



## Detail

Complaint Number: 767

Immigration Judge: (b)(6)

Complaint Received Date: 05/21/13

Current ACIJ  
Fong, Thomas Y. K.

Base City  
(b) (6)

Status  
CLOSED

Final Action  
Complaint dismissed because it  
cannot be substantiated

Final Action Date  
06/13/13

### Past ACIS:

A-Numbers(s)	Complaint Nature(s)	Complaint Source(s)
(b)(6)	Due process	Respondent Atty (b) (6)
		(b) (6)

**Complaint Narrative:** R's long time counsel made a complaint asserting that the IJ caused his detained client to be held in custody longer than necessary by belatedly granting the atty's motion for a continuance over the obj of a substitute atty.

### Complaint History

05/29/13	ACIJ reviews the ROP
06/05/13	ACIJ meets with DHS
06/11/13	ACIJ meets with IJ & SLA
06/13/13	Complaint dismissed because it cannot be substantiated
06/19/13	Database entry created

# Immigration Judge Complaint Intake Form

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

**Date Received at OCIJ:** \_\_\_\_\_

complaint source type	
<input type="checkbox"/> anonymous <input checked="" type="checkbox"/> respondent's attorney <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____	<input 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
complaint receipt method	
<input type="checkbox"/> letter <input type="checkbox"/> fax	<input type="checkbox"/> IJC memo (BIA) <input type="checkbox"/> unknown <input type="checkbox"/> email <input type="checkbox"/> other: _____
<b>date of complaint source</b> (i.e., date on letter, date of appellate body's decision) 5/21/13 a voicemail message was left on my office phone while I was on leave. Upon return to work on 5/28, I returned the phone call.	<b>complaint source contact information</b> name: _____ address: _____ email: _____ phone: _____ fax: _____
<b>additional complaint source details</b> (i.e., DHS component, media outlet, third party details, A-number) Matter of (b) (6) A (b) (6)	

IJ name	base city	ACIJ
(b) (6)		Thomas Y.K. Fong
relevant A-number(s)	date of incident	
A (b) (6)	May 14, 2013	
allegations		
Respondent's long-time counsel made a telephonic complaint asserting that IJ (b) (6) caused his detained client to be held in custody longer than necessary by belatedly granting the atty's motion for a continuance over the objection of a substitute atty (b) (6) sent by counsel to seek respondent's release. He alleged it was told by (b) (6) court clerk that it was "sitting on (b) (6) desk" without action despite being filed days before the scheduled hearing. He thereby alleged that his client was held in custody for an extra 8 days unnecessarily.		
nature of complaint		
<input type="checkbox"/> in-court conduct <input type="checkbox"/> incapacity	<input type="checkbox"/> out-of-court conduct <input type="checkbox"/> other: _____	<input checked="" type="checkbox"/> due process <input type="checkbox"/> bias <input type="checkbox"/> legal <input type="checkbox"/> criminal

date	action	initials
5/21/13	Atty (b) (6) leaves a voicemail message on this ACIJ's office phone stating that he has a complaint to air. Note: ACIJ Fong was on leave from 5/11 – 5/27.	
5/28/13	ACIJ upon returning to work returns call of the complainant atty and is relayed the specifics of the atty's complaint wherein he asserts the above allegations of a May 14 detained Master Calendar docket. I inform him that I will investigate his complaint and get back to him. I immediately ordered that the ROP be obtained for review.	
5/29/13	ROP is received and review begins.	
5/30/13	Initial review of the ROP is completed. There is no DAR record of a hearing being held on May 14. I contact the SLA (b) (6) to find out which court staff and DHS trial atty were with IJ (b) (6) on that date so that I can obtain information from them about what they may know about the case and the allegations made by the complainant atty.	
6/5/13 & 6/11/13	ACIJ holds separate discussions with DHS Atty (b) (6) Legal Assistant/Court Clerk (b) (6) and In-House Spanish Interpreter (b) (6). See Confidential Memo and a Letter prepared to complainant below for details of my ROP review, DAR review and discussions with the above.	
6/11/13	Subsequent discussions held with IJ (b) (6) and SLA (b) (6) in that staff should be reminded that they should not wait for return of an absent IJ when a motion for continuance is filed on a detained respondent if time is of the essence. It should normally be referred to that week's "Duty Judge" or another Detainee IJ for ruling. (Note: EOIR's intranet system was down on the June 12 work day and access to PC drives where this report was stored prevented completion of this report until 6/13/13.)	
6/13/13	Conclusions and Recommendations: There is no merit to the attorney's complaint. Further, contrary to the complainant's assertion that the continuance of the case was over the objection of counsel who appeared, this attorney never filed a Notice of Representation (Form EOIR-28) nor did he ever raise the issue to IJ (b) (6) who was unaware of his appearance or desire to hold a bond/custody re-determination hearing. IJ (b) (6) despite case law that would support a denial of the continuance motion ( <u>Matter of Patel</u> , infra) granted the respondent's counsel's motion to continue as soon as was able to review the motion. Written response to complainant atty mailed. (See copy of letter below.) Thus no IJ counsel or action is necessary on this complaint although as noted above the legal assistants will be reminded to refer motions like this to other IJs if a timely decision cannot be rendered by the IJ presiding over a matter.	

