BIA) <input type="checkbox"/> unknown <input type="checkbox"/> email <input type="checkbox"/> phone (incl. voicemail) <input type="checkbox"/> in-person <input checked="" type="checkbox"/> other: BIA decision |
| date of complaint source (i.e., date on letter, date of appellate body's decision) | complaint source contact information |
| 27 February 2013 | name: _____ address: _____ _____ _____ email: _____ phone: _____ fax: _____ |
| additional complaint source details (i.e., DHS component, media outlet, third party details, A-number) | |

| IJ name | base city | ACIJ |
|--|--|---|
| (b) (6) | (b) (6) | John W. Davis |
| relevant A-number(s) | date of incident | |
| A(b) (6) | 30 December 2010 | |
| allegations | | |
| In the case the IJ refused to hear respondent's 240A(B) case because the biometrics were not up to date. The BIA stated that the "IJ's frustration was understandable," but remanded the matter for a full hearing on the application. Additionally, the IJ issued an inappropriate order of removal that was not fully addressed by the Board since the matter was remanded on other grounds. | | |
| nature of complaint | | |
| <input checked="" type="checkbox"/> in-court conduct <input type="checkbox"/> incapacity | <input type="checkbox"/> out-of-court conduct <input type="checkbox"/> other: _____ | <input type="checkbox"/> due process <input type="checkbox"/> bias <input checked="" type="checkbox"/> legal <input type="checkbox"/> criminal |

Can. act. already
interviewed
[Conc. / Disc / Term]
[Conc. / Disc / Term]

003923



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)(7)(C)

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

Name: (b) (6)

A (b) (6)

Date of this notice: 2/27/2013

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

lucasd
User team: Docket

1/28



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

Name (b) (6)

A (b) (6)

Date of this notice: 2/27/2013

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

lucasd
Userteam: Docket

Falls Church, Virginia 22041

File: A(b) (6)

Date:

FEB 27 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

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

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

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's December 30, 2010, decision ordering him removed from the United States. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

In his December 30, 2010, the Immigration Judge refused to consider the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), because the respondent's biometrics were not up-to-date and the proceedings had been continued several times (I.J. at 2). The Immigration Judge also noted, with little consideration, that the respondent's United States citizen children would not suffer the requisite hardship (I.J. at 2). The Immigration Judge stated that (b)(6) did not want to continue with the hearing and consider the application without knowing if the respondent had a criminal record (I.J. at 2). As such, the Immigration Judge ordered the respondent removed from the United States, ~~he~~ did not issue an order denying the respondent's application for cancellation of removal or an order finding the respondent removable (I.J. at 3).¹

On appeal, the respondent contends, *inter alia*, that his failure to update his biometrics, which had expired during the pendency of his proceedings, was the result of ineffective assistance of counsel noting that his prior counsel did not inform him that he needed to take action in updating his biometrics. As such, the respondent requests a remand for full consideration of his

¹ The Immigration Judge issued an order that "the respondent be removed from the United States and that he make himself available to the authorities from Homeland Security so they can take him back at this time ... [s]o, the Court will record that the respondent has been removed at this time" (I.J. at 3). This is highly unusual and does not appear to be an appropriate order of removal (I.J. at 3). Nevertheless, because the record needs to be remanded, we will not address this issue further (I.J. at 3).

application for cancellation of removal. The Department of Homeland Security ("DHS") has filed notice that it does not oppose the respondent's request for a remand and in fact "concurs with the respondent's claim that he did not receive sufficient notice regarding the requirement that he update his biometrics prior to the December 30, 2010 hearing." See DHS's Brief at 2. The DHS has indicated it supports a remand in this case. See *id.*

The Immigration Judge's frustration, in light of the protracted procedural history of this case, is understandable. It is also clear, however, that the respondent had made an attempt to provide what was asked of him but that a confluence of circumstances — including issues with the performance of former counsel, the passage of time, and the respondent's inaction — caused the delay in updating his biometrics. Given the totality of the circumstances in this case, we find it provident to remand the record to the Immigration Judge for full adjudication of the respondent's application(s) for relief.² On remand, the Immigration Judge should clarify and give the respondent adequate notice of the biometrics requirements and the consequences of noncompliance as required by the regulations in 8 C.F.R. § 1003.47 (2012).

Accordingly, the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

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


FOR THE BOARD

² Because the DHS has agreed to remand the record in this case, we find it unnecessary to address the respondent's claim of ineffective assistance of counsel at this time. Notably, the DHS argues that the respondent has not met his burden of proof in this regard. The DHS may fully litigate the respondent's case upon remand, and the respondent should likewise be provided the opportunity to present evidence in support his application(s).

