



Detail

Complaint Number: 782

Immigration Judge: (b)(6)

Complaint Received Date: 07/18/13

Current ACIJ
Weisel, Robert D.
Past ACIJ:

Base City
(b) (6)

Status
CLOSED

Final Action
Oral counseling

Final Action Date
07/23/13

A-Numbers(s)	Complaint Nature(s)	Complaint Source(s)
(b)(6)	Legal	BIA

Complaint Narrative: Insufficient fact finding - remand to a different judge

Complaint History

07/18/13 Complaint referred to ACIJ
07/23/13 Oral counseling
07/26/13 Database entry created

Sep 11, 2013

1 of 1

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

Immigration Judge Complaint Intake Form

Date Received at OCIJ:

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"/> ____ Circuit <input type="checkbox"/> OIL <input 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 checked="" type="checkbox"/> IJC memo (BIA) <input type="checkbox"/> unknown <input type="checkbox"/> email <input type="checkbox"/> other: _____
date of complaint source	complaint source contact information
(i.e., date on letter, date of appellate body's decision) 7/10/13	name: David L. Neal address: BIA Chairman _____ _____ _____ email: _____ phone: _____ fax: _____
additional complaint source details	
(i.e., DHS component, media outlet, third party details, A-number) A (b) (6)	

IJ name		base city		ACIJ	
(b) (6)				Weiser	
relevant A-number(s)		date of incident			
(b) (6)		5/5/11			
allegations					
insufficient fact finding - remanded to a different judge.					
nature of complaint					
<input type="checkbox"/> in-court conduct	<input type="checkbox"/> out-of-court conduct	<input type="checkbox"/> due process	<input type="checkbox"/> bias	<input checked="" type="checkbox"/> legal	<input type="checkbox"/> criminal
<input type="checkbox"/> incapacity	<input type="checkbox"/> other: _____				



Memorandum

Subject	Date
(b) (6) (BIA July 10, 2013)	July 17, 2013

To

Brian O'Leary, Chief Immigration Judge

MaryBeth Keller, Assistant Chief Immigration Judge

From

David L. Neal, 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 July 10, 2013, 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 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

File: A(b) (6)

Date: JUL 10 2013

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

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

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] -
Entered without inspection

APPLICATION: Adjustment of status; voluntary departure

The respondent, a native and citizen of China, appeals the Immigration Judge's May 5, 2011, decision¹ finding him statutorily ineligible for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The Department of Homeland Security has not responded to the appeal. The Immigration Judge's decision will be vacated, and the record will be remanded to the Immigration Court for further proceedings.

The Immigration Judge denied the respondent's application for adjustment on the basis that he had not demonstrated his admissibility as he appeared likely to become a public charge pursuant to section 212(a)(4) of the Act, 8 U.S.C. § 1182(a)(4) (I.J. at 3-4). The Immigration Judge also denied the respondent's adjustment application because he failed to provide an updated medical exam as required pursuant to section 212(a)(1)(A) of the Act (I.J. at 3).²

In order for an intending immigrant to overcome the public charge ground of inadmissibility, his or her sponsor must submit an Affidavit of Support (Form I-894). An Affidavit of Support is sufficient if it demonstrates that a sponsor's

reasonably expected household income for the year in which the intending immigrant filed the application for . . . adjustment of status . . . would equal at

¹ The respondent's Notice of Appeal indicates that he appeals the Immigration Judge's May 2, 2011, decision. Because no decision in this case was issued on that date, we consider this a scrivener's error.

² Regarding the respondent's medical exam (Form I-693), the regulations provide that "the medical examination must have occurred not more than 1 year prior [to] the date of application for adjustment of status," not within 1 year of the hearing. See 8 C.F.R. § 245.5. We also observe that, although it occurred after the Immigration Judge gave (b) (6) oral decision, the respondent produced a more current Form I-693 at the hearing (Tr. at 145-48).

least 125 percent of the Federal poverty line for the sponsor's household size . . . under the Poverty Guidelines in effect when the intending immigrant filed the application The sponsor's household income for the year in which the intending immigrant filed the application for . . . adjustment of status shall be given the greatest evidentiary weight; any tax return and other information relating to the sponsor's financial history will serve as evidence tending to show whether the sponsor is likely to be able to maintain his or her income in the future.

