



## Detail

Complaint Number: 700

Immigration Judge: (b)(6)

Complaint Received Date: 12/13/12

Current ACIJ  
Weisel, Robert D.

Base City  
(b)(6)

Status  
CLOSED

Final Action  
Complaint resolved per  
complaint

Final Action Date  
02/20/13

**Past ACIJ:**

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

Complaint Narrative: (b)(6), Board notes unprofessional comments by II.

**Complaint History**

12/13/12 Complaint referred to ACIJ  
12/13/12 Database entry created  
02/20/13 Complaint resolved per complaint 574 - 574

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

## Immigration Judge Complaint Intake Form

**Date Received at OCLJ:**

complaint source type	
<input type="checkbox"/> anonymous	<input checked="" type="checkbox"/> BIA
<input type="checkbox"/> respondent's attorney	<input type="checkbox"/> respondent
<input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.)	<input type="checkbox"/> other: _____
<input type="checkbox"/> Circuit	<input type="checkbox"/> EOIR
<input type="checkbox"/> OIL	<input type="checkbox"/> OPR
<input type="checkbox"/> DHS	<input type="checkbox"/> Main Justice
<input type="checkbox"/> OIG	<input type="checkbox"/> media
complaint receipt method	
<input type="checkbox"/> letter	<input checked="" type="checkbox"/> IJC memo (BIA)
<input type="checkbox"/> fax	<input type="checkbox"/> unknown
<input type="checkbox"/> email	<input type="checkbox"/> phone (incl. voicemail)
<input type="checkbox"/> other: _____	<input type="checkbox"/> in-person
date of complaint source	complaint source contact information
(i.e., date on letter, date of appellate body's decision)	name: <u>David Neal, Chairman</u>
<u>Dec. 10th, 2012</u>	address: <u>Board of Immigration Appeals</u>
additional complaint source details	
(i.e., DHS component, media outlet, third party details, A-number)	
<u>A (b) (6)</u>	email: _____
	phone: _____
	fax: _____

IJ name	base city	ACIJ
(b) (6)		Weiser
relevant A-number(s)	date of incident	
(b) (6)	Feb. 24 <sup>th</sup> , 2011	
allegations		
The Board "Found certain of the IJ's statements regarding the respondent's past relationships and his cognitive abilities to be unprofessional."		
nature of complaint		
<input checked="" type="checkbox"/> in-court conduct	<input type="checkbox"/> out-of-court conduct	<input type="checkbox"/> due process
<input type="checkbox"/> incapacity	<input type="checkbox"/> other: _____	<input type="checkbox"/> bias
		<input type="checkbox"/> legal
		<input type="checkbox"/> criminal

Rev. May 2010

date	action	initials
12/13/12	sent email to MTK (see	RDL
	Attached)	

**Weisel, Robert (EOIR)**

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**From:** Weisel, Robert (EOIR)  
**Sent:** Thursday, December 13, 2012 3:15 PM  
**To:** Keller, Mary Beth (EOIR)  
**Subject:** A# (b) (6)

Mary Beth:

I received this case as part of my daily IJ Board Decisions. The panel referred the case to a different IJ commenting, "We find certain of the IJ's statements regarding the respondent's past relationships and cognitive abilities to be unprofessional." Undoubtedly, this will morph into a Chairman's referral. We had a recent discussion regarding possible action to be taken regarding a similar situation with the Judge in another case (A# (b) (6)). Please see my e mail to you dated, October 16<sup>th</sup>, 2012 to refresh your recollection. I think we should consider both cases as one for purposes of taking action.

Bob

Robert D. Weisel  
Assistant Chief Immigration Judge  
26 Federal Plaza- Suite 1237  
NY, NY 10278



# Memorandum

<b>Subject</b>	<b>Date</b>
Matter of (b) (6) (BIA December 10, 2012)	December 13, 2012
<b>To</b> Brian O'Leary, Chief Immigration Judge MaryBeth Keller, Assistant Chief Immigration Judge	<b>From</b> David L. Neal, Chairman
<p>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 December 10, 2012, 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.</p> <p>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.</p> <p>Thank you for your attention to this matter.</p> <p>Attachments</p>	

Falls Church, Virginia 22041

File: A (b) (6)

Date: DEC 10 2012

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

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

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 under section 240A(b)(1)

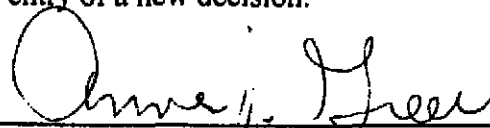
The respondent, a native and citizen of Guatemala, has timely appealed the Immigration Judge's February 24, 2011, decision. The respondent appeals the denial of his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The record will be remanded for a new hearing before a different Immigration Judge.

The respondent's application for relief from removal is governed by the amendments to the Immigration and Nationality Act brought about by the passage of the REAL ID Act of 2005. See section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4). We review an Immigration Judge's findings of fact, including credibility findings, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all questions of law, discretion, and judgment and any other issues in appeals from decisions of Immigration Judges. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent claims that the Immigration Judge was biased against him, as evidenced by unfounded assumptions and inappropriate remarks. We find certain of the Immigration Judge's statements regarding the respondent's past relationships and his cognitive abilities to be unprofessional (I.J. at 13-14, 16-17). Furthermore, we agree that the Immigration Judge improperly injected (b) (6) past experience to make assumptions about what occurred during the respondent's prior deportation proceedings in (b) (6). Given these circumstances, we find that remand of proceedings for a new hearing before a different Immigration Judge is warranted.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for a new hearing before a different Immigration Judge and for the entry of a new decision.

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

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

(b) (6)

File A (b) (6)

February 24, 2011

In the Matter of

(b) (6)

Respondent

)  
)  
)  
)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration Act -  
an alien present without being admitted or  
paroled.

APPLICATIONS: Section 240A(b)(1) of the Immigration Act -  
cancellation of removal for a non-resident. In  
the alternative, voluntary departure under Section  
240B of the Immigration Act under the rules set  
out at 8 C.F.R. 1240.26(c).

ON BEHALF OF THE RESPONDENT:

ON BEHALF OF THE DEPARTMENT  
OF HOMELAND SECURITY:

(b) (6), Esquire

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

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is an adult man from  
Guatemala. The respondent was placed in removal proceedings  
through the Notice to Appear, which is Exhibit 1 in this  
proceeding. It was issued February 6, 2005 by Immigration  
Officers in (b) (6), when the respondent apparently was  
encountered there by chance, apparently while traveling back and  
forth from (b) (6) to (b) (6).