3 (b) (6)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

(b) (6)

File No.: A (b) (6)

December 30, 2010

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

CHARGE:

APPLICATION: Cancellation of removal.

ON BEHALF OF RESPONDENT:

ON BEHALF OF DHS:

(b) (6)

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

ORAL DECISION OF THE IMMIGRATION JUDGE

The Court would indicate that in this particular matter, the matter was set for a hearing regarding cancellation of removal under the ten year statute.

The respondent was before the Court on September 4, 2008. The Court would indicate that the Court indicated to him when we set this matter down the last time that this would be the last continuance because it has been continued for quite some time. The Court would indicate that the respondent was first before the Court on January 27, 2006. He was in front of the Court on March

8, 2006. He was in front of the Court on May 31, 2006. He was in front of the Court on November 1, 2006. All Master Calendars.

At that time, on November 1, 2006, we set the matter down for an Individual hearing on August 8, 2007. It was continued to September 4, 2008. Then it was continued to November 5, 2009. Then it was continued again to December 30, 2010.

The Court will indicate that this case is practically five years old. The respondent is not ready to go forward. The Court basically would indicate that the Court does not want to do the hearing without knowing whether there is a criminal record or not. He is not ready to go forward at this time.

So, the Court would indicate that, first of all, he has had sufficient time to get ready. I mean he has had five years and has not done it. Okay. That is fine.

The second thing is, I have read the reports from the doctors regarding the qualifying relatives, which are two minor children. First of all, the son has arch problems. He has flat feet. Okay. That is not extreme and unusual hardship. The daughter supposedly fell out of the car at one time when she was trying to open the door. She says that her back now hurts her. The evaluation from the doctor indicates that there is nothing physically wrong with this particular child. So, I do not want to continue the matter over again to hear that the son has flat feet and the daughter has back problems when the doctor has indicated that he sees no problem whatsoever. She will have to

be evaluated at a later date.

The Court would indicate that (b)(6) & (b)(7)(C) offered the respondent voluntary departure if he was willing to take it. He has indicated that he does not wish to do so.

The Court would indicate that because this case is so old, the Court is not going to continue the matter again.

ORDER

The Court is going to order that the respondent be removed from the United States and that he make himself available to authorities from Homeland Security so they can take him back at this time. So, the Court will record that the respondent has been removed at this time.

(b) (6)

United States Immigration Judge

CERTIFICATE PAGE

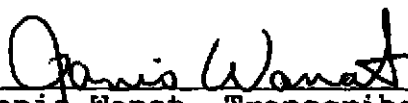
I hereby certify that the attached proceeding before
JUDGE (b) (6) in the matter of:

(b) (6)

A (b) (6)

(b) (6)

is an accurate, verbatim transcript of the recording 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.



Janis Wanat, Transcriber
Free State Reporting, Inc.

February 22, 2011
(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.

Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Monday, March 04, 2013 3:54 PM
To: Davis, John (EOIR); Moutinho, Deborah (EOIR)
Cc: Weil, Jack (EOIR); Elliot, Nina (EOIR)
Subject: RE: (b) (6) remand and complaint intake form

John,

Agree that because this just came back from the BIA it should be referenced in your ongoing conversations with (b) (6) (b) (5)

(b) (5)

Mtk

MaryBeth Keller

Assistant Chief Immigration Judge

From: Davis, John (EOIR)
Sent: Monday, March 04, 2013 11:27 AM
To: Keller, Mary Beth (EOIR); Moutinho, Deborah (EOIR)
Cc: Weil, Jack (EOIR)
Subject: (b) (6) remand and complaint intake form
Importance: High

Mary Beth and Deborah,

I have not yet received an IJC Memo on this matter, (b) (6) however I certain that one should be forth coming. In the case Judge (b) (6) refused to hear the merits of the respondent's 240A (B) because the biometrics were not up to date, after respondent had made efforts to have them completed. Additionally, the BIA had very legitimate questions regarding the issuance and language of the removal order – see footnote 1, the BIA did not address the order issues given that they remanded the matter for a full hearing. The language of the removal order is so unique that I am including Judge Weil as a recipient of this email.

This case, although older, illustrates and reinforces the problems that (b) (6) is experiencing and is on a PIP for.

Please let me know if you need anything further in this matter.

Warmest Regards,

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