## CONFIDENTIAL MEMORANDUM

**To:** ACIJ Mary Beth Keller  
**From:** ACIJ Thomas Y.K. Fong  
**Date:** June 11, 2013  
**Re:** Complaint in the Matter of (b) (6) (IJ  
(b) (6) by Attorney of Record (b) (6)

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### I. Question Presented

Did IJ (b) (6) belatedly grant a previously filed continuance and thereby inappropriately delay a bond hearing despite the Respondent's counsel's readiness to proceed with a bond hearing?

### II. Background

The respondent initially began his matter upon issuance of an NTA dated October 13, 1997 with his case initially presided over by IJ (b) (6) in a Non-Detained Master calendar. At a subsequent hearing he was found removable and his COR application was also denied. His case was appealed and remanded for further proceedings by the BIA, but subsequently reassigned to IJ (b) (6) as IJ (b) (6) had been assigned to a full-time Detainee docket and no longer available to hear the case. IJ (b) (6) ultimately issued an in absentia removal order against the respondent, but then reopened his matter again on October 20, 2010. However, the respondent was now detained by DHS having been taken into custody by them on or about April 27. Notice to the court of his detention initiated scheduling of the Respondent's case to a First-time or initial Detained Master Calendar docket for May 14, 2013, again before IJ (b) (6). It should be noted that due to the large number of detained filings and types of mandated "bond" hearings in (b) (6) (b) (6) that the (b) (6) detained dockets are categorized and normally not commingled for First-time MC detained hearings, Regular bond dockets, (b) (6) bond hearings, (b) (6) bond dockets, (b) (6) Competency hearings and other Reset dockets in order to be sure that these various court dockets are not over scheduled.

Notice of this First-time hearing was expeditiously sent (with a minimum 7 day mailed notice) on May 2 to the Respondent's counsel, (b) (6). On May 8, 2013, he filed a Motion for a Continuance, indicating that he had a conflict with the May 14, 2013 hearing date. It should be noted that IJ (b) (6) was on leave from May 8 – 10 and the intervening weekend of May 11 -12, prevented (b) (6) from reviewing the Motion for Continuance until (b) (6) return on May 13, the day before the scheduled May 14 hearing.

The respondent's attorney alleged in a telephonic discussion of May 28 of his complaint filed with this ACIJ that IJ (b) (6) failed to timely rule on his continuance motion despite being told by (b) (6) court clerk that the motion was sitting on (b) (6) desk days before the scheduled hearing. Accordingly, he sent a substitute attorney (b) (6) to appear in Court on May 14, 2013 on his behalf. (b) (6) further asserted that this attorney was ready that day to proceed with a

bond re-determination hearing. The attorney finally contends that IJ (b) (6) nevertheless continued the matter without hearing the bond request over this substitute attorney's objection; and thereby caused his client to be held unnecessarily in custody for an extra 8 days.

There is no DAR record for May 14, as it appears none took place that day. The DAR record only evidences the respondent's proceeding of May 22, 2013, where a bond hearing was held. On that date, the respondent through counsel presented a completed "Custody Redetermination Questionnaire" requesting a bond in the amount of \$8,000, to which the Government agreed.

### III. Analysis

A. Did IJ (b) (6) fail to respond to the motion to continue prior to the hearing? Yes, but she had good cause for not doing so. The motion to continue was received at EOIR on May 8, 2013, just six days prior to the First-time Master Calendar hearing. But there is a notation on the written motion itself in IJ (b) (6) handwriting indicating that (b) (6) granted the continuance motion resetting the case to a Reset Master for a requested bond hearing for May 22. However, IJ (b) (6) did not date, sign or initial (b) (6) note which would have been the better practice and made this ACIJ's review of the complaint easier. Accordingly, although it is correct that IJ (b) (6) did not provide a written decision on the motion prior to the hearing --- (b) (6) apparently did rule upon the motion within a day of returning from (b) (6) leave. It would have been physically impossible for (b) (6) to rule upon counsel's motion filed while (b) (6) was on leave. Further, it would have been pointless to send out a written decision granting (or denying) the motion for a continuance the day before it was scheduled to be heard. Regardless, it is long settled law that the mere filing of a motion does excuse failure to comply for a court order. Matter of Patel, 19 IN 260 (BIA 1985) (mere filing of a motion to continue does not relieve a respondent and his counsel from attending); Matter of Perez-Andrade, 19 IN 433 (BIA 1987); see also (b) (6)