That Notice to Appear alleges the respondent is a native and citizen of Guatemala and that he arrived near (b) (6), (b) (6) on or about July 4, 1996 without being legally admitted.

The respondent filed a motion to change venue which is Exhibit 2 in the record. It was submitted by respondent's present counsel. The Notice to Appear does not make any assertion that the respondent was not properly served with that Notice to Appear and the Court does find that there was proper service in terms of delivery of the document to the respondent. Page 1 of the motion to change venue alleges that the respondent is an alien who entered the U.S. on or about February 6, 2005. On page 2 of the motion to change venue, there is a more formal set of pleadings listed by number, and there it is stated that the respondent is a native and citizen of Guatemala who arrived in (b) (6) approximately April 2, 1989 without being admitted or paroled. And there is a statement that the respondent concedes he is subject to removal as charged. It further states that the respondent will seek cancellation of removal and voluntary departure.

The Court would note that there is no claim there in the motion to change venue that the respondent is eligible for a special form of relief under the NACARA provisions and respondent has never in fact submitted an application seeking to qualify for such relief.

The respondent's original application for cancellation



of removal is in the record as Exhibit 3. It was filed with the Court in approximately August 2005. There it alleges an entry through (b) (6) August 3, 1989 and also alleges that the respondent has never departed the United States since that entry. That notation is made on page 2 of the application for cancellation.

Exhibit 4 is a group of supporting documents submitted with that.

Exhibit 5 is the revised cancellation application filed with the Court more than four years later in November 2009 and signed by the respondent under oath on December 22, 2010. In that application, Exhibit 5, the typed form indicates the same entry date in August 1989 and also in the typed form states that the respondent has never departed from the U.S. since this arrival in 1989. However, this was corrected on the date of signing to be consistent with some statements that had been made on the record during the period between 2005 and 2010 which indicated that the respondent was claiming he had in fact left the country once in 1996.

Exhibit 5 was corrected on the record when the respondent signed it to show that he left the U.S. in December 1996 and returned during the same month, for an estimated 29 day trip to Guatemala to visit his sick father.

The Court does find that the pleadings in Exhibit 2, the motion to change venue and also various statements made on

the record by respondent, through counsel, during discussions at the master calendar hearings before Immigration Judge (b) (6) and then eventually Immigration Judge (b) (6), are in fact clear, convincing evidence that the respondent is subject to removal. That is, he is not a U.S. citizen. He is a native and citizen of Guatemala and he is present in the U.S. because he arrived here without being legally admitted or paroled.

A separate issue is what was the date of the entry or whether there was more than one entry. Which was the last entry, et cetera, as reflected in the Court's discussion so far.

This issue of the date of entry is left in doubt by the respondent's varying statements on that issue and some other evidence.

However, the date on which the respondent last entered the United States is immaterial to whether he is subject to removal on the charge laid against him, so the Court does sustain that charge.

Since the respondent is subject to removal, he has the burden of proof to show that he qualifies for some form of relief for removal. He must do so by a preponderance of the credible evidence. His relief applications are subject to the REAL ID Act which took effect in mid-2005, approximately three months before the respondent filed his first application for cancellation of removal.

Under the REAL ID Act, the respondent does not benefit

from any presumption that he is credible in presenting his testimony. He must establish this through his presentation of the case as a whole. Further, the REAL ID Act allows the Court to assess the respondent's credibility considering a variety of factors, including minor or collateral apparent discrepancies in the statements presented by the respondent, through testimony and written documents and other sources.

The Court further notes that the respondent seeking relief under the REAL ID Act has an affirmative duty to corroborate his case with evidence that he may be able to obtain, even if he feels that his own testimony in itself would be sufficient to justify a grant of relief.

In the present case, the respondent has had five years or actually more than five years to obtain and submit corroborating evidence since he filed his application for relief.

The Court would again reiterate there is no claim to relief under the NACARA provisions for this respondent. And it does not appear that he would in fact qualify for such relief. Reasons were stated on the record.

For the respondent's application for cancellation of removal under Section 240A(b)(1) of the Immigration Act, he must establish four relatively objective factors and also show that he deserves the relief he is seeking as a matter of discretion, which is a more subjective, less structured area of inquiry.

The first requirement under sub-division A of the

statute is that the respondent show he has been continuously physically present in the United States for a period of 10 years before service of the Notice to Appear in February 2005. However, this continuous physical presence may include brief absences, subject to a rule of no absence more than 90 days. No total absences more than 180 days. In other words, the respondent has to show that he has been present in the U.S. almost all the time since February 1995.

The respondent does claim that he left the U.S. for 29 days in 1996 and, therefore, he must show that he has prior physical presence in the United States before his alleged departure in 1996, for the reasons the Court will explain.

The second requirement under sub-division B of the statutory provision is that the respondent show he has been a person of good moral character for the last 10 years. This 10 year period is not the same period as the 10 years of continuous presence. The good moral character issue extends through the pendency of the application for relief. The Board of Immigration Appeals has held the 10 years of good moral character have to be for the 10 year period immediately before the final administrative decision. For this Court's purposes, it means the respondent needs good moral character since February 2001.

The third requirement under sub-section C of the statute is that the respondent not be subject to removal for certain criminal and related or similar issues. On this point,

the Court believes there is no issue raised by the record and, therefore, the Court does not expect to discuss this in detail.

The fourth requirement under sub-Division D of the relief provision is that the respondent must establish "exceptional and extremely unusual hardship" to a qualifying relative. That is to say, a close relative who is a citizen or lawful permanent resident of the United States.

The respondent's three potential qualifying relatives are three children born in the U.S. The first two are sons born in November 1992, now 18 years old and a second son born in January 1994, now 17 years old. The third qualifying relative is a daughter born in the U.S. in August 2006, currently 4 years old. That daughter is apparently in Guatemala at this time with her mother, who the respondent is involved in a relationship with, according to his testimony, but who does not have legal status in the U.S. and, therefore, cannot be a qualifying relative herself. The respondent has testified that the mother and daughter left the U.S. in 2008 when the daughter was about 2 years old and have been in Guatemala since that time.

According to the respondent's testimony, the mother of his daughter is actually a citizen of El Salvador, but the respondent testified that this woman was in the process of obtaining or trying to obtain some type of status in Guatemala, apparently based on her relationship to the respondent.

