



## Detail

Complaint Number: 720

Immigration Judge: (b)(6)

Complaint Received Date: 02/13/13

Current ACIJ  
Fong, Thomas Y. K.

Base City  
(b) (6)

Status  
CLOSED

Final Action  
Oral counseling

Final Action Date  
02/19/13

Past ACJIS:

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

**Complaint Narrative:** BLA affirmed the IJ's denial of an asylum claim, however did note that "we do not approve of the IJ's comment that [REDACTED] does not have the responsibility to be a ferret and, accordingly, the court has not read over the 300 pages of documents"

Complaint History	
02/13/13	Complaint referred to ACIJ
02/19/13	Oral counseling
02/21/13	Database entry created

(b) (6)



# Memorandum

Subject	Date
(b) (6) (BIA February 7, 2013)	February 12, 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 February 7, 2013, and relevant portions of the record in the above-referenced matter.

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

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

Attachments

Falls Church, Virginia 22041

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File: A (b) (6)

Date: FEB -7 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

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

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

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: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, appeals the November 17, 2011, denial of his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The Immigration Judge made an adverse credibility finding, held that the asylum application is time-barred, and alternatively denied the application on burden of proof grounds. The appeal will be dismissed.

For purposes of the appeal, we will assume that the respondent presented credible testimony to include his version of events. We also will assume that the asylum time bar does not apply. *See* sections 208(a)(2)(B) and (D) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a)(2)(B) and (D); 8 C.F.R. §§ 1208.4(a)(2)(i)(A)-(B).

The respondent testified that gang members beat him up one time because he reported gang activity within his community to the authorities (I.J. at 10; Tr. at 42). The respondent reported the beating to the police, and the responsible gang members were arrested, tried, and sentenced to 2 years in jail (I.J. at 10; Tr. at 43-44). He described no additional past mistreatment besides threats and conditions of lawlessness affecting all people in El Salvador (I.J. at 11; Tr. at 59-60).

The respondent has not articulated membership in a legally cognizable particular social group or made a claim based on another protected ground (I.J. at 10). *See* (b) (6). Furthermore, even assuming nexus to a protected ground, while we do not approve of the respondent's beating or gang violence in general, we affirm the holding that he has not demonstrated past persecution (I.J. at 11). *See, e.g.,* (b) (6). In addition, the respondent has not shown that the Salvadoran government was unable or unwilling to protect him from harm (I.J. at 11). *See* (b) (6). Therefore, he may not benefit from

the regulatory presumption of a well-founded fear of persecution. *See* 8 C.F.R. § 1208.13(b)(1); *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

Moreover, the respondent has identified no specific individuals who would target him for persecution upon return to El Salvador (I.J. at 17). As noted above, the record further does not show that the Salvadoran government would be unable or unwilling to protect him from such harm. Therefore, the respondent has not independently proven a well-founded fear of persecution on account of a protected ground (I.J. at 19-20). *See* 8 C.F.R. § 1208.13(b)(2).

The respondent also claims that his father subjected him to physical abuse rising to the level of persecution on account of membership in the particular social group of "Salvadoran sons subject to domestic violence by their fathers" (I.J. at 11-12; Tr. at 15, 36-37; Exh. 13; Respondent's Brief at 27). Once when the respondent was 21 years old, his common law wife left his two children with the respondent's father and the children cried because they did not have milk (I.J. at 12; Tr. at 3). We find no clear error in the factual determination that the respondent's father hit the respondent with the flat of a machete out of frustration regarding these circumstances (I.J. at 12; Tr. at 37-38). *See* 8 C.F.R. § 1003.1(d)(3)(i). The respondent also has not claimed that he sustained serious injuries. Subsequently, the respondent lived with his father for almost 5 years, experiencing only limited physical abuse (I.J. at 12; Tr. at 55-57). The respondent then resided at the home of the parents of his common law wife for 2 years, and experienced no further abuse even though he visited his father's home every weekend (I.J. at 14; Tr. at 55-58). The record further does not show that the respondent's father has been abusive to the respondent's mother or three adult sisters, who have lived in the father's household since the respondent was 21 years old (I.J. at 13; Tr. at 67). Likewise, the respondent has not claimed that his father ever harmed his children, who are currently living in El Salvador with the parents of his common law wife (I.J. at 13-14, 17; Tr. at 25-26, 66-67). *See Matter of A-E-M-*, 21 I&N Dec. 1157, 1160 (BIA 1998). The respondent also has not shown that his father would be able to persecute him, considering that he is elderly and suffering from kidney disease (I.J. at 16-17, 19-20; Tr. at 62). For these reasons, we affirm the holding that the respondent has not shown a protected ground formed or will form one central reason for persecution at the hands of his father (I.J. at 14). *See* section 208(b)(1)(B)(i) of the Act; 8 C.F.R. §§ 1208.13(b)(1)-(2).

In addition, since the respondent never reported the abuse to the authorities, he has not proven that the Salvadoran government was or would be unable or unwilling to protect him from his father (I.J. at 15; Tr. at 39-40). *See* (b) (6). In light of these holdings, we need not determine whether the respondent's proposed particular social group is legally cognizable (Respondent's Brief at 26-44).

