



Detail

Complaint Number: 780

Immigration Judge: (b)(6)

Complaint Received Date: 07/18/13

Current ACIJ Dufresne, Jill H. Base City (b)(6) Status CLOSED Final Action Date 08/14/13
Past ACIJ:

A-Numbers(s)	Complaint Nature(s)	Complaint Source(s)
(b)(6)	Due process In-court conduct	BIA

Complaint Narrative: (b)(6) scheduled hearing on date atty advised she was not available

Complaint History	
07/18/13	Complaint referred to ACIJ
07/26/13	Database entry created
08/14/13	Oral counseling

Immigration Judge Complaint Intake Form

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

Date Received at OCIJ: _____

complaint source information	
complaint source type	
<input type="checkbox"/> anonymous <input checked="" type="checkbox"/> respondent's attorney <input checked="" 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"/> Circuit <input type="checkbox"/> EOIR <input type="checkbox"/> DHS <input type="checkbox"/> Main Justice <input type="checkbox"/> OIL <input type="checkbox"/> OPR <input type="checkbox"/> OIG <input type="checkbox"/> media
complaint receipt method	
<input checked="" type="checkbox"/> letter <input type="checkbox"/> fax	<input checked="" 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 type="checkbox"/> other: _____
date of complaint source (i.e., date on letter, date of appellate body's decision) 7/15/13	complaint source contact information name: <u>KJC</u> address: <u>DAVID Neal, Chan</u> <u>BIA</u> email: _____ phone: _____ fax: _____
additional complaint source details (i.e., DHS component, media outlet, third party details, A-number)	

complaint details		
IJ name	base city	ACIJ
(b) (6)		Depese
complaint number(s)	date of incident	
A(b) (6)	1/31/12	
allegations		

Due process - scheduled hearing on date city advised she was not available

☐ incapacity ☐ other: _____

Moutinho, Deborah (EOIR)

From: Dufresne, Jill (EOIR)
Sent: Wednesday, August 14, 2013 10:57 AM
To: Moutinho, Deborah (EOIR)
Subject: IJC Complaint against Judge (b) (6) Court, dated 18, 2013, (Matter of (b) (6) (b) (6))i

Good morning, Deborah,

This IJC complaint was addressed with Judge (b) (6) through counseling.

Please let me know if you need any additional information.

Thank you,

JHD



Memorandum

Subject	Date
Matter of (b) (6) (BIA July 16, 2013)	July 18, 2013

To

Brian O'Leary, Chief Immigration Judge

MaryBeth Keller, Assistant Chief Immigration Judge

From

David L. Neal, Chairman

Attached please find a copy of the Board's decision dated July 16, 2013, and relevant portions of the record in the above-referenced matter.

The Board asked me to bring this case to your attention.

This case will be held in Suzette Henderson's office for one week. If you wish to review the record, please contact Suzette Henderson.

Thank you for your attention to this matter.

Attachments

Falls Church, Virginia 22041

File: A (b) (6)

Date:

JUL 16 2012

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. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Continuance

The respondent, a native and citizen of Ghana, appeals the Immigration Judge's February 21, 2012, decision denying his request for a continuance and deeming his asylum claim abandoned. The Department of Homeland Security has filed a brief in opposition. We will dismiss the appeal.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent originally planned to seek adjustment of status based on the anticipated filing of a visa petition by his second United States citizen wife. At his first hearing on January 4, 2011, he was granted a continuance for the filing of the visa petition. At his second hearing on April 5, 2011, he was granted another continuance, over the DHS's objection, to obtain more evidence to establish the validity of his marriage. At the next hearing on July 21, 2011, the Immigration Judge denied the respondent's request for a continuance pending adjudication of his wife's visa petition, and continued the proceedings for a final hearing on any application for discretionary relief. The Immigration Judge directed that any application not filed 15 days before the hearing would be deemed abandoned.

At the next hearing, on January 31, 2012, the respondent announced that his wife had withdrawn the visa petition, and he wished to seek asylum. The Immigration Judge granted a continuance over the DHS's objection, to allow the respondent to file his asylum application. The Immigration Judge warned that the claim would be deemed abandoned if the application was not filed at the next hearing (Tr. at 33). The Immigration Judge offered three hearing dates, none

of which was convenient for the respondent's counsel. The Immigration Judge then chose the first of those dates, February 21, 2012, for the next hearing.

On February 21, 2012, the hearing did not begin at the scheduled time of 11:00 a.m. The respondent's counsel had been present earlier, but was not present when the respondent's case was called. The respondent stated that he did not have an asylum application ready to file because his attorney had not told him he needed it. The Immigration Judge was unpersuaded by that explanation because the respondent had been present at the prior hearing when the Immigration Judge warned that failure to file the application would render the claim abandoned. The Immigration Judge then deemed the respondent's asylum claim abandoned and ordered his removal.

The Immigration Judge did not err by deeming the respondent to have abandoned his claim for asylum. An Immigration Judge may set reasonable time limits for the filing of applications and supporting documents, and the failure to file within the time set means the opportunity to file is deemed waived. 8 C.F.R. § 1003.31(c); *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010). "The Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them." *Matter of R-R*, 20 I&N Dec. 547, 549 (BIA 1992); accord *Matter of Shamu*, 23 I&N Dec. 754, 764-65 (BIA 2005) (affirming pretermission of late application for cancellation of removal as abandoned).