The issue of the exceptional and extremely unusual

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hardship is assessed through the guidance of the published the Board of Immigration Appeals and the (b) (6) Circuit Court of Appeals. In this area, the principle significant published decisions are a trio of decisions from the Board of Immigration Appeals. The names of the cases are Matter of Monreal, Matter of Recinas, and Matter of Andazola. I do not have the citations available at the moment, but I note these are well-known to the parties and the Board of Immigration Appeals.

The three decisions all concerned women from Mexico facing removal proceedings who had U.S. citizen children, so they are somewhat similar to the factual background of the present case.

In that series of decisions, the Board explained the effect of the cancellation statute's requirement for a showing of exceptional and extremely unusual hardship to a qualifying relative, in particular, as in this case, to a U.S. citizen child.

This discussion draws in part on the background or the statutory history of cancellation of removal for a non-resident. It clearly is a successor form of relief to the previous suspension of deportation under Section 244 of the Immigration Act, which was amended in 1996 to eliminate suspension claims in new cases and instead create the cancellation of removal form of relief.

Congress made a number of changes when it replaced one

statutory provision with another, and the Court believes it is fair to say that either all or almost of the changes in question made the relief more difficult to qualify for. It is impossible for the Court to believe that this was not done deliberately by Congress so as to make such relief less available or more difficult to qualify for.

The differences include the obvious change in the requirement of physical presence from seven years to 10 years. The equally significant change that the issuance of the charging document cuts off credit for future time spent in the United States after the case has begun.

The requirement that hardship be shown, changed from a requirement of hardship to either the relief applicant or the qualifying relative and made relief to the qualifying relative a requisite, whereas relief to the applicant is relevant only to issues of discretion. And furthermore, the Congress changed the terminology concerning relief from "extreme hardship" to the current standard of exceptional and extremely unusual hardship.

In the trio of decisions I have referred to, the Board stated what is obvious once it has been stated, that extremely unusual hardship, by its nature, cannot be the type of hardship which most qualifying relatives would experience if a close relative is removed or deported from the United States. Therefore, extremely unusual is an indication by Congress that the type of hardship commonly experienced as the result of the

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deportation of a close relative, would not be sufficient. And given that the hardship has been raised from the "extreme" level to an even higher level, it seems clear that Congress was setting the bar very high for this form of relief.

In applying the statute to the facts in a particular case, this Court is required to honor the intent of Congress as well as possible and not to blur the question of eligibility by describing relatively common forms of hardship as somehow "extremely unusual". And the Court tries to decide such cases in light of that rule.

In the (b) (6) Circuit Court of Appeals, the (b) (6) Circuit believes that it is unnecessary and in a sense, incorrect, for an Immigration Judge to go to the issue of discretion and consider the cancellation application on the issue of discretion, if in fact the respondent has not met his burden of proving these first four more objective requirements for relief. See (b) (6)

(b) (6)

(b) (6). The (b) (6) Circuit sees this type of adjudication as a two part process.

The Court will follow that advice from the (b) (6) Circuit. However, the Court will note the following. There are obvious positive discretionary factors in the case, such as the respondent's U.S. citizen children, respondent's apparent history of honest work in the United States, supporting his relatives, et



cetera.

On the other hand, the Court believes there are significant issues about discretion in reference to the history of the respondent's dealings with the Immigration law system in the United States. If the respondent is eligible at all for cancellation of removal, then the Court tends to think that, that relief should be denied as a matter of discretion for two reasons.

First, the respondent in this case, I believe has done exactly what Congress seemed to be trying to legislate against when it made the issuance of a charging document in a deportation or removal proceeding, an event which would prevent an alien from accruing credit for further time spent in the United States. This concern of Congress was apparently based on the belief of Congress that aliens were engaging in dilatory tactics, failing to comply with requirements of the Immigration law in order to delay the resolution of their legal matters until they would have seven years in the U.S. So Congress saw it not only as dilatory, but in a sense, subverting the system by allowing people to drag out their case until they met a requirement that they had not met before.

The Court believes that the history of this case does appear to actually represent such a case. The Court will explain the reasons for that in the decision.

The respondent, on the other hand, does not show the

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type of extremely appealing or critical discretionary issues which might outweigh the negative issue just mentioned. For example, the respondent does not have a relative suffering from a major health crisis that cannot be treated in another country. The respondent does not have a proven record of very strong contributions to society through volunteer work, involvement in neighborhood organizations, et cetera. There is no other factor about the respondent's case on a discretionary level which is extremely strong.

For these reasons, as I say, the Court believes that the discretionary outcome of the case would be quite questionable.

I do decide voluntary departure as an issue of discretion as well. However, it is a less valuable form of relief and it is not premised upon a lengthy period of time in the U.S. So, I believe that applying the discretionary issue to the voluntary departure eligibility is really a different issue than it is in reference to cancellation.

As far as the summary of the Court's findings about the respondent's eligibility for relief, I would state them as follows.

As mentioned, I do not see any reason why the respondent is removable for criminal or related grounds and, therefore, I will not discuss that requirement further.

The Court is assuming, for the sake of this decision,

(S) (S)

that the respondent has the necessary good moral character for the past 10 years. He does not have a record of criminal convictions, nor is there independent evidence of vicious habits, bad behavior, et cetera.

However, if further hearings are required at some point, the Court would want to have more information about certain aspects of the respondent's background and activities.

And the issues that I would be curious about at that time, which I have set aside for the time being, is whether the respondent has been deliberately deceptive in the course of his applications for relief before this Court. Whether we could have clearer information about the respondent's marital history. The respondent has been involved apparently in relationships with three different women during his time in the United States, and tells us that he was legally married to a citizen. Lived with her for only a very short period and then began living with the mother of his two sons who is now deceased. The respondent states he did not obtain a divorce from the U.S. citizen wife for many years, because he and the mother of the two children had no interest in being legally married. The Court is not actually worried about the fact that they lived together without a marriage certificate, but the Court is concerned about the lack of information we have about the actual substance of the marriage to the U.S. citizen, how long it lasted, whether the respondent was involved in adultery during a time he had an ongoing

relationship with his U.S. citizen wife, et cetera. Those are different matters that I do not think need to be dealt with at this time, but would be more significant to the Court if other issues were resolved in the respondent's favor.

Further, the Court would say that I would like more information, other than the respondent's testimony, about what circumstances led his U.S. citizen daughter and her mother, who is now the respondent's second wife, to go to live in Guatemala. This question is raised by the lack of objective evidence about the whereabouts of that woman, whereabouts of the daughter, the reasons given for the woman's departure from the U.S., which was that she had a son in El Salvador who was experiencing problems. And the Court actually has almost a total absence of information except the respondent's words about the whereabouts and situation of the woman and the daughter.