For these reasons, exercising our de novo review authority over issues of law, discretion, or judgment, we find no error in the denial of asylum and withholding of removal. *See* 8 C.F.R. §§ 1003.1(d)(3)(ii), 1208.13(a), and 1208.16(b); (b) (6); *Matter of D-I-M-*, *supra*. The respondent also has not established that he more likely than not will suffer torture by or with the acquiescence (to include the concept of willful blindness) of a public official of the Salvadoran government, as required for protection under the CAT (I.J. at 20). *See* 8 C.F.R. §§ 1208.16(c) and 1208.18(a);



*Pang, supra*, at 1233-34. He has not claimed to have suffered past torture or provided sufficient reasons why he would be targeted for such mistreatment in the future.

Lastly, we reject the respondent's contention that the Immigration Judge denied him a full and fair hearing. (b) (6)

(b) (6). The respondent claims that the Immigration Judge prejudiced him by disallowing the telephonic testimony of his half-brother (I.J. at 5-6; Tr. at 69-73). He has not explained how the half-brother's testimony would have affected the aforementioned burden of proof rulings (Respondent's Brief at 49).

The respondent also claims that the Immigration Judge cut off a line of inquiry regarding his mental health as it relates to hardship that he will experience upon removal to El Salvador (Tr. at 84-88).<sup>1</sup> We disagree. The pertinent inquiries in determining the respondent's eligibility for relief and CAT protection are whether he has established a well-founded fear of persecution, a clear probability of persecution, or that he more likely than not will be "tortured" within the meaning of the regulations. See 8 C.F.R. §§ 1208.13 and 1208.16.

The respondent asserts that his mental condition is relevant in determining his eligibility for "humanitarian asylum" and whether he will suffer "some other harm" (Respondent's Brief at 50-51). The regulations provide that when an alien is found to be a refugee on the basis of past persecution, the asylum application must be denied if there has been a fundamental change in circumstances negating a well-founded fear of future persecution or the applicant could avoid persecution by relocating. 8 C.F.R. § 1208.13(b)(i). However, an alien may still receive asylum if there are compelling reasons for being unable to return to the country due to the severity of past persecution (i.e., "humanitarian asylum") or a reasonable possibility of suffering "other serious harm." 8 C.F.R. §§ 1208.13(b)(iii)(A)-(B). Since the respondent has not demonstrated past persecution, these concepts are not relevant here (I.J. at 18-19). For these reasons, the respondent has not demonstrated the prejudice necessary to establish a due process violation.

We do not approve of the Immigration Judge's comment that (b) (6) "does not have the responsibility to be a ferret and, accordingly, the court has not read the over 300 pages of documents" (I.J. at 3-4; Respondent's Brief at 52). Nevertheless, the Immigration Judge clarified that (b) (6) considered the United States Department of State's Country Report and all evidence referenced in the prehearing brief filed by the respondent's counsel (I.J. at 4-5; Exh. 9). The Immigration Judge supported the findings discussed in this opinion with reference to the record and we conclude that the respondent received a fair hearing.

The record reflects that the respondent submitted timely proof of having paid the voluntary departure bond. Therefore, the period of voluntary departure will be reinstated.

Accordingly, the following orders are entered.

ORDER: The appeal is dismissed.

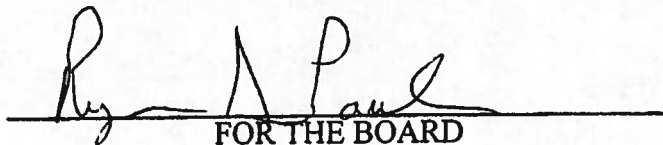
<sup>1</sup> The respondent does not claim that he lacked sufficient mental competency to proceed without safeguards under *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) (Tr. at 40).

**FURTHER ORDER:** Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). See section 240B(b) of the Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

**NOTICE:** If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

**WARNING:** If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. See 8 C.F.R. § 1240.26(e)(1).

**WARNING:** If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. See 8 C.F.R. § 1240.26(i).

  
FOR THE BOARD

## IMMIGRATION COURT

(b) (6)

Amended

In the Matter of

(b) (6)

Respondent

Case No.: A(b) (6)

IN REMOVAL PROCEEDINGS

## ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on November 17, 2011. 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 MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO.

[ ☒ ] Respondent's application for voluntary departure was granted until 1/15/2012 upon posting a bond in the amount of \$ 500 with an alternate order of removal to MEXICO. *filed on 11/15/2011*

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 Judge's oral decision.  
 [ ] Proceedings were terminated.  
 [ ] Other: \_\_\_\_\_

Date: Nov 17, 2011

(b) (6)

Appeal: Waived Reserved

Appeal Due By:

Immigration Judge

12/19/11

DHS

Rep

ALIEN NUMBER: (b) (6)

ALIEN NAME: (b) (6)

(b) (6)

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE ☒  
TO: ☐ ALIEN ☐ ALIEN c/o Custodial Officer ☐ ALIEN's ATT/REP ☒ DHS  
DATE: 11/17/11 BY: COURT STAFF [Signature]  
Attachments: ☐ EOIR-33 ☐ EOIR-  
28 ☐ Legal Services List ☐ Other

BOARD OF  
GRAND APPEALS  
OF THE CLERK

2011 DEC 15 A 1:35

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IMMIGRATION REVIEW

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

(b) (6)

File: A (b) (6)

November 17, 2011

In the Matter of

(b) (6)

RESPONDENT

)  
) IN REMOVAL PROCEEDINGS  
)  
)

CHARGE: Section 212(a) (6) (A) (i) of the Immigration and Nationality Act - entry without being admitted or paroled after inspection by an Immigration officer, or arrived at a time and place other than that designated by the Attorney General.