8 C.F.R. § 213a.2(c)(2)(ii)(C). The guidelines for determining the income requirements are provided by United States Citizenship and Immigration Services as an attachment to the Affidavit of Support (Form I-864P). The effective dates for the poverty guidelines are provided at the bottom of the form. Although the regulation states that the greatest evidentiary weight is to be afforded to the sponsor's household income for the year in which the intending immigrant filed the application for adjustment of status, the regulation provides the Immigration Judge with the discretion to request more current information if necessary to the proper adjudication of the case. 8 C.F.R. § 213a.2(a)(1)(v)(B). The Immigration Judge has authority to grant or deny an alien a waiver of inadmissibility under section 212(a)(4) of the Act,³ as well as an obligation to inform the respondent of any apparent forms of relief from removal that may be available to him. *See Matter of Ulloa*, 22 I&N Dec. 725, 726 (BIA 1999); *see also* 8 C.F.R. § 1240.11(a)(2)

We find that the Immigration Judge's decision provides an insufficient basis upon which the Board can adequately conduct a meaningful review. The Immigration Judge did not include any specific factual findings regarding household size (*Compare* Exh. 13 at 26 with Tr. at 129). Moreover, no authoritative source for the income guidelines is provided in the record. Upon a review of the record and under the totality of the circumstances, we find it appropriate to remand the record to a different Immigration Judge (Tr. at 139) to determine whether the respondent is statutorily eligible for, as well as deserving of, adjustment of status.

ORDER: The Immigration Judge's decision is vacated, and the record is remanded to the Immigration Court to a different Immigration Judge for further proceedings consistent with the foregoing opinion.

Tereza L. Donarz
FOR THE BOARD

³ Factors to be considered in determining whether an alien is likely to be a public charge, in conjunction with the Affidavit of Support, include the alien's age; health; family status, assets, resources, and financial status; and education and skills. *See* section 212(a)(4)(B).

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

(b) (6)

File A(b) (6)

In the Matter of:

In DEPORTATION Proceedings

(b) (6)

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on May 5, 2011.
This memorandum is solely for the convenience of the parties. If
the proceedings should be appealed, the Oral Decision and Order will
be transcribed and will become the official opinion in this case.

☒ The Respondent's application for Voluntary Departure was
denied and he/she was ordered deported to ~~or~~ The People's Republic of China

☐ Respondent's application for Voluntary Departure was granted
to on or before _____ with an alternate Order of
Deportation to _____.

☐ Respondent's application for ASYLUM; WITHHOLDING OF DEPORTATION
ADJUSTMENT OF STATUS
VOLUNTARY DEPARTURE
was Granted/Denied.

☐ Respondent's application for ASYLUM was Granted / Denied.

☐ Respondent's request for WITHHOLDING OF DEPORTATION
was Granted / Denied.

☒ The Respondent was Granted / Denied adjustment of status.

☐ The proceedings were terminated.

☐ The Department of Homeland Security / Respondent have/has waived appeal.

☐ Appeal was reserved by Department of Homeland Security / Respondent.
Notice of Appeal to be filed no later than _____.

☐ Other _____

Date:

May 5, 2011

(b) (6)

Immigration Judge

80

LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

- () 1. You have been scheduled for a deportation hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years after the date of entry of the final order of deportation.
- () 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years from the date of your scheduled hearing.
- () 3. You have been granted voluntary departure from the United States pursuant to section 244(e) (1) of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years from the date of scheduled departure or the date of unlawful reentry, respectively.
- () 4. A final order of deportation has been entered against you. If you fail to appear for deportation at the time and place ordered by the DHS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years after the date you are scheduled to appear.

** The term "exceptional circumstances" refers to exceptional circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM DEPORTATION FOR WHICH YOU WILL BECOME INELIGIBLE

- ARE: 1) Voluntary departure as provided for in former section 242(b) of the Immigration and Nationality Act;
- 2) Suspension of deportation or voluntary departure as provided for in former section 244(e) of the Immigration and Nationality Act; and
- 3) Adjustment of status or change of status as provided for in former section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English and in Spanish. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language he/she understands.

Date:

Immigration Judge

or

Clerk of the Court: _____

MZ

THIS DOCUMENT WAS SERVED:

ALIEN/ATTY INS/DHS

IN PERSON

VIA US MAIL

VIA FEDERAL EXPRESS

☒ ☒
☐ ☐
☐ ☐

DATE 5/5/11
2013-2789

CLK

004031

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

(b) (6)

File A (b) (6)

May 5, 2011

In the Matter of

(b) (6)

Respondent

)
)
)

IN DEPORTATION PROCEEDINGS

CHARGE: Immigration and Nationality Act Section
241(a)(1)(B) in that he entered the United States
without inspection.

APPLICATIONS: Immigration and Nationality Act Section 245 and
245(a) adjustment of status to lawful permanent
resident, and in the alternative voluntary
departure.

ON BEHALF OF RESPONDENT:

ON BEHALF OF THE DEPARTMENT OF
HOMELAND SECURITY

(b) (6)

(b)(6) & (b)(7)(C) Esquire
Assistant Chief Counsel

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

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On February 3, 1998 the respondent withdrew his
applications for asylum, 243(a) withholding of deportation, and
suspension of deportation, and voluntary departure was granted
until February 3, 1999, with an alternate order of deportation to
the People's Republic of China. The respondent failed to depart

from the United States within the time period granted to him.