The Court would further say that it has reached the conclusion that the respondent is "not credible", by which I mean not that everything that he says is not true, but rather that what the respondent says is not established simply because he says it and needs to be in some other way corroborated, either by other evidence or at least by very plausible common sense reasoning that this must be the way something happened.

The respondent has been noticeably inconsistent on an important issue, which is the date of his last entry to the United States. Was it February 2005, as stated on page 1 of the

motion to change venue? Was that simply a rote statement by respondent's counsel without consideration? Did the respondent last arrive in the U.S. in July 1996 as alleged by the Notice to Appear, apparently not reflected by any record of the Immigration Officers and presumably based on some statement the respondent made when he was interrogated in (b) (6). Or, did the respondent last arrive in the United States in December 1996 as he testified before the Court and stated in his correction to the final application for cancellation of removal? Or, has the respondent been in the U.S. continuously without any absence since 1989? The Court believes the respondent has given poor explanation for these discrepancies.

The February 2005 date is the easiest to set aside, because it could just be the result of the attorney assuming that the issuance of the Notice to Appear was the date when the respondent arrived in the U.S.

On the other hand, the respondent has been evasive, in the Court's view, as to the prior deportation proceeding that began in (b) (6) in 1989.

As reflected in Exhibit 11, the respondent has made statements in the course of these proceedings that he did not receive the 1989 Order to Show Cause or that if he received it, he did not understand what it was. He did not know it started a deportation case against him. The respondent has made statements that he did not attend any deportation hearing in reference to

that case, whereas in other testimony, the respondent has eventually admitted that he knew he had a deportation case from 1989. That he did not investigate the outcome because he was afraid of what he would find out. That he thought it was possible that an order of deportation had been issued for him and that he essentially did not want to know that, so he did not look into it. And eventually admitting in his testimony that he did go twice to an Immigration Court at a detention center in (b) (6) (b) (6) where a Judge explained things to a group of detainees together, through an interpreter, and that the respondent was twice given more time to get an attorney to represent him in that case. So, the respondent has given us a "cover story" of not really understanding anything about some prior problem with Immigration in 1989, but has eventually given statements that indicate he knew he was in a deportation case. He did go to court. He was told to come back on a future date. The Judge advised him to get an attorney, et cetera.

The Court would also note in reference to this case that the plausibility of the respondent's denials of understanding that he had a deportation case are drawn into severe question by the fact that the respondent spent an extended period of time in a detention center, which was an Immigration detention center only, and it was in (b) (6). This Court has worked in that location for five years. And, in fact, was an Immigration Judge in that area during the time the respondent was

detained in 1989, although I did not have any involvement with the case. So, the idea that a person spent a substantial period of time in an Immigration detention center, went to court twice, heard a Judge talk to him through a Spanish speaking interpreter, but did not understand he had a deportation case is, in the Court's view, close to the point of being totally unbelievable, even if the person had more cognitive problems than the respondent seems to have. So, as far as the Court is concerned, this has a bad effect on the respondent's credibility. It appears that the respondent is willing to make up a story for himself, which he may have at some point begun to believe to some extent, and repeated without content, reason or plausibility, until he is actually pinned down about details that would indicate the story makes no sense. And that is of significance and concern to the Court when considering the respondent's statements about other matters which the Court has no independent evidence on. And one example being the current situation with the respondent's U.S. citizen daughter and the mother of that daughter who the respondent married, apparently, around the time she was going to leave the U.S.

The Court also believes that corroboration is noticeably lacking in this case to make up for the weaknesses in the respondent's credibility, and the Court will mention some of the items which raise questions about corroboration or the lack thereof.

The Court notes that the respondent is telling us he was outside the U.S. for a period of time in 1996. He is telling us that it was less than 30 days. And in his sworn statement and testimony, indicates it was from the beginning of December to the end of December of that year.

For reasons unknown to the Court, the Notice to Appear reflects the idea that the respondent arrived on or about July 4, 1996. Almost the opposite time of year from December. Obviously summer in (b) (6) is different from December. And the explanation for this is unclear to the Court. More importantly, it seems to the Court that there is a gap in corroborating documentation to reflect the respondent's physical presence in the United States in 1996.

For example, we have a photocopy of a tax return for the respondent for the year 1995, but we do not seem to have any tax record relating to 1996. We do have a letter from an employer which seems to indicate that the respondent was working in the U.S. at that time, but it is far from clear that this letter is based on records that the employer would actually remember 14 years later, whether the respondent was there continuously during a particular year in the mid-90s.

Furthermore, in Exhibit 6D, page 11, item 11, we have an immunization record for the respondent's son (b) (6) who had been born in 1992. And that shows a series of dates, reflected as month, day and year, when the son received various



vaccinations or immunizations at some health clinic in the United States.

There is only one date there from 1996, and for reasons I do not know, the date is not recorded in the month, day and year format. Instead, it simply shows that the respondent received a certain vaccination in the year 1996 and then there is a word written next to it which is illegible. Perhaps two words.

The Court thinks that this may reflect that the clinic was simply told that (b) (6) had that vaccination in 1996, but for some reason did not give the vaccination itself, does not have any specific record to show that the vaccination was given, et cetera. And this makes the Court wonder whether that vaccination might have been given in a different location, possibly outside the United States.

Is that speculative on the Court's part? Yes, it is. Why is the Court speculating? Because I do not have, apparently, a piece of paper that helps to show that the respondent really was in the U.S. for 11 months out of the 12 months in 1996.

This is an example of the weakness in corroboration in general.

However, there are more specific items of corroborating evidence that could be presented, which are not in the record and for which the respondent has no good explanation for their absence.

First, the respondent has based his arguments that he

was not aware of the deportation case or did not know about the hearing that was held in January 1990, at which a Judge ordered him deported, or did not receive a notice for that on the idea that he gave the address of a cousin in (b) (6) when he was released from custody, as the place where hearing notices should be sent. But that the cousin told him she never received any hearing notice and that she herself moved from that home within two months more or less after the respondent provided the address to the Government. The respondent testified that he himself thought it was reasonable to suppose that he would have received the hearing notice within two months after he bonded out, which seemed to be a suggestion that the Government had been remiss in not sending the notice for the hearing sooner so the respondent could receive it before his relative moved away from that address.

Leaving aside the logic of that testimony, the Court believes that the respondent has given no good explanation for the lack of any statement from the cousin in question, who supposedly could say that she never received a hearing notice. She never told the respondent he had received a notice from the Immigration Court, et cetera. The respondent said that cousin still lives in (b) (6), the same general community he lives in and that he could locate her and ask for such a statement, but he has not done so.