APPLICATIONS: Asylum, restriction on removal (withholding of removal) or withholding or deferral of removal pursuant to Article 3 of the Convention Against Torture.

ON BEHALF OF RESPONDENT: (b) (6)

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

ORAL DECISION OF THE IMMIGRATION JUDGE

I. INTRODUCTION

(b) (6)

is a 36-year-old male who is single, he lives here in the United States with his

(b) (6)

2012 FEB -7 AM 11:04

IMMIGRATION COURT

common-law mate or mate that he has lived with in El Salvador.

(b) (6) came into the United States illegally on February 26, 2004. The respondent testified today that his common-law mate, or his mate, is living with him in (b) (6) and that she entered illegally approximately three years ago. The respondent and his mate or common-law wife, as we will term that relationship, have three <sup>children</sup> ~~citizens~~ who all live in El Salvador with the respondent's common-law wife's mother.

The Department of Homeland Security (DHS) brought these removal proceedings against the respondent pursuant to the authority of the Immigration and Nationality Act. The proceedings were commenced by the filing of a Notice to Appear with the Immigration Court and serving that document on the respondent on September 29, 2009.

In the Notice to Appear the Department of Homeland Security alleges that the respondent is not a citizen or national of the United States, but is a native and citizen of El Salvador (Exhibit 1). The Department of Homeland Security alleges that the respondent arrived at the United States on or about February 26, 2004 near (b) (6) without being admitted or paroled after inspection by an Immigration officer. Based upon these allegations the Department of Homeland Security charged the respondent as being subject to removal pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as an alien present in the United States without being admitted



or paroled, or who arrived in the United States at a time or place other than that designated by the Attorney General.

The respondent, at a previous master calendar hearing before this Court admitted all of the allegations and conceded removability. His admissions and concession of removability is supported by other documents in the file, including the respondent's own application for asylum. The Court found that the respondent was removable by clear and convincing evidence. Accordingly removability is not an issue before this Court, the only issue before this Court is whether or not the respondent is entitled to the relief that he is requesting. The respondent was asked to designate a country of removal should removal become necessary, the respondent declined to do that. The Government asked the Court to designate El Salvador, and the Court designated El Salvador.

The Court has also in the record of proceeding, Exhibit 2, which is a motion to change venue, Exhibit 3, which is an I-213. Exhibit 4 is an asylum application which, according to respondent's counsel today off the record, was filed with the Court on December 1, 2009. Exhibit 5 is a submission of evidence which consists of over 300 pages of documents which are general documents relating to El Salvador and gang violence as well as Country Reports. Also in Exhibit 5 there are income tax filings and other documents in support of the respondent's application. The Court does not have the

responsibility to be a ferret and, accordingly, the <sup>Court</sup>respondent has not read the over 300 pages of documents, however, the Court is generally familiar with the situation in El Salvador with respect to gangs, gang violence, and other matters relating to asylum in the country of El Salvador. The Court is highly aware of the Country Reports and those Country Reports by the Department of ~~Homeland Security~~<sup>State</sup> and relevant and the Court will consider all of the elements set forth in the Department of State Report on Human Rights. There is also in the record of proceeding Exhibit 6 which is a history of being caught at the border between the United States and Mexico and a history of the respondent's statements to Department of Homeland Security officials that he was not an El Salvadoran citizen but was actually a citizen of Mexico and he was returned back to Mexico. Exhibit 7 in the record of proceeding is the biometric notice. The biometric notice and warnings were given.

Exhibit 8 is another filing by respondent's counsel, a second motion to submit evidence. It contains the biometric information and also a psychological evaluation by a (b) (6) which was issued in February 17, 2009, even though the Court notes that there is a typographical error in the report that would indicate that the report was made in 2010, (b) (6) was a witness today and testified that was a typographical error. Exhibit 10 is a prehearing statement by the respondent and there is a brief that has been filed, which is Exhibit 9 in the record

of proceeding. Exhibit 11 are matters which were filed today which are amendments to the asylum application. Exhibit 12 is a motion for expert to appear by telephone, which this Court granted, and Exhibit 13 is the respondent's prehearing statement.

All of these exhibits have been considered by the Court except for the matters set forth in this opinion herein above regarding the numerous documents which have been filed without any reference to them, except in the brief by (b) (6) (b) (6), and the Court is aware of those matters as set forth in the brief in the documents and has considered those as well.