In this case, the Immigration Judge set a clear deadline and warned that failure to file the application by the next hearing would render the claim abandoned. Because the deadline had been clearly set forth and the respondent did not have an adequate explanation for not having prepared an application, the application was properly deemed abandoned.

We understand the Immigration Judge's concern about the possibility that the respondent was prolonging the proceedings by pursuing a frivolous claim. Nonetheless, the Immigration Judge did not have an adequate reason to schedule the final hearing for a day on which the respondent's counsel asserted she was unavailable. In this case, however, the lack of counsel's presence did not play a factor in the disposition of the case, and therefore the respondent was not prejudiced by her absence or by the denial of another continuance. A "decision denying [a] motion for continuance will not be reversed unless the alien establishes that the denial caused him actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983); see also (b) (6)

(b) (6)

The respondent indicated that he had not prepared an asylum application during the weeks since the prior hearing. He did not give any explanation for the lack of an application other than the assertion that he did not know it was needed (Tr. at 39). The Immigration Judge rightly rejected this explanation because the directive to file it was clearly stated at the prior hearing. Counsel's presence at the hearing would not have changed the fact that the application had not been prepared for filing. The respondent has not proffered any other explanation on appeal, and has not asserted that the outcome of the proceedings would have been different if his counsel had been present.

The respondent has not moved to reopen based on ineffective assistance of counsel. He has attached evidence that he filed a disciplinary complaint against his former counsel, but he did not comply with the other requirements for making a claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Most importantly, the respondent has not provided his former counsel an opportunity to respond to his allegations and explain her absence and lack of preparation of the asylum application.

For these reasons, we will dismiss the appeal.

ORDER: The appeal is dismissed.



FOR THE BOARD

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

(b) (6)

File: A (b) (6)

February 21, 2012

In the Matter of

(b) (6)

RESPONDENT

)
)
)
)

IN REMOVAL PROCEEDINGS

CHARGES: 237(a)(B) of the Act through 101(a)(15) - you
have remained in the United States for a longer
time than permitted.

APPLICATIONS: Continuance.

ON BEHALF OF RESPONDENT: PRO SE

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

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male who is a native and citizen of Ghana. He arrived in the United States on September 12th, 2006, as a visitor and when he overstayed his visitor's visa, he was placed under proceedings when a Notice to Appear was filed with the Immigration Court on February 10, 2010. The respondent appeared for multiple hearings beginning January 4, 2011. In

July of 2011, he admitted the allegations and conceded the charge of removability. I find that the charge, therefore, has been established by evidence which is clear, convincing and unequivocal.

FACTUAL AND PROCEDURAL HISTORY

At the hearings in 2011, the respondent was represented by an attorney and that attorney stated that the respondent had married a United States citizen and that that citizen would be filing a visa petition on his behalf.¹

Based on the respondent's claim that he had entered into a bona fide marriage, notwithstanding the circumstances of it, to wit that it was entered into after proceedings commenced, the Court afforded him the opportunity to file a Velarde motion. The respondent did. The Court denied the motion in July of 2011, but continued the case.

However, at a hearing in January of 2012, the Department of Homeland Security (hereinafter DHS) presented a letter addressed to the petitioner, concerning her visa petition that she had filed on the respondent's behalf. It was addressed to (b) (6) and stated that she had filed a visa petition on the respondent's behalf on January 9, 2011, and that she had appeared on January 30, 2012, and withdrawn that petition. That

¹ This was not the respondent's first marriage. An I-130 had been filed on his behalf by another woman, (b) (6), in 2008 and deemed abandoned in 2009. After that, the Department of Homeland Security started proceedings against the respondent in January 2010. He then married his current wife in November of 2010.

was memorialized in a letter dated January 30, 2012. See the attached letter.

Nonetheless, the respondent requested at the hearing in January of 2012 to be afforded an opportunity to apply for asylum. The Court agreed to continue the case provided that the respondent file an application at today's hearing. However, the respondent has not.

The respondent has requested that the case be continued because his attorney is not present today and that he wants to proceed with asylum. The Court has denied that request for the following reasons. First, the Department of Homeland Security has opposed the request to continue the hearing both in January and also today. Second, the respondent has not given a sufficient or reasonable excuse for his failure to file the application for asylum or withholding today. Third, the respondent made the request for asylum, withholding and protection under the Torture Convention approximately five to six years after he entered the United States; he is facing the one-year bar for asylum. Fourth, there is no indication that the respondent was suffering from any disability or restriction which would have prevented him from filling out the I-589 and submitting it to the Court today, with or without an attorney. For all of these reasons, the Court has denied the request. There is another consideration and that is that the respondent's extended delays of resolution of the case based on promises

which did not come to fruition, marriages in which petitioners have withdrawn petitions; his history is one of essentially broken promises and agreements.

The respondent has declined to request voluntary departure and declined to designate a country of removal. The Court will direct removal to Ghana.

Accordingly, the following order is entered:

ORDER

IT IS HEREBY ORDERED that the respondent be removed to Ghana.

(b) (6)

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.


KRISTEN J. BELLOTTI (Transcriber)

FREE STATE REPORTING, Inc.

APRIL 11, 2012

(Completion Date)