The Court notes that this cousin apparently is the

person in whose name and possibly from whose funds, the bond was posted for the respondent. So that cousin would have presumably some interest in having the respondent attend hearings when ordered or at least would be keeping track of the situation.

The Court would say also that the respondent's testimony on the issue of his address is somewhat evasive and equivocal. His attorney elicited statements that he had provided this address and the attorney asked about the address where the respondent had gone to live. But, in fact, the respondent has indicated he never went to live at that address, even for one day with his cousin. Nor has he indicated that he has ever tried to advise the Immigration Court or INS of any change in his address.

The respondent tells us he has a brother in (b) (6) (b) (6) who has temporary protected status, though we have no statement from this brother. And I believe we have no proof that there is a brother with temporary protected status in the U.S. That brother is not a qualifying relative, but obviously, we would expect that a brother living in a foreign country with this respondent would keep in touch enough with the respondent that he would be aware of when the respondent has lived in the U.S., whether the respondent has left and when, and other things about the respondent which the respondent tells us are true, but which he has not corroborated through a statement from his brother.

Likewise, the respondent says he has a sister in (b) (6) who is a lawful permanent resident, but the respondent

has not presented any statement from his sister to corroborate any aspect of his claim.

The respondent has his wife who he married in 2006 in the U.S., according to his testimony, and who went to Guatemala in 2008 with their daughter and who apparently has not returned. The respondent indicates he is in contact with that wife. He sent money to her. They discuss various matters, et cetera. We have no statement from this woman. We have nothing to show it could not be obtained. This would be relevant both to things she knows about the respondent during the time she knew him in the U.S., but also relevant to the issue of conditions in Guatemala, since she traveled there more or less of her own free will according to the respondent and brought her daughter with her and has lived there for more than two years at this point. A statement from this woman as to conditions in Guatemala as it has a bearing on her in daily life, would be useful information presumably to corroborate the respondent's testimony. The respondent, of course, is telling us he has only lived in Guatemala for less than one month in the last 21 years.

Further, the statement of this woman would be important as to the future plans of the couple for themselves and the children, considering her as a stepmother of the two boys. And without a statement from this woman, it is unclear what plans there are, what intentions there are, et cetera. The respondent, for example, testified that his wife is in the process of

obtaining status in Guatemala, presumably through the respondent being a citizen there, yet, is this a reflection of her plan to live there indefinitely? Is it something she had to do to stay there for a short time, et cetera.

This issue is viewed in conjunction with the respondent's testimony that the wife is living in a house which he and she constructed, so to speak, on land that he owns in Guatemala, having inherited it through his father. The respondent did specify that the land is probably not in his name legally in the land records in Guatemala, but he agreed that everyone in his family would understand that he is in fact the owner of that land. The respondent indicated that he had spent at least \$5,000 obtaining and improving that property. And his testimony as to his reasons for wanting to have a home of this type in Guatemala when he is seeking to remain in the U.S. indefinitely, a plan that he apparently began before he was in removal proceedings or at about the same time the removal proceedings started, is obviously relevant to assessing the respondent's claims that it would be a great hardship to his family for them to return to Guatemala with him.

The Court would also note in reference to this, that although the records in the case are somewhat hard to account for, the respondent stated that his marriage certificate to the woman in question is currently in Guatemala. However, the Court would note that at Exhibit 6D, item 38 at page 40 of that

exhibit, we have an item described in the table of contents as the "marriage certificate". But actually, it is a receipt for a license to marry and there is no copy of the registered marriage certificate or completed marriage license signed by someone authorized to conduct a marriage. The Court would say that, in fact, we have the respondent's testimony that he is legally married to the woman in question. We do not have clear evidence that they actually completed the ceremony, nor is it clear to the Court why the marriage certificate is only in Guatemala, since undoubtedly the respondent could obtain a certified copy here in the U.S. by going to the clerk's office.

As to the issue of 10 years continuous presence, the Court believes the respondent has failed to establish this by a preponderance of the credible evidence.

The Court has previously referred to the existence of a prior Order to Show Cause issued in August 1989 by the Immigration Service in (b) (6). The respondent has given somewhat equivocal or changing answers as to whether he ever left the U.S. since he was served with that Order to Show Cause. If he had not left the country since 1989, then he would not have accrued credit for time to seek suspension of deportation or cancellation of removal in this relief application and he would not be eligible for such relief, because the issuance of the charging document was later made to constitute a cutoff of time and this does apply retroactively, so to speak.

The respondent has alleged a departure after being served with the Order to Show Cause in 1989, leaving aside the issue that he apparently executed an outstanding order of deportation when he left the U.S. voluntarily in 1996. The Court believes the respondent's prior Order to Show Cause prevents him having the necessary 10 years of continuous physical presence for the sake of this application for cancellation of removal.

The Court believes the reason is that since the respondent's last claimed re-entry date to the U.S. is in December 1996, which is less than 10 years before the issuance date of the Notice to Appear in this case, he would have to have a period of time previous to the entry in December 1996 in order to fill out the 10 year required period.

But the Court believes that all of the time that the respondent previously had in the U.S. is the period between August 1989 when he was served with the Order to Show Cause, apparently a few days after entering the U.S., and the departure he claims in December 1996. All of that period would not count for the purpose of the continuous physical presence requirement, because it was essentially all subject to the cutoff effect by the service of the Order to Show Cause in August 1989. The respondent is not claiming he was ever in the U.S. before that time, leaving aside the issue of the gap in time.

The Board of Immigration Appeals, in the Court's view, has reached the same conclusion in a slightly different factual

context in its decision in Matter of Cisneros-Gonzalez, 23 I&N Dec. 668 (BIA 2004). In the Cisneros case, the Board held first that the service of the charging document stops the alien from accruing further credit for more time spent in the U.S. after that date. And second, the Board held that an alien can begin a new period of continuous presence by returning to the U.S. on some time after having been served with the Order to Show Cause or charging document in the first case.

But, as mentioned in this case, the respondent had no time in the U.S. before the first Order to Show Cause was served, except an inconsequential few days. And, he does not have a full period of 10 years between his date of claimed return, December 1996 and the issuance of the Notice to Appear in February 2005.

The Cisneros case involved an alien who had been served with a charging document, had been ordered deported and was actually deported by the Immigration Service, who then returned to the U.S. almost immediately and then was in the U.S. for a period of more than 10 years. Under that scenario, the Court believes it would be possible for the period from the second arrival until the issuance of the new charging document or the application for relief, to fulfill the 10 year continuous presence requirement. However, the difference in this case and the Cisneros case is the factual difference that this respondent was not back in the United States on a second arrival for a full period of 10 years before he was placed in proceeding.