At the hearing today the respondent testified before the Court and the Court also heard evidence from (b) (6). Respondent's counsel asked permission to have the respondent's brother, (b) (6) who does not have the same last name as the respondent, to testify by telephone. The Court asked the respondent's counsel to tender what would be said, the respondent's counsel made a tender and the Court found that not only was this objectionable because there was no notice given that the brother (b) (6) was going to be here, or a witness, let alone a witness by telephone. There was no permission in advance requested by respondent's counsel to have his half-brother Santos testify by phone, and the Court found generally that the testimony which was tendered by respondent's counsel would be irrelevant to the case. That testimony, which the

Court found would not be relevant is evidence that his brother may have filed for asylum, however, there was a tender that

(b) (6) would testify that his brother never came to him or he never advised him, or there was no advisals given with respect to the statute of limitations for filing an asylum application for a year. The Court finds that evidence generally irrelevant in the issues in this case. And based upon the Government's objection to lack of notice, the lack of having the respondent *Brother* here for the Court to determine credibility by being able to observe a fact witness of a relative of the respondent and the fact that the respondent's brother's testimony was irrelevant, the Court denied that request.

Accordingly, the Court renders its decision with respect to asylum, restriction on removal pursuant to Section 241(b) (3) of the Act and protection, albeit deferral or withholding of removal pursuant to Article 3 of the Convention Against Torture as found in the regulations, based upon the evidence in the record and the testimony of the respondent and the respondent's expert witness, which the Court heard.

## II. APPLICABLE LAW

The applicable law in this case has been prepared in advance of this hearing. Please dictate this into my oral decision. The applicable law has been provided to both counsel for the respondent and Department of Homeland Security counsel. It is attached to the summary decision in this case and is made

a part of this oral decision as if fully set forth in total herein as the applicable law. The applicable law is identified in this case by a heading which is asylum, withholding of removal, and relief under the Convention Against Torture. On the top of the first page there are pages 1 of 14 through 14 of 14. There is a footer on each page which announces and sets forth that this is the applicable law provided today, November 17, 2011 in the matter of (b) (6)

A (b) (6)

### III. FINDINGS AND ANALYSIS OF IMMIGRATION JUDGE:

#### 1. ONE-YEAR STATUTE OF LIMITATIONS FOR FILING ASYLUM CLAIM

The Court is aware that pursuant to the Immigration and Nationality Act Section 208(a)(2)(B) and also pursuant to precedent decisions of the Board of Immigration Appeals, such as Matter of S-B-, 24 I&N Dec. 42, 44 (BIA 2006) that a respondent has to prove that his application was filed within one year after his arrival in the United States by clear and convincing evidence. The Court can also grant an untimely application if the respondent demonstrates that the existence of change in circumstances which materially affected eligibility for asylum, or extraordinary circumstances relating to the delay of an application being filed within the specified period. See INA §208(a)(2)(D)(E). The regulations provide a non-exclusive list for example of changed circumstances and extraordinary circumstances for the purpose of the statute of limitations.

A (b) (6)

See 8 C.F.R. §§1208.4(a)(4), (5). In any event, an untimely application must be filed within a "reasonable period after discovering the change in circumstances or after the extraordinary circumstances have passed." Matter of A-T-, 24 I&N Dec. 296 (BIA 2007). See also 8 C.F.R. §1208.4(a)(4)(ii). The Board of Immigration Appeals has clarified, however, that there is no automatic one-year extension in which to file an application following a change in circumstances. See Matter of P-M-H- and S-W-C-, 25 I&N Dec 193 (BIA 2010).

The respondent has presented testimony that he did not understand or know about the one-year statute of limitations. The respondent has also presented evidence by way of expert testimony that the respondent may suffer from post-traumatic stress syndrome as a result of his growing up in the war-torn country of El Salvador while he was a youth. However, there is no evidence in the record that would provide even by the preponderance of the evidence, let alone clear and convincing evidence, that the respondent's PTSD resulted in his disability to file his application within the one-year period. There are suggestions that that may be the case. There were arguments that that may be the case by counsel and there were assumptions that it may be the case by the fact that he has been diagnosed with PTSD and avoidance problems, however, there is no evidence in the record that the respondent could not or did not miss that one-year filing date as a result of him suffering from PTSD or



any other related issue as set forth in the psychological report or the psychological testimony of (b) (6). Accordingly, the Court finds that the respondent has not filed an appropriate asylum application within the one year and even if there were excusable events that may have resulted in some delay, the application was not filed until over five years after he came to the United States. It was only filed after the respondent was brought into removal proceeding and was filed by his counsel, (b) (6) as a defensive application. Accordingly, the Court finds that, in any event, the asylum application was not filed within a reasonable time period and there is absolutely no evidence that his mental disease or disorder, as diagnosed by the psychiatrist, resulted in his not being able to file his application within the year period of time. Here the Court finds most revealing the respondent's testimony that he was unaware of his responsibility or duty to file an asylum application within one year. The Court is very aware that the Board of Immigration Appeals in this Court and other Immigration Judges have found that the fact that the respondent is unaware of the statute of limitation does not excuse the filing of the application within the one-year period of time. Accordingly, the Court finds the respondent is not entitled to asylum because he missed the one-year filing deadline.

