



## Detail

Complaint Number: 754

Immigration Judge: (b)(6)

Complaint Received Date: 04/30/13

Current ACIJ  
Davis, John W.

Base City  
(b) (6)

Status  
CLOSED

Final Action  
Complaint concluded --  
corrective action already taken

Final Action Date  
03/05/13

**Past ACJIS:**

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

**Complaint Narrative:** The IJ's decision did not a full legal analysis; instead the IJ simply referred to counsel's oral arguments. Additionally voluntary departure was granted by the IJ without any discussion or qualification of the respondent.

### **Complaint History**

03/05/13 Complaint concluded -- corrective action already taken  
05/03/13 Database entry created

Sep 11, 2013

1 of 1

## EOIR FOIA Processing (EOIR)

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**From:** Davis, John (EOIR)  
**Sent:** Friday, May 03, 2013 1:29 PM  
**To:** Moutinho, Deborah (EOIR)  
**Cc:** Keller, Mary Beth (EOIR)  
**Subject:** RE: IJC Memo - (b) (6) (b) (6)  
**Attachments:** complaint intake form DJC May 13.doc  
  
**Importance:** High

Good Morning Deborah,

I have attached the most recent (b) (6) complaint intake form. It should, and the others that will likely be closed out as; "having been overtaken by intervening events. On (b) (6) the IJ in question submitted (b) (6) retirement in lieu of adverse action for failure to make the requisite improvement on (b) (6) PIP. "

Please let me know if you need anything further.

Warmest Regards,

**John W. Davis**  
**Assistant Chief Immigration Judge**  
3130 North Oakland Street  
Aurora, CO 80010

(b) (6)

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**From:** Moutinho, Deborah (EOIR)  
**Sent:** Wednesday, May 01, 2013 6:31 AM  
**To:** Davis, John (EOIR)  
**Subject:** FW: IJC Memo - (b) (6) (b) (6)

Good Morning

The attached case concerning IJ (b) (6) is being forwarded to you per ACIJ Keller's request.

Please let me know if you would like to review the ROP.

Thank you  
Deborah

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**From:** Henderson, Suzette M. (EOIR)  
**Sent:** Tuesday, April 30, 2013 1:21 PM  
**To:** O'Leary, Brian (EOIR); Keller, Mary Beth (EOIR)  
**Cc:** Minton, Amy (EOIR); Weil, Jack (EOIR); Moutinho, Deborah (EOIR); Henderson, Suzette M. (EOIR)  
**Subject:** IJC Memo - (b) (6) (b) (6)

Good afternoon,

Please see the attached IJC Memo from Chairman David L. Neal. Thank you.

R/Suzette Henderson

# Immigration Judge Complaint Intake Form

**HQ Use Only:**  
complaint #: \_\_\_\_\_  
source: first / subsequent

Date Received at OCIJ: 30 April 2013

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

complaint details		
<b>IJ name</b>	<b>base city</b>	<b>ACIJ</b>
(b) (6)	(b) (6)	John Davis
<b>relevant A-number(s)</b>	<b>date of incident</b>	
(b) (6)	3 April 2012	
<b>allegations</b>		
<p>The IJ's decision did not a full legal analysis; instead the IJ simply referred to counsel's oral arguments. Additionally voluntary departure was granted by the IJ without any discussion or qualification of the respondent.</p>		
<b>nature of complaint</b>		
<input checked="" type="checkbox"/> in-court conduct <input type="checkbox"/> out-of-court conduct <input type="checkbox"/> due process <input type="checkbox"/> bias <input type="checkbox"/> legal <input type="checkbox"/> criminal <input type="checkbox"/> incapacity <input type="checkbox"/> other: _____		

[illegible]

# Memorandum



Subject	Date
(b) (6) (BIA April 17, 2013)	April 30, 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 April 17, 2013, and relevant portions of the record in the above-referenced matter.

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

Further, the Board anticipates returning the record of proceedings for this remanded case to the Immigration Court in one week. If you wish to review the record prior to its return to the Immigration Court, please contact Suzette Henderson.

Thank you for your attention to this matter.

Attachments

Falls Church, Virginia 22041

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File: A (b) (6)

Date:

APR 17 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

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

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

APPLICATION: Cancellation of removal under section 240A; remand

The respondent, a native and citizen of Mexico, has filed a timely appeal of the Immigration Judge's April 3, 2012 decision which denied his application for cancellation of removal. The Department of Homeland Security ("DHS") has filed a brief and a motion for summary affirmance of the Immigration Judge's decision; however, we do not find that summary affirmance would be appropriate in this case. The record will be remanded.