For this reason, the Court does hold that the respondent is ineligible for the relief he is seeking as a matter of law.

The Court further notes that issues as to notice of the hearing in absentia, whether the respondent was aware of the nature of the deportation proceedings fully, whether he actually attended a deportation hearing while he was in detention, these issues are less important because it is the service of the Order to Show Cause rather than the issuance of the in absentia order of deportation that affects the continuous presence for the respondent.

As to the issue of the exceptional and extremely unusual hardship to a qualifying relative, the Court also believes the respondent has failed to prevail on this issue. Again, the Court emphasizes the respondent's burden under the REAL ID Act, which I believe is material in this case, but I frankly think the respondent would not have met his burden on this issue even under the prior standards for evaluating a relief application.

As far as the qualifying relatives, the Court believes it is obvious that the daughter in Guatemala has not been proven to be a qualifying relative who would suffer the type of exceptional and extremely unusual hardship that would be a basis for relief. The daughter was apparently taken to Guatemala when she was about 2 years old, by her mother, and apparently with the

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consent of the respondent. And the respondent seems to, from his testimony, still be on good terms with the mother of the daughter. There is nothing to indicate this was a child custody dispute or something of that nature, except for the lack of any evidence from the woman in question. Apparently, the woman and the daughter are living on land that the respondent owns, as mentioned previously. The idea that the respondent would allow his daughter to go to Guatemala or cooperate in that regard, if he thought that it would be an exceptional and extremely unusual hardship for her to be there in the foreseeable future, does not really make sense. It might even raise questions about the respondent's good moral character. But, at best, it seems to be a theoretical possibility that at some time in the future, the daughter would experience some type of extreme hardship that would allow the respondent to qualify for such relief.

To reach a decision on this issue in favor of the respondent when we do not have a statement from the mother of the child, about the child's current circumstances, would be even more unjustified.

As far as the respondent's two sons, they are approximately one year and one grade apart in high school. Both are going to finish high school in the U.S. in the foreseeable future. Hardship to one or the other seems to be essentially the same. I do not see any item or fact in the case that indicates the hardship would be much different for one rather than the

other. One might think that the older son would potentially have a more extreme hardship or perhaps might look at it as more of a hardship for the younger son, depending on circumstances. But hardship seems to be essentially the same for each of them. Neither has a serious health issue. Neither seems to have some other unique factor. Something in particular about that son which raises a special issue for that person.

The Court notes that the statute requires a showing of exceptional and extremely unusual hardship to a qualifying relative. The Court cannot accumulate lesser degrees of hardship to two or more relatives, except insofar as it may have a bearing on the issue of discretion. The respondent needs to show that at least one qualifying relative will suffer the exceptional and extremely unusual hardship, not that, for example, five qualifying relatives will each suffer a substantial amount of hardship and then add that together to meet the statutory requirement.

The factual question is whether the respondent has shown exceptional and extremely unusual hardship would occur to either healthy son who is close to graduation from high school while this case is likely to be pending before the Board of Immigration Appeals.

The Court believes the answer is no. The respondent's application for cancellation states that the sons would not go to Guatemala if the respondent is removed from the country.

Although, respondent's attorney asked him a series of leading questions about what the hardship would be to the sons if they did go to Guatemala with the respondent. The respondent's answers on this point were, at best, equivocal.

If the sons did go to Guatemala with their father, it would seem they would be old enough as a practical matter and as a legal matter to return to the U.S. on their own within a short period of time. The sons are close to the age where they might be living on their own, not that they necessarily would, but they legally could and they might be able to. There are certainly many 18 and 19 and 20-year-olds who live independently from their parents for one reason or another. Further, the Court would note that the sons are coming close to the age of 21 where they will not even qualify as children of the respondent as defined in the Immigration Act for the purposes of being qualifying relatives.

However, the Court does not mean to suggest that exceptional and extremely unusual hardship that might result to the son would be disregarded because it would only be a qualifying relative for a short period of time. I do not mean to suggest that. But these sons are, in fact, even under the recognition of the Immigration law, close to the age where we expect children to be more independent. Parents may wish to support their children until a later age, but many children are not.

The respondent has never explored the possibility of

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his sons staying in the U.S. for a period of time with his permanent resident sister or his brother who lives in the same area and has temporary protected status. I know that status is temporary, but since it has existed for citizens of Guatemala for at least 10 years, it seems to me that it is "temporary" for the foreseeable future. The sons receive Social Security payments based on their relationship to their mother who died approximately eight years ago. The sons get good grades. Apparently behave well in school and in many respects seem to have the basic qualifications to make a successful life for themselves.

In the alternative, the respondent's conclusory testimony about the conditions the children would face if they went to Guatemala, where it is noted he has not lived for over 20 years, is not sufficient evidence to establish by a preponderance of the credible evidence that if the sons did go to Guatemala, this would result in exceptional and extremely unusual hardship. Especially considering that the respondent has a small piece of land, a house and relatives there. The boys' stepmother is there. Their little sister is there, et cetera.

The respondent's and sons' testimony about the hardship of going to Guatemala included testimony about how the respondent would not be able to find work in Guatemala, because he would not be able to do the same type of work, landscaping, that he has been doing in the U.S. for a lengthy period. As far as the Court

is concerned, this is a much too limited inquiry. The respondent left a small community in Guatemala. He came to a metropolitan area in (b) (6). He has lived here successfully and supported himself and relatives. There is nothing to indicate that the skills he has as a worker cannot be applied to some other similar type of work, such as construction work, farming work, et cetera.

The fact that the respondent might have a much lower standard of living, earn much less, et cetera, is certainly possibly, although not really proven by the record we have in front of us. But that, in the Court's view, would go to the issue of discretion. Or to the extent it might cause an exceptional and extremely unusual hardship for the sons. And the Court does not see that this has been established.

And the Court believes that the earlier record in the master calendar hearings before Judge (b) (6) and Judge (b) (6) reflects confusion on the part of the parties about several fundamental issues.

First, the respondent as mentioned, previously had made various statements, mostly through counsel, that he had no notice about the prior deportation proceeding. He did not understand the nature of the deportation case. He never attended a deportation hearing, et cetera. The Court believes that the respondent's own testimony eventually, during the individual hearing, and the documentary evidence in Exhibit 11, prove to the

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contrary.