#### IV. NEXUS

The Court has considered carefully and weighed the

definition of the particular social group or the nexus which respondent's counsel, (b) (6) argued to the Court was applicable in this case. Respondent's counsel acknowledged on the record that the gang violence, which the respondent was subject to and his desire to move to escape gang violence would not be distinguishable from the (b) (6) Circuit case in (b) (6)

(b) (6) which is the controlling case in this jurisdiction, see (b) (6)

(b) (6). The Court does not see any distinguishing characteristics with respect to respondent's issues with gangs in this case. In fact, here the Court finds that the respondent cannot show that he has even been persecuted by gang members. Respondent testified that the gang members beat him up one time as a result of his reporting gang violence and gang activity within his community. The respondent then reported that he reported this beating to a police officer and that as a result of this report the gang members who assaulted and beat him up were arrested by the police, tried in a court, and received an appropriate sentence for their action. The respondent made light of the fact it was only two years; however, the Court has no control over an El Salvador court or the punishment which the El Salvador court would execute as a result of a criminal act of gangs in El Salvador. Here the respondent reported the gang beating. Here the respondent's gang members were prosecuted by the police officers, here

justice took place in accordance with El Salvadoran law and the respondent's attackers were punished appropriately. The respondent claims that there has been no other type of interference with this respondent other than threats, intimidation of violence, robbery, and other matters which all people in El Salvador are subject to by reason of gangs in El Salvador. The Court finds that the respondent's beating does not rise to the level of persecution as required in the (b) (6) Circuit and finds that even if it did the respondent cannot show the Court that that beating was not addressed by police officers, in fact, the evidence is contrary to that.

Accordingly, the gang beating is not a nexus which this Court could find persecution by the government of El Salvador or by a group the government of El Salvador cannot or will not control.

The respondent's counsel argues that the respondent is a member of a family and that his family was subject to physical abuse by their father and, therefore, the respondent's physical abuse that he testified to by his father qualifies him for asylum. The definition of respondent's counsel in this case is that he is a son who suffered abuse and domestic violence in El Salvador. This definition is contained in exactly the words of the respondent's counsel, however, nevertheless, the Court finds that there is not one scintilla of evidence that the father targeted only members of his family for his violent acts. There is evidence that the respondent as a child may have been hit by

his father. At one time after he reached the age of 21 the respondent testified that he was hit by the flat of a machete in his back because his father had lost his temper due to his son's common law wife bringing children to be tended by the father and mother and the children were crying and hungry because they did not have milk. The respondent testified that he went to get milk from the market and stayed quite a long period of time and when he arrived back at his home his father was mad and hit him on the back with a machete because he had not stood up for his family. There was no evidence that he was targeted by his father because he was his son, he was targeted by his father in this case because his father was mad and lost his temper because his son failed to provide his children with proper nourishment causing he and his wife to be disturbed by the crying of children who were left without milk.

Further in this connection, the evidence in the record is clear, that the respondent testified that was the last time that his father physically abused or beat him. He testified that he was at that time age 21. He further testified that he lived with his father and mother in El Salvador from the time he was 21 until he was 26, for almost five years he did not receive any further abuse from his father except an occasional hit on the arm or on the shoulder. The respondent did testify that his mother was subject to mistreatment by his father, that all of his family were mistreated by his father, however, the evidence

in the record is that the mother still lives with the father, the father is now 76 years old suffering from kidney disease. The mother is the one who is the caregiver of the father. Also living with the mother are three adult children. There is no further evidence that the father has been abusive to the wife or the three adult daughters living with them since the respondent's statement with respect to when he was 21 years of age was the last time his father hit him with any kind of stick or implement. The respondent also testified that when he was 26 years old he moved to the city to live with his wife's parents, or his common-law wife's parents. And then since that time he has been out to his father and mother's house at least every weekend during the two years that he lived in the city and that not one time did his father ever hit or abuse him. This is also contrary to the testimony of (b) (6) suggested in his testimony that the wife told him on the telephone at an interview which was instigated by (b) (6) that she had seen the father attack the respondent. (b) (6) interpreted and assumed that this was an incident that occurred after he had moved into the city and after he had met his wife. Nevertheless, the evidence of respondent is contrary to that. He and his common-law wife lived in the same village or may have lived in the same house with his mother and further during almost six years. The respondent and his wife have left their children in El Salvador with the respondent's common-law wife's

mother. She is caring for the children. There is no evidence of any harm to the children either by the father of the respondent or by any gang members. There is no evidence in the record of any continuing threats of gang members except a letter by his parents which was discredited by the respondent's own testimony today.

In accordance with the above and foregoing the respondent's case for asylum and/or restriction on removal would fail because the respondent has failed to show that he has suffered persecution on the account of race, religion, nationality, membership in a particular social group, or political opinion. The respondent's designation of a particular social group with respect to him being a son who has received abuse by a father and, thus, having to leave El Salvador to escape that abuse if that were true, would render that definition circular in that the definition is defined by the abuse to the son. There was no definition in the designation of social group by respondent's counsel that he was a family member seeking to escape abuse from an abusive parent who was abusive to the family members. That is to be assumed and presumed from the respondent's counsel's arguments and respondent's testimony that his family members, including his mother, were abused by his father as well as him. That does not meet respondent's burden of proof with respect to nexus.

Accordingly, the respondent has failed to meet the



nexus proof that he has been persecuted by the government of El Salvador or a group which the government cannot or will not control in El Salvador. There is no evidence in the court that the respondent ever reported any abuse from his father to police officers even though his friends were police officers.