(b) (6)

B. Did IJ (b) (6) grant the motion to continue in Court over the substitute attorney's objection? No. There is no DAR record of a May 14, 2013 hearing because no hearing took place on that day as the motion for continuance was granted before the hearing could take place. Due the lack of a DAR record, this ACIJ had only the ROP itself to review, but also interviewed the two court staff and the DHS attorney assigned in court that day with IJ (b) (6) to elicit information of what did occur. DHS Assistant Chief Counsel (b) (6) & (b) (7)(C) court clerk/Legal Assistant (b) (6) and court interpreter (b) (6) were identified from court records as those being present that day.

(b) (6) & (b) (7)(C) when asked to relate what he knew of this situation specifically recalled without any prompting and prior to IJ (b) (6) entering the court, that he overheard a conversation between the court clerk (b) (6) & (b) (7)(C) and an attorney (b) (6). Although (b) (6) never filed a notice of attorney representation (Form EOIR-28), that he approached the court clerk's desk and stated that he was appearing on behalf of the Respondent and also substituting that day for attorney (b) (6). (b) (6) & (b) (7)(C) further stated that (b) (6) & (b) (7)(C) informed (b) (6) that the judge had in fact granted the motion for continuance. When (b) (6) asked whether a bond re-determination hearing could take place despite the continuance motion being granted, (b) (6) & (b) (7)(C)

stated that it could not. She explained that since the initial First-time Detained Master Calendar was set for other than bond purposes that the respondent's case had in fact been reset by Judge (b) (6) for the court's separate Bond calendar for next week, May 22 (one of dates wherein the respondent's counsel's motion stated he would be available). The attorney then departed without ever filing a notice of representation or seeing or discussing the matter with Judge (b) (6).

(b) (6) was also subsequently interviewed by this ACIJ. She related the same information, noting that IJ (b) (6) never was approached or spoke to (b) (6). She further confirmed that she told (b) (6) that a bond hearing could not be held on this First-time Detained Master Calendar docket as it was reserved for other matters, but at the subsequent May 22 Reset Bond Master that he could seek a bond re-determination for his client. This is in fact what ultimately happened.

Spanish Interpreter (b) (6) on questioning stated that she had no recollection of seeing (b) (6) on May 14 or overhearing any conversation between (b) (6) and (b) (6). She assumed she was not in court at the time of this conversation.

At the May 22 hearing (b) (6) appeared and a bond hearing was held with a grant of release of respondent on a posted bond amount. A review of the DAR for that hearing makes no mention of the May 14 events and (b) (6) never raised any issue about why the case was not called or heard on May 14, nor are any of the assertions of IJ's actions raised now in this complaint. The case is now in the process of being transferred back to IJ (b) (6) Non-Detained docket for further hearing.

**IV. Conclusions:** There is no merit to the attorney's complaint. Further, contrary to the complainant's assertion that the continuance of the case was over the objection of counsel who appeared, this attorney never filed a Notice of Representation (Form EOIR-28) nor did he ever raise the issue to IJ (b) (6) who was unaware of his before court appearance or desire to hold a bond/custody re-determination hearing. IJ (b) (6) granted the respondent's counsel's motion to continue as soon as (b) (6) was available to review and consider the motion. Nevertheless, staff was reminded to use the regularly assigned weekly Duty Judge (or another Detainee IJ) to rule on motions like this if a presiding IJ is unavailable for an extended period of time. Written response to complainant atty mailed. See copy of below.

RESPONSE LETTER of June 13, 2013:

## **U.S. Department of Justice**

Executive Office for Immigration Review

*Immigration Court*

Thomas Y. K. Fong  
Asst. Chief Immigration Judge

606 S. Olive Street, 15<sup>th</sup> Floor  
Los Angeles, California 90014

June 13, 2013

(b) (6)

In re: Matter of (b) (6) Complaint against Judge  
(b) (6)

Dear (b) (6)

This letter is in response to your telephonic complaint of May 28, 2013, wherein you asserted that Immigration Judge (IJ) (b) (6) belatedly granted a Motion for Continuance you filed and thereby delayed a bond hearing for your client causing him to be unnecessarily held in custody for an extra eight (8) days before release.