The factual findings of the Immigration Judge are reviewed to determine whether they are "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). All other issues in appeals from decisions of Immigration Judges, including legal and discretionary determinations and applications of law to fact, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's case is governed by the amendments to the Immigration and Nationality Act brought about by passage of the REAL ID Act of 2005 (I.J. at 1-2).

The respondent has pointed to no clear error in the Immigration Judge's factual findings and we find none. Both parties agree that the respondent pleaded guilty to Theft-\$100 to \$500, (b) (6) Revised Statutes section (b) (6), a Class 2 Misdemeanor, which carried a maximum possible sentence of 1 year imprisonment (I.J. at 2; Respondent's Appeal Brief, at 3; DHS Motion and Brief, at 2; Respondent's Memorandum in Support of Cancellation of Removal, Tab K). Upon de novo review of the legal issue presented, we agree with the Immigration Judge's conclusion that the respondent did not establish his eligibility for cancellation of removal as a nonpermanent resident under section 240A(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(C).<sup>1</sup>

The respondent has been convicted of an offense under section 237(a)(2) of the Act, 8 U.S.C. § 1227(a)(2), a crime involving moral turpitude, and it was punishable for up to 1 year imprisonment, thus rendering him ineligible for cancellation of removal as a nonpermanent resident, pursuant to section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C). See *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010); see also *Matter of Cortez-Canales*, 25 I&N Dec. 301

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<sup>1</sup> The Immigration Judge's decision did not provide a full legal analysis in this case, instead simply referencing the arguments made by counsel at the immigration hearing.

(BIA 2010); *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), *clarified*. We disagree with the respondent's argument that the crime must have been committed within 5 years of the respondent's arrival in the United States (Respondent's Appeal Brief, at 7-8). *Id.* Therefore, the Immigration Judge's conclusion that the respondent was ineligible for cancellation of removal as a nonpermanent resident, based on his theft conviction, was correct (I.J. at 2). See section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C).

However, the Immigration Judge's oral decision does not contain any discussion or further orders regarding voluntary departure. Voluntary departure was discussed on the record (Tr. at 21-24), but this was done after the Immigration Judge rendered <sup>(b) (6)</sup> oral decision, and a grant of a 60-day voluntary departure period with a \$500 voluntary departure bond was included in the summary order. The Immigration Judge did not address the sentence imposed upon the respondent for his theft conviction, and whether or not such would render him ineligible for voluntary departure. See section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G); 8 C.F.R. § 1240.26(c)(1)(iii); see also 8 C.F.R. § 1003.1(d)(3)(i) (Board's limited authority regarding fact-finding). Furthermore, no further qualifying questions regarding eligibility for a grant of voluntary departure were asked on the record (Tr. at 1-24). See 8 C.F.R. §§ 1240.26(c)(1)(i)-(iv). Upon remand, as appropriate, the Immigration Judge should render a decision fully discussing voluntary departure, including factual findings and any applicable statutory, regulatory, and discretionary considerations.

During the pendency of the appeal, the respondent filed a Motion to Administratively Close Proceedings, noting that he has an approved visa petition and arguing that he is eligible for a provisional waiver of unlawful presence (Form I-601A). See 78 Fed. Reg. 536-01 (January 3, 2013) (to be codified at 8 C.F.R. §§ 103 and 212), 2013 WL 24532. The new regulations include a provision allowing for administrative closure. The DHS has filed an opposition to the motion. In light of our decision to remand this case for the reason noted above, we find it appropriate for the Immigration Judge, on remand, to consider the respondent's recently-submitted motion, the parties' positions on the motion, and any evidence submitted in support of it. See *Matter of Avelisyan*, 25 I&N Dec. 688 (BIA 2012).

Accordingly, the following order will be entered.

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

  
\_\_\_\_\_  
FOR THE BOARD



IMMIGRATION COURT

(b) (6)

In the Matter of

Case No.: (b) (6)

(b) (6)

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 4-3-12.  
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 or in the alternative to .

[ ] 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 6-4-12 upon posting a bond in the amount of \$ 500 with an alternate order of removal to MEXICO

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

[ ] Proceedings were terminated.