The Court has also problems with credibility of the respondent in this case. The respondent filed his application in 2009 with this Court and in that application he suggests that he is a part of a social group because he was a member of an elite law enforcement unit which targeted gang members and that the gang members would remember him because of his police force activity. While the respondent's counsel struck that from the asylum application, nevertheless, the matter is still set forth in the respondent's application. The respondent testified today that the respondent has never been a member of the police force. He wanted to be a member of the police force, he applied to become a member of the police force, however, because of some heart condition which he suffered he was unable to become a member of the police force. His closest association with police force is he knew two police officers who were here in the United States who may have been police officers who were here because of being targeted by gang violence. However, there is no evidence in the record to support that conclusion, there is merely speculation and assumption.

The respondent's own testimony is contrary to his

application and suggestion that he was here to escape gang violence or that he was to escape the abuse of a parent, including his father. The testimony was very clear, that he had to move from El Salvador because he was living with his in-laws in El Salvador. The house was small and that he had to leave El Salvador because the house was small and he had to provide a different place for he and his common-law wife to live. That is his testimony. There was no testimony in the record that he left El Salvador because his father beat him. There was no evidence in the record that he left El Salvador because of gang violence. The only evidence in the record is the respondent's testimony that he left because the house was too small or that he was living with his in-laws. He testified that he had never been abused by his father from 21 years of age to the time he left when he was 28 years of age in El Salvador. He did testify that during the time he lived with his parents in El Salvador with his common-law wife and children that he was sometimes hit on the shoulder or harmed by his father, but there was no other abuse. The respondent, his three sisters, are adult individuals. The respondent is an individual who is presently 36 years of age, his father is 76 years of age. The respondent is in good health, his father is not in good health. His father is suffering from a kidney disease. The respondent <sup>Father</sup> is under the care of his mother and his three adult sisters in El Salvador at the present time. There is absolutely no evidence that if the

respondent would go back to El Salvador that he would be abused in any way by his father or gang members or anyone else in El Salvador. There is absolutely not one scintilla of evidence that the respondent, if he has to go back to El Salvador, would be targeted for persecution by gang members, by the government, or by any other individuals in El Salvador.

Here the Court is asked to jump to a conclusion and jump to assumptions after assumption to assume that a 34-year-old individual would be subject to beating by a 76-year-old man who is physically incapacitated by disease. In this connection the Court finds that the respondent does not even meet the burden that he has a credible fear of returning based upon a credible possibility of returning to El Salvador with respect to his asylum claim and since the respondent has to prove that it is more likely than not that he would be subject to persecution if he is returned to El Salvador, the respondent's case fails because he has not even met the lower burden of proof regarding asylum and there is no proof in the record that he is more likely than not would be subject to further beatings or persecution by his father who is elderly in El Salvador. In fact, his parents live in El Salvador, his common-law wife's parents live in El Salvador, his children live in El Salvador, and they seem to be living in El Salvador safely and without incident. There has been no harm to any of them that is evident in this record.

The Court finds that the respondent may be suffering from some mental disease or defect, he may have PTSD, he may have other mental issues, however, respondent's counsel's argument that hardship is implicated in asylum is not persuasive to the Court. There is nothing in the record and there is no case law that would establish that the fact that the respondent would be subject to hardship if he was returned to El Salvador because of his PTSD or other mental deficiencies that may have been diagnosed by the psychologist in this case, would implicate asylum in any way. The respondent must establish in order to meet his burden of proof that he would be persecuted on the account of race, religion, nationality, membership in a particular social group, or political opinion. Not that he would suffer hardship if he were to go back because he has some sort of mental problem as a result of growing up in a war torn El Salvador when he was a minor. There is no indication in the record that if the respondent were to return to El Salvador that he could not seek and be treated for these mental problems in El Salvador. He went to see a psychologist in 2009. The psychologist in 2009 told him then that he should get further psychological treatment and that <sup>he</sup>~~she~~ should be evaluated as to whether or not he should be put on medication. However, the respondent has never done that in the two year lapse that has evolved since the doctor in (b) (6) told him that he should be doing that. His excuses are non-persuasive to the Court, that

he has found nobody that speaks Spanish in (b) (6) that would help him. In El Salvador psychologists speak Spanish and the Court notes that and in El Salvador he may be able to get treatment by Spanish-speaking psychologists who are unavailable to him in (b) (6)

Accordingly, the Court finds that since the respondent has not even met the burden of proof regarding asylum that he has been persecuted on the account of race, religion, and nationality, or that he suffers a reasonable likelihood or possibility of being persecuted if he is returned to El Salvador on account of any of the protected basis, the Court finds that the respondent's application for restriction on removal would likewise fail to meet his burden of proof that it is more likely than not that he would suffer that persecution. The Court even doubts whether the respondent has a subjective fear of returning to El Salvador in this incidence, let alone an objective and reasonable relevant evidence that he would suffer persecution. The respondent testified today that if he returned to El Salvador he could live in a city where his father was not present and that that would eliminate any subjection to further fear of being hit or hurt by his father. Further, there is no objective evidence that would meet the objective standard of reasonable fear. Since there is no objective evidence in the record that the father is even capable of hurting him further. Accordingly, the Court will deny his application for restriction

on or withholding of removal pursuant to Section 241(b) (3) of the Immigration and Nationality Act.