The Court notes that DHS, through Trial Attorney (b) (6), submitted a letter/memo to Judge (b) (6) on February 12, 2009, expressing the conclusion that there was no evidence of notice to the respondent for the hearing in absentia that was held in (b) (6) in January 1990. The Court believes that this conclusion expressed in the memo was based on incomplete records and the lack of complete information.

First, the record also includes what is marked for identification as Exhibit 7, which the Court believes are an incomplete set of copies from the A file or administrative file of the Immigration and Naturalization Service in reference to the 1989 case in (b) (6). Those papers do not include all the information that is reflected in Exhibit 11, which are copies from the Court's record of the proceeding, which is a separate file by a separate agency. That exhibit, Exhibit 11, includes a copy of the notice sent to the address respondent had provided for purposes of hearing notice, notifying him that the hearing would be held in January 1990, as well as the danger of failing to appear. The respondent has only hearsay to indicate that no notice arrived at his cousin's home, at the address he had given. He has no corroboration from that relative, although it should be available. The respondent eventually admitted that he feared there had been a hearing in absentia and he did not try to find out the result in the case from (b) (6) because he lacked the

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courage to find out what he would learn. This is a type of willful ignorance.

As far as the apparent lack of notice referenced by the Trial Attorney in the memo, the Court has made a statement on the record based on my experience as an Immigration Judge during that period at that Immigration Court. I was a Judge in that area for five years, more or less equally divided between the two years or so before the respondent arrived in the U.S. and two and a half or three years after his case was conducted. Based on that, I do know that the District Counsel's office in (b) (6) had notified the Court office that it did not have the staff to sort mailed notices for individual hearings for aliens, and that it instead wished to only receive a computer printout of upcoming cases which it would use to locate its files and find out what hearings were coming up and needed to be prepared.

It is true, I do not have a written record to reflect this, but the Court believes it is entirely proper for an Immigration Judge or any Judge to take notice of information that the Judge knows from the process of conducting hearings in a certain court at a certain time.

As far as the Court is concerned, the notice which is copied in Exhibit 11, is enough evidence to show that the respondent was notified properly of the hearing in January 1990.

The Court also notes that at one point respondent's counsel stated on the record to Judge (b) (6) that he had filed a



motion to reopen the old deportation case. But eventually, counsel told this Immigration Judge that the motion was either never actually filed or was filed but never pursued. The Court further notes that the respondent has given inconsistent answers as to whether he ever did leave the United States and the respondent remained somewhat unclear and lacking in definition on this point, even after Judge (b) (6) stated on July 20, 2005 during a master calendar, that if he thought the respondent had been in the U.S. without ever departing since 1989, then he would intend to terminate this removal proceeding and leave the respondent to seek reopening of the deportation case.

In the memo from (b) (6) referred to earlier, DHS states that it did not choose to reinstate the 1990 order of deportation, which theoretically it might have thought was justified. It chose not to do so. It may have chosen not to do so because of confusion about whether the respondent was properly notified. Or it may have made that decision for some other reason that the Court is not aware of. The Court believes that the DHS decision not to reinstate the prior order is entirely within the discretion of that agency and the Court does not mean to suggest it is a mistake.

This Court, in fact, has some questions about the scope of reinstatement and perhaps some reservations about whether that is wise in every case in which it may be used.

However, the important point is that this is not a

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decision for the Immigration Court to make, so I do not mean to second guess that decision.

I do believe that a decision by DHS not to use the reinstatement procedure is not legally equivalent to somehow eliminating the legal effect of the prior order of deportation issued by the Court in (b) (6) in January 1990 and does not prevent that order from having an effect on the respondent's legal status and eligibility for relief from removal. The correct way for an agency or a party to accomplish that result would be to vacate the order through a motion to reopen and vacate or a motion to reopen and terminate or some other procedure of that nature.

If the respondent had pursued a motion to reopen of the in absentia order from January 1990, that motion to reopen could have been assessed by the Immigration Court in (b) (6) through a legal framework with specific requirements the respondent would need to meet. The respondent has failed to do so and instead has substituted equivocal, unclear and inaccurate testimony about the procedure in 1990 in the course of this proceeding, which is not the proper place to try to challenge or undermine the effect of the prior order of deportation.

For the reasons the Court has expressed, the Court believes the respondent has met the requirements to show that he is not removable for criminal and related grounds and may be assumed for the sake of this decision to have the necessary good

moral character for the past 10 years.

The Court further believes that the respondent has failed to meet his burden of proof on the physical presence and hardship issues.

For these reasons, the Court hereby denies the application for cancellation of removal.

The respondent has made an alternative application for voluntary departure. I discussed the issue of discretion in relation to that earlier in this decision.

The Court, frankly, believes that the respondent may not deserve voluntary departure as a matter of discretion for his own sake, given what I view as a deliberate or at least conscious attempt to disregard the effect of the Immigration law relating to his case from 1989 and 1990 and to deny that it in a sense existed or had any meaning, which I believe is a negative discretionary factor.

However, in terms of the present situation, the respondent has two teenage sons close to graduation from high school in the United States and if the respondent is removed from the United States, then he may wish to leave with those sons instead of leaving them behind in the United States. It would be much better for the sons if the respondent were with them, assuming the three of them were going to leave the United States at the same time. And this is the main reason that the Court believes the respondent should be granted voluntary departure as

a matter of discretion.

Otherwise, I think the respondent has met all the statutory requirements for that relief.

Therefore, the Court issues the following orders.

The application for cancellation of removal is denied for the reasons stated.

The respondent is granted voluntary departure from the United States on or before April 25, 2011 or any extension of that time that perhaps could be granted by the Department of Homeland Security if it deems fit.

The respondent is directed to report to the offices of ICE here in (b) (6), specifically the DRO office, or as directed within 30 days from today, by March 28, to advise that office of any plans he has to leave the United States through voluntary departure at that time.

The respondent is also directed to file a voluntary departure bond in the amount of \$1,500 with the District Office in (b) (6) within five working days from today, which will take the respondent to March 3, 2011. That is the deadline for filing the voluntary departure bond.

If the respondent fails to depart in accordance with the order of voluntary departure, and as subject to the effect of any appeal to the Board of Immigration Appeals which the respondent may make, then the Court holds that the order of voluntary departure would automatically convert to an order for

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the respondent's deportation to Guatemala based on the charge sustained in the Notice to Appear.

(b) (6)

Immigration Judge

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.

  
Robin Conover (Transcriber)

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

April 26, 2011  
(Completion Date)

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1 A. Okay.