On June 9, 2006 the respondent filed a motion captioned Motion to Vacate Decision and Administratively Close, which was denied by the Court on August 4, 2006. On August 18, 2006 the respondent filed a motion to reopen and a request for a stay of deportation. A stay of deportation was issued on August 18, 2006. On August 22, 2006, the Department of Homeland Security filed its response to the respondent's motion to reopen. DHS opposed reopening, arguing that the motion was untimely and that the respondent was required to surrender for deportation on May 31, 2000 and failed to do so, and that he should now be considered a fugitive from justice.

In its decision dated August 25, 2006 the Court noted that although the respondent argues in the motion to reopen that his motion to reopen is not untimely because it was filed within 90 days of the decision on the Motion to Vacate Decision and Administratively Close, the Court found such argument to be fallacious. And the Court further noted that although DHS asserted that the respondent was required to surrender for deportation on May 31, 2000, this assertion was unsupported by any documentary evidence. The Court noted that it would not condone the respondent's failure to comply with the voluntary departure order, but there were factors in the case which would warrant the Court's exercise of its authority to reopen on its own motion pursuant to 8 C.F.R. Section 1003.23(b)(1);

specifically, the respondent's marriage to a U.S. citizen and three U.S. citizen children, as well as that he was suffering from cancer. And the motion to reopen was granted August 25, 2006.

This is a REAL ID Act case. The Court questions the respondent's credibility, and does not find that he has testified credibly. His testimony was frequently evasive, internally inconsistent, and inconsistent with documents offered in support of the request for relief, including amended tax returns. But in reality this case, unlike many, does not turn on credibility, credibility is not the determining factor in this case.

The respondent, as an applicant for adjustment of status, is required to provide certain documentation in Immigration Court. One, as acknowledged by counsel, is a medical which is less than one year old. The respondent has failed to meet this requirement. The last medical that I was able to find in the record of proceeding was from 2007.

Even more significantly, the respondent has failed to establish that he meets the public charge requirements. The respondent has not established that there are sufficient income and assets among the individuals involved in this case, including the cosponsor, to meet the requirements set forth in 8 C.F.R. which would establish that the respondent has met his burden and establish that he will not become a public charge in the United States. The respondent has not established that he is

statutorily eligible for adjustment of status, and the Court will deny that application for relief.

He also seeks in the alternative voluntary departure. The Court will certainly not grant that relief to the respondent, nor was he qualified for that relief by counsel. But even if he had stated that he would obey an order of voluntary departure, the Court would not find that testimony to be credible since he was previously granted voluntary departure and failed to depart. He testified that the reason that he failed to depart was that he had met his wife, and she became pregnant. The Court would note that if family is the reason that the respondent did not depart previously, certainly now he has even more family members in the United States and even less incentive to follow the Court's order. And, again, the Court does not believe the respondent, by his very own actions, has established that he would follow any order this Court issued. So it is fruitless to allow counsel an opportunity to attempt to qualify him for voluntary departure since even if he said he would depart, it is meaningless in light of his immigration history. And we all know actions speak louder than words.

Accordingly, after careful review of the record, the following order will be entered.

ORDER

The respondent's application for adjustment of status pursuant to Sections 245 and 245(i) of the Immigration and

(B

Nationality Act are denied.

The respondent was not qualified for voluntary departure but, if sought, that application would have been denied.

And the respondent is ordered removed from the United States to the People's Republic of China on the charge contained in the Order to Show Cause.

(b) (6)

United States Immigration Judge
May 5, 2011

CERTIFICATE PAGE

I hereby certify that the attached proceeding

before (b) (6) 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.


J. K. Buckley (Transcriber)

Deposition Services, Inc.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

July 6, 2011

(Completion Date)

(B

1 A. Yes.

2 Q. -- is what the cosponsor needs.

3 A. Yes, it should be 27,937.

4 Q. So we're going to depend that this person is going
5 to deplete his savings account to support this individual.

6 A. The person signed an affidavit of support, Your
7 Honor, it's a contract between that person and the Government of
8 the United States.

9 INTERPRETER TO JUDGE

10 Q. Judge, may I excuse for the bathroom?

11 A. Certainly.

12 JUDGE TO (b) (6)

13 Q. So then I guess he is statutorily eligible if he
14 gets a new medical. I would love to deny this case, quite
15 honestly, I think he's been lying to me since day one, but it's
16 very difficult to prove it. It would, I really think that this
17 is truly one of the few cases that I've ever had that I felt that
18 way about it.

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

20 Q. Oh.

21 A. What?

22 Q. We need to look at the regulations at 213(a)
23 because in order to use assets, to qualify as significant assets
24 the combined cash value of all of the assets less any offsetting
25 liabilities, and then it says must be five times the difference

Moutinho, Deborah (EOIR)

From: Weisel, Robert (EOIR)
Sent: Tuesday, July 23, 2013 12:42 PM
To: Moutinho, Deborah (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: A#s [non responsive] (Judge [non responsive] and (b) (6) (Judge (b) (6))

Deborah:

I have concluded both these matters with oral counseling. You may close them. Thanks

Robert D. Weisel
Assistant Chief Immigration Judge
26 Federal Plaza, Room 1237
New York, N.Y. 10278