In this connection there is absolutely not one scintilla of evidence in the record that the government of El Salvador or an agent acting on behalf of the government of El Salvador or an agent of the government or an individual acting with implied authority from the government of El Salvador which the government of El Salvador would turn a blind eye would torture the respondent if he goes back to El Salvador. In fact, there is no evidence in the record the respondent is even afraid of going back to El Salvador for fear of being tortured. Torture is defined in the regulations is specific, and there is no evidence that the respondent has ever suffered torture or fears suffering torture if he goes back to El Salvador, as that term is defined in the regulations. Accordingly, the respondent has not proven to the Court that it is more likely than not that he would be tortured if he goes back to El Salvador as required under the regulations and accordingly the application for restriction on or withholding of removal pursuant to Article 3 of the Convention Against Torture is likewise here denied.

Finally, the respondent has asked, in the alternative, for post-conclusion voluntary departure pursuant to Section 240B(d) of the Immigration and Nationality Act. Here the Court has struggled with the fact that the respondent has filed an application in which he alleged that he was a member of an elite



police force when he was not. The Court also struggled with the fact that the respondent's filing of the application in which he sets forth why he fears persecution in El Salvador from the gangs was particularly based upon the matters that he would be remembered by gangs wherein he submitted reports wherein he helped individuals be prosecuted by the government and that he believes that the government would not protect him. The respondent has also set forth in his application that he was a shrimp delivery man and that his delivery was threatened repeatedly and, <sup>he</sup> beat<sup>in</sup> by gang members on at least two occasions. However, that is not in accordance with the testimony before the Court today. The only testimony the Court has that he was only beaten one time and that was out of reprisal because he reported gang members to the police in his community. The Court finds that based upon the Act and the REAL ID Act under which this case is filed, that the respondent may not and cannot be found as a credible witness because his testimony differs from the matters and facts set forth in his application, even though the application was amended today to strike out some or most of these allegations, they are, nevertheless, contained in an asylum application which the respondent filed with this Court in 2009 and signed on 2009 with his counsel before the Court. The respondent amended the application and then swore and subscribed to the truthfulness of the application together with all exhibits today. However, the application, even though amended,

does contain matters which are contrary to and opposed to his own testimony today. And based upon that and based upon the REAL ID Act the Court cannot find that the respondent was credible today.✓ Accordingly, his application for asylum would be denied as well as his application for withholding and protection pursuant to CAT would be denied because the respondent was not credible with the Court. However, the Court struggles with whether or not the respondent is entitled to voluntary departure by reason of the fact that he filed an application which was inconsistent with and not in accordance with his testimony today. The Court notes that the Court must find that the respondent has been here at least one year, that he has been a person of good moral character for one year, and that he deserves, and he is not barred from voluntary departure by criminal activity and, further, that he merits a favorable discretion of the Court. The Court would note that if the respondent gave false testimony under oath at the hearing today that the respondent would be barred from a finding of good moral character. However, it appears that today he came clean, that the application was amended and his inconsistent statements in his application and his testimony today, that his testimony today is more likely than not true and, accordingly, the Court cannot find that he lacks good moral character. The respondent has been here for an extended period of time. He has very little criminal activity, he has been employed, been able to

earn a living, he has filed his income taxes, even though some of the taxes might be subject to some examination by the IRS, the Court finds that, nevertheless, he did file them and he did make reports to the IRS. He stated that he has not worked illegally, that he has only used his Treasury Identification Number to gain employment in (b) (6) which the Court can readily believe in (b) (6). Accordingly, on the ~~hardest~~ <sup>hardest</sup> and barest of margins the Court finds that the respondent is entitled to post-conclusion voluntary departure and will grant the maximum amount of time today of 60 days. Accordingly, and based upon the above and foregoing the following orders are entered by this Court.

ORDER

ORDER: Respondent's application for asylum is denied.

IT IS FURTHER ORDERED that the respondent's application for restriction on removal pursuant to Section 241B(1) of the Act is denied.

IT IS FURTHER ORDERED that respondent's application for protection pursuant to Article 3 of the Convention Against Torture is denied.

IT IS FURTHER ORDERED that in lieu of an order of removal the respondent is allowed to voluntarily depart the United States on or before January 17, 2012 or any extension thereof that may be granted by the Department of Homeland Security and under such conditions as the Department of Homeland

Security may impose. It is further ordered that respondent post a voluntary departure bond pursuant to the Act in the amount of \$500 within five business days of today. Today is November 17 and accordingly the Court finds that the five business days would run on Thanksgiving Day and, therefore, the respondent has until November 25 to file a bond with the Department of Homeland Security in the amount of \$500, as required. The respondent must also provide proof to the Department of Homeland Security that he has the means of departing to El Salvador within the five business days and that he has the appropriate travel documents which would allow him to enter back into El Salvador.

The Court further orders that if the respondent fails to comply with the voluntary departure or any of the orders with respect to voluntary departure as set forth above, the respondent shall be removed from the United States to El Salvador in accordance with the charges set forth in the Notice to Appear without further notice or proceedings in this case.

Sir, the Court warns you that you must leave the United States on or before January 17, 2012, unless the Department of Homeland Security gives you an extension to that or you file an appeal. However, you must also file a voluntary departure bond on or before November 25, 2011 with the Department of Homeland Security and you must provide travel documents and proof that you have the ability to pay your way back to El Salvador without expense to the United States

Government on or before that date to the Department of Homeland Security. If you fail to comply with that order my order automatically converts to an order of removal without further notice or proceedings, you would be ordered removed from the United States to El Salvador on the charges contained in the Notice to Appear. You are further warned, sir, that if you file an appeal of my decision to the Board of Immigration Appeals you must file proof with the Board of Immigration Appeals that you have posted your voluntary departure bond and met other conditions as required by this Court with the Board of Immigration Appeals within 30 days of your filing the appeal or the Board of Immigration Appeals will not reinstate the voluntary departure order.