[ ] Other: Intermitted because

Date: Apr 3, 2012

(b) (6)

Immigration Judge

Appeal: Waived/Reserved

Appeal Due By:

5-3-12

ALIEN NUMBER: (b) (6)

ALIEN NAME: (b) (6)

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CERTIFICATE OF SERVICE

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

TO: ☐ ALIEN ☐ ALIEN c/o Custodial Officer ☒ ~~ALIEN's ATT/REP~~ ☒ DHS

DATE: 4-3-12 BY: COURT STAFF

Attachments: ☐ EOIR-33 ☐ EOIR-

28 ☐ Legal Services List ☐ Other

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Q6

REQUEST FOR PERSONNEL ACTION

(b) (6)  
COPY

1. Actions Requested Conversion to Temporary Employee NTE (b) (6) Settlement Agreement	2. (b) (6)
3. For Additional Information Call (Name and Telephone Number) (b) (6)	4. (b) (6)

5. Action Requested By (Typed Name, Title, Signature, and Request Date) (b) (6)	6. Action Authorized by (Typed Name, Title, Signature, and Concurrence Date) Brian M. O'Leary CIJ
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**PART B - For Preparation of SF 50 (Use only codes in FPM Supplement 292-1. Show all dates in month-day-year order.)**

1. Name (Last, First, Middle) (b) (6)	2. Social Security Number (b) (6)	3. Date of Birth (b) (6)	4. Effective Date (b) (6)
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FIRST ACTION		SECOND ACTION	
5-A. Code	5-B. Nature of Action	6-A. Code	6-B. Nature of Action
5-C. Code	5-D. Legal Authority	6-C. Code	6-D. Legal Authority
5-E. Code	5-F. Legal Authority	6-E. Code	6-F. Legal Authority

7. FROM: Position Title and Number Immigration Judge (Permanent)  EIR108					15. TO: Position Title and Number Immigration Judge (Temporary NTE (b) (6))						
8. Pay Plan IJ	9. Occ. Code (b) (6)	10. Grade or Level	11. Step or Rate	12. Total Salary	13. Pay Basis	16. Pay Plan (b) (6)	17. Occ. Code (b) (6)	18. Grade or Level	19. Step or Rate	20. Total Salary/Award	21. Pay Basis
12A. Basic Pay	12B. Locality Adj.	12C. Adj. Basic Pay	12D. Other Pay	20A. Basic Pay	20B. Locality Adj.	20C. Adj. Basic Pay	20D. Other Pay				
14. Name and Location of Position's Organization (b) (6)					22. Name and Location of Position's Organization (b) (6)						

<b>EMPLOYEE DATA</b>				24. Tenure		25. Agency Use		26. Veterans Pref for RIF	
23. Veterans Preference 1 - None 3 - 10-Point/Disability 5 - 10-Point/Other 2 - 5-Point 4 - 10-Point/Compensable 6 - 10-Point/Compensable/30%				0 - None 2 - Conditional 1 - Permanent 3 - Indefinite				YES NO	
27. FEGLI				28. Annuitant Indicator				29. Pay Rate Determinant	
30. Retirement Plan				31. Service Comp. Date (Leave)				32. Work Schedule	
								33. Part-Time Hours Per Biweekly Pay Period	

<b>POSITION DATA</b>				35. FLSA Category		36. Appropriation Code		37. Bargaining Unit Status	
34. Position Occupied 1 - Competitive Service 3 - SES General 2 - Excepted Service 4 - SES Career				E - Exempt N - Nonexempt					
38. Duty Station Code (b) (6)				39. Duty Station (City - County - State or Overseas Location) (b) (6)					

40. Agency Data	41.	42.	43.	44.		
45. Educational Level	46. Year Degree Attained	47. Academic Discipline	48. Functional Class	49. Citizenship 1 - USA 6 - Other	50. Veterans Status	51. Supervisory Status

**PART C - Reviews and Approvals (Not to be used by requesting office.)**

1. Office/Function	Initials/Signature	Date	Office/Function	Initials/Signature	Date
A. ELR/OGC	Rena Schenker	(b) (6)	D.		
B. OGC/xo	SOA	(b) (6)	E.		
C.			F.		

2. Approval: I certify that the information entered on this form is accurate and that the proposed action is in compliance with statutory and regulatory requirements.	Signature	Approval Date
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**SETTLEMENT AND RELEASE OF CLAIMS AGREEMENT**

This Settlement and Release of Claims Agreement ("Agreement") is entered into by the Parties: Immigration Judge (b) (6) the National Association of Immigration Judges ("NAIJ"), and the Executive Office for Immigration Review, United States Department of Justice (the "Agency") (collectively "the Parties").