2 Q. I'm caring about him showing there's proof that he  
3 was here --

4 A. Sure.

5 Q. -- because he can't file a form unless he can  
6 prove --

7 A. Yes, I have --

8 Q. -- he's been in the country for the 10 years. So  
9 do we have the proof?

10 A. I have proof here with the application, Judge. I  
11 don't know if you want to accept the application today or not?

12 Q. Well, I don't think I'm the one that accepts the  
13 application anymore. Thanks. As you said, I think it has to go  
14 through. But, all right. So where is the proof? All right.  
15 He's got two notices dated October 10th, '89 and 9-6-89. So what  
16 are we talking about?

17 A. (No audible response.)

18 Q. I'm a little confused by the way this is tabbed.

19 A. Yes, Judge. I think it's tabbed by year.

20 Q. But in the front you list numbers, 1, 2, 3, 4, 5,  
21 6, 7, but there's no corresponding tab numbers. All right.

22 There was a notice of a hearing by the Immigration Judge in

23 (b) (6) October 11th, '89. September 6th. So, what  
24 ever happened with that case?

25 A. Judge --

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1 Q. He was supposed to report, it looks like, to the  
2 bond office July 16th, 1990. So, do we know if there was a final  
3 disposition of the deportation case?

4 (b) (6) TO JUDGE

5 Q. I wonder if it was another A number?

6 A. Yes, there is another A number.

7 Q. There is? I don't have that.

8 A. So I'm wondering if I have to terminate these  
9 proceedings?

10 JUDGE TO (b) (6)

11 Q. He hasn't left since or he's claiming that?

12 A. I don't believe so, Judge.

13 (b) (6) TO (b) (6)

14 Q. Have you left the United States since '89?

15 A. Yeah.

16 Q. You did leave?

17 A. Yeah.

18 (b) (6) TO JUDGE

19 Q. He says he did leave, Judge.

20 A. When did he leave?

21 (b) (6) TO (b) (6)

22 Q. When did you leave?

23 A. (No audible response.)

24 JUDGE TO (b) (6)

25 Q. Can you find out when he left?



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1 adjournment for if it wasn't to speak to him about it?

2 A. Well, it was to establish his entry date.

3 Q. Don't absences have something to do with entry  
4 date? I mean if he came in '89 and left for six years and then  
5 came back a second time, isn't that important to know in terms  
6 of, I mean, would we then be going by the '89 date or by the  
7 later date? So, don't you have to know all absences, all  
8 departures? How long, for what purpose, to figure out when was  
9 actually his last entry date?

10 A. Yes, Judge.

11 Q. But you didn't think that, that was important  
12 enough then?

13 A. Well, in my notations, I usually ask people when  
14 they come to my office if they ever left the United States.  
15 That's one of the first questions I asked. When I first met with  
16 him, he explained to me there were no absences. So, I need to  
17 review that with him.

18 Q. Well, if there were no absences, fine. I'll  
19 terminate these proceedings. He's back in deportation  
20 proceedings and he's got to move to reopen down in (b) (6).  
21 Because he's got another A number and he had another hearing down  
22 there it seems.

23 A. Yes.

24 Q. He should be in deportation not removal. And he  
25 should have to move to reopen under that other A number. So, if

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1 that's the case, that's fine. But we can't proceed until we know  
2 which is the truth.

3 A. Yes. So you're saying he'd be able to reopen his  
4 deportation proceedings at this point?

5 Q. If he came in '89 and never left.

6 A. Yes.

7 Q. Then he's in the wrong proceedings right now.  
8 These proceedings are based upon a supposed '96 entry. If there  
9 was no '96 entry, I terminate these proceedings. He's got to  
10 move to reopen the old deportation proceedings.

11 A. Yes.

12 Q. So you've got to get to the bottom of this with  
13 him and figure out how many departures, if any. If there were  
14 none, then we proceed one way. If there was some, we have to  
15 determine if they were lengthy enough to break any period of  
16 residency. It's not just a matter of when did you enter? '89?  
17 Okay.

18 (b) (6) TO JUDGE

19 Q. Is there any, is there a second A number, Judge,  
20 or the first A number? Because I don't see the notice.

21 A. A (b) (6) was the first A number. It's tabbed  
22 very strangely, but if you go all the way to the back, there's a  
23 tab that says 1989.

24 Q. Oh.

25 A. I mean I think this is by year. But it doesn't



**U.S. Department of Justice**

**Executive Office for Immigration Review**

*Immigration Court*

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*Assistant Chief Immigration Judge*

*26 Federal Plaza, 12<sup>th</sup> Floor Room 1237  
New York, NY 10278*

**February 20, 2013**

**To:** (b) (6)  
Immigration Judge

**From:** Robert Weisel (RW.)  
Assistant Chief Immigration Judge

**Re:** Letter of Counseling

By this letter, I counsel you for inappropriate, demeaning remarks in connection with two matters over which you presided, and which the Board of Immigration Appeals remanded to a different immigration judge. With this counseling, I expect you to improve your demeanor and professionalism, without the need for further intervention or future administrative action. The chairman of the Board of Immigration Appeals had referred the two matters at issue to the Chief Immigration Judge, for review and I specifically relate the following:

# Non-Responsive

# Non-Responsive

2. Matter of (b) (6) (BIA December 10, 2012). In this matter, the Board opined that "We find certain of the Immigration Judge's statements regarding the respondent's past relationships and his cognitive abilities to be unprofessional (IJ at 13-14, 16-17). Furthermore, we agree that the Immigration Judge improperly injected (b) (6) past experience to make assumptions about what occurred during the respondent's prior deportation proceedings in (b) (6)"

Also, your comments in the Oral Decision on February 24<sup>th</sup> 2011 were inappropriate and (again) relied on assumptions, without any support in the record, to wit: "So, the idea that a person spent a substantial period of time in an Immigration detention center, went to court twice, but did not understand he had a deportation case is, in the Court's view, close to the point of being totally unbelievable, even if the person had more cognitive problems than the respondent seems to have."

In sum, I counsel you to refrain from using demeaning statements, particularly with regard to the mental health of respondents, and from offering speculative and gratuitous commentaries. Such remarks are inappropriate and unprofessional. You are also cautioned not to engage in conduct which tends to cut off or inhibit attorneys from adequately developing the record, and thereby denying a full and fair proceeding.

**Please contact me this week after you have reviewed my comments to set up a mutually convenient time for us to further discuss these cases.**

I acknowledge receipt of this Letter of Counseling as noted below.

(b) (6)

Employee

2-20-13

Date