(b) (6)

United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE

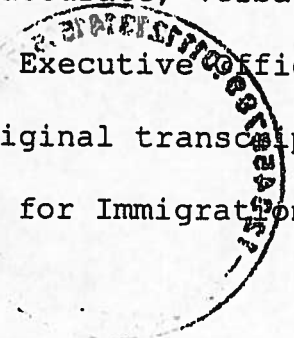
(b) (6) in the matter of:

(b) (6)

A (b) (6)

(b) (6)

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

  
*Karen Seeholzer*

KAREN SEEHOLZER (Transcriber)

DEPOSITION SERVICES, Inc.

January 11, 2012

(Completion Date)



**Moutinho, Deborah (EOIR)**

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**From:** Fong, Thomas (EOIR)  
**Sent:** Wednesday, February 20, 2013 3:37 PM  
**To:** Moutinho, Deborah (EOIR)  
**Cc:** Keller, Mary Beth (EOIR)  
**Subject:** RE: IJC Memo - (b) (6) (February 7, 2013)  
**Attachments:** Complaint (b) (6) (IJ(b) (6)).doc

ACIJ Keller and Deborah,

Attached is the updated/completed IJ Complaint Intake form, actions and recommendations on this above BIA referral. I counseled by telephone with IJ (b) (6) yesterday as noted in my remarks entry of that date. I recommend no other action being necessary. NOTE: A needed correction, I initially identified this case as "due process" issue, but it is actually an "in-court conduct" issue referred to OCIJ by the BIA --- please correct this entry.

Tom

Thomas Y.K. Fong  
Assistant Chief Immigration Judge  
Immigration Court/EOIR/DOJ  
606 South Olive Street, 15th Floor  
Los Angeles, CA 90014  
(213)894-2811

(b) (6)

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**From:** Moutinho, Deborah (EOIR)  
**Sent:** Wednesday, February 13, 2013 12:21 PM  
**To:** Fong, Thomas (EOIR)  
**Cc:** Keller, Mary Beth (EOIR)  
**Subject:** FW: IJC Memo - (b) (6) (February 7, 2013)

Good Afternoon

Please see the attached case concerning IJ (b) (6). If you would like to review the ROP please let me know and I will get it from the BIA and send it right out.

Thank you  
Deborah

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**From:** Henderson, Suzette M. (EOIR)  
**Sent:** Tuesday, February 12, 2013 1:35 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) (February 7, 2013)

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: \_\_\_\_\_

complaint source information	
<b>complaint source type</b>	
<input type="checkbox"/> anonymous <input type="checkbox"/> respondent's attorney <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____	<input checked="" type="checkbox"/> BIA <input type="checkbox"/> respondent <input type="checkbox"/> OIL <input type="checkbox"/> Circuit <input type="checkbox"/> EOIR <input type="checkbox"/> OPR <input type="checkbox"/> DHS <input type="checkbox"/> OIG <input type="checkbox"/> Main Justice <input type="checkbox"/> media
<b>complaint receipt method</b>	
<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: _____
<b>date of complaint source</b>	<b>complaint source contact information</b>
(i.e., date on letter, date of appellate body's decision) BIA referral of 2/12/2013 of a BIA decision entered 2/7/2013	name: BIA Chairman David Neal _____ address: _____ _____ _____ email: _____ phone: _____ fax: _____
<b>additional complaint source details</b>	
(i.e., DHS component, media outlet, third party details, A-number) (b) (6)	

complaint details		
<b>IJ name</b>	<b>base city</b>	<b>ACIJ</b>
(b) (6)	(b) (6)	Thomas Y.K. Fong
<b>relevant A-number(s)</b>	<b>date of incident</b>	
A(b) (6)	11/17/2011	
<b>allegations</b>		
BIA affirmed the IJs denial of an asylum/persecution claim. In doing so it also rejected Respondent's contentions that he was denied a full and fair hearing; and further disagreeing with the claim that the IJ cut off a line of inquiry. However, the BIA did note that "We do not approve of the IJ's comment that (b) (6) "does not have the responsibility to be a ferret and, accordingly, the court has not read the over 300 pages of documents" (It referred to the IJ's decision at 3-4; Respondent's brief at 52.) Nevertheless, it did note that the IJ "clarified" this statement by noting that (b) (6) had "considered the USDOS Country Report and all the evidence referenced in the prehearing brief filed by R's counsel (I.J. at 4-5; Ex. 9); and further the IJ "supported the findings discussed in this opinion with reference to the record and we conclude that the R received a fair hearing."		
<b>nature of complaint</b>		

<input checked="" type="checkbox"/> in-court conduct	<input type="checkbox"/> out-of-court conduct	due process	<input type="checkbox"/> bias	<input type="checkbox"/> legal	<input type="checkbox"/> criminal
<input type="checkbox"/> incapacity	<input type="checkbox"/> other: _____				

007136