**Background**

- On November 5, 2012, (b) (6) was placed on a performance improvement plan ("PIP"). The PIP detailed performance deficiencies in Job Element 1 (Legal Ability) and Job Element 3 (Accountability for Organizational Results) of (b) (6) performance work plan (PWP). The PIP was initially scheduled to be a 120-day opportunity period, but it was extended two weeks because (b) (6) was out of the office unexpectedly on sick leave during the opportunity period. The PIP opportunity period expired on (b) (6) (b) (6).
- On or around (b) (6) after reviewing (b) (6) performance during the opportunity period, (b) (6) immediate supervisor informed (b) (6) and (b) (6) NAIJ representative that (b) (6) performance had not improved to a minimally satisfactory level, *i.e.*, "Improvement Needed" level, in Job Element 1 (Legal Ability) and Job Element 3 (Accountability for Organizational Results).

(b) (6)  
EK WD RS

- Because the Agency had determined that (b) (6) performance was not at the minimally satisfactory level at the conclusion of the PIP opportunity period, the Agency was preparing to initiate a proposed removal action against (b) (6)

### Terms of Agreement

Under this Agreement, the Parties hereby agree to the following terms and conditions:

I. In consideration of the promises set forth below, (b) (6) and NAIJ hereby agree to the following undertakings:

(a) (b) (6) signature on this Agreement signifies (b) (6) voluntary conversion from (b) (6) permanent position as an Immigration Judge at the (b) (6) Immigration Court, to a temporary appointment as an Immigration Judge at the (b) (6) Immigration Court that will expire on (b) (6) (b) (6). This temporary position will be at (b) (6) current grade (b) (6) and rate of pay, and will include the benefits to which (b) (6) currently entitled. On (b) (6), this temporary appointment will expire, and (b) (6) will be separated from the Agency and the Federal service. Within 30 days of the effective date of this Agreement, the Agency will prepare a Standard Form (SF) 52 documenting the conversion date as the effective date of this Agreement. Nothing in this agreement shall be deemed to effect, alter, amend, or waive (b) (6) entitlement to receive full retirement benefits for which (b) (6) eligible upon the date of expiration of (b) (6) temporary appointment to the same extent (b) (6) would have received them had (b) (6) remained in a non-temporary employment status.

(b) (b) (6) and NAIJ voluntarily waive any and all requests for Equal Employment Opportunity ("EEO") counseling, and any complaints, grievances, charges, appeals, or claims (b) (6)

(b) (6)

907 JWD RSS  
EK JWD RS

or it has filed, claim to have filed, or may file in the future with any arbitrator, court, or administrative agency, including but not limited to Equal Employment Opportunity Commission ("EEOC") and the Merit Systems Protection Board ("MSPB"), relating to or arising from (b) (6) employment, including (b) (6) temporary appointment, with the Agency at any and all times prior to and including the effective date of this Agreement. In the event any EEO complaint, MSPB appeal, grievance, or any other claim arising out of (b) (6) employment, prior to and including the effective date of this Agreement, is filed, (b) (6) and NAIJ agree that it also is covered and resolved by the terms of this Agreement.

Additionally, this Agreement resolves all disputes, all issues, and all disagreements between (b) (6) NAIJ, and/or the Agency, arising out of or connected with the facts of (b) (6) employment with the Agency up to and including the effective date of this Agreement.

(c) (b) (6) and NAIJ, now and forever, fully and finally release, acquit and forever discharge the Agency, all present and former officials, officers, agents, or employees of the Agency (collectively referred to as "Releasees") from any and all claims, demands, rights of action, causes of action, lawsuits, judgments, claims for costs, attorneys' fees, damages, losses, expenses, or claims of any other character, in law or equity, which (b) (6) or (b) (6) heirs, executors, administrators, or assigns; or NAIJ; have brought, or could have brought, against Releasees, that relate to or arise from (b) (6) employment with the Agency, at any and all times prior to and including the effective date of this Agreement. Nothing in this Agreement shall be deemed to waive claims that any reasonable person could not have known or foreseen at the time of this Agreement, which arise after the effective date of this Agreement.

(b) (6)  
EJW JWD RS