### **I. Background**

The respondent's court proceeding began with the filing of a Notice to Appear (NTA) charging document dated October 13, 1997 with his case initially presided over by IJ (b) (6) in a Non-Detained case setting. At a subsequent hearing he was found removable and his COR application was also denied. His case was appealed and remanded for further proceedings by the BIA, but subsequently reassigned to IJ (b) (6) as IJ (b) (6) had by then been transferred to a full-time Detainee docket and no longer available to hear the remanded matter. IJ (b) (6) ultimately issued another order in absentia ordering your client removed, although subsequently (b) (6) reopened his matter again.

Your respondent at some point became detained by DHS after having been taken into custody on or about April 27, 2013. Notice to the court of his detention initiated scheduling of his case to a first-time or initial Detained Master Calendar (MC) docket for May 14, 2013, again before IJ (b) (6). It should be noted that due to the large number of detained filings and types of mandated hearings in (b) (6) that the (b) (6) detained dockets are separated into different subcategories in order to be sure that these various court dockets are not over scheduled.



Notice of this first-time MC May 14 hearing was expeditiously sent to you on May 2 as the Respondent's counsel. On May 8, 2013, you filed a Motion for a Continuance, indicating that you had a conflict with the May 14 hearing date. However, IJ (b) (6) was on leave from May 8 – 10 and the intervening two days of the weekend of May 11 -12, prevented (b) (6) from reviewing the Motion for Continuance until (b) (6) return on May 13, the day before the scheduled May 14 hearing.

Nevertheless, you alleged in a telephonic discussion on May 28 with this ACIJ that IJ (b) (6) failed to timely rule on your continuance motion despite you being told by (b) (6) court clerk that the motion was on the judge's desk days before the scheduled hearing. Accordingly, you sent a substitute or co-counsel attorney (b) (6) to appear in Court on May 14, 2013 on your behalf. You further asserted that this attorney was ready that day to proceed with a bond re-determination hearing. You finally contend that IJ (b) (6) nevertheless continued the matter without hearing the bond request and over this substitute attorney's objection; and thereby caused your client to be held unnecessarily in custody for an extra 8 days.

There is no DAR record for May 14, as none took place that day. The DAR record only evidences the respondent's bond proceeding of May 22, where a bond hearing was held. On that date, the respondent through you as counsel presented a completed "Custody Redetermination Questionnaire" requesting a bond in the amount of \$8,000 to which the Government agreed. Your client was ultimately released on that agreed bond amount.

## II. Analysis

Although you are correct that IJ (b) (6) did not rule upon your motion before the May 14 hearing date, (b) (6) had good cause for not doing so. The motion to continue was received by the court on May 8, just six days prior to the First-time Master Calendar Detained hearing date. However, Judge (b) (6) was on leave and absent from the court from May 8 until the day before the hearing set for May 14. (b) (6) did ultimately grant the continuance motion and continued the case to a Reset Master for a requested bond hearing for May 22. Accordingly, although it is correct that IJ (b) (6) did not provide a written decision on the motion prior to the hearing --- (b) (6) apparently did rule upon the motion within a day of returning from (b) (6) leave. It would have been physically impossible for (b) (6) to rule upon counsel's motion filed while (b) (6) was on leave. Further, it would have been pointless to send out a written decision by mail granting (or denying) the continuance motion the day before it was scheduled to be heard.

Again, it should be noted that due to the large number of detained filings and types of mandated "bond" hearings in (b) (6) that the (b) (6) detained dockets are categorized and separated into First-time or initial Master Calendar dockets, Regular bond dockets, (b) (6) bond hearings, (b) (6) bond dockets, (b) (6) hearings and other Reset dockets in order to be sure that these various court dockets are not over scheduled. Regardless, it is well settled judicial practice that a court has inherent authority to set its own dockets. See (b) (6)

(b) (6)



Further, Judge (b) (6) did not grant the Motion to Continuance in court over your substitute attorney's objection. There is no DAR record of a May 14, 2013 hearing because no hearing took place that day. Your written Motion for Continuance was granted before the hearing took place. However, this ACIJ did review the ROP itself, and also interviewed the two court staff and the DHS attorney assigned in court that day with IJ (b) (6) to elicit information of what did occur. DHS Assistant Chief Counsel (b) (6) & (b) (7)(C) (b) (6) court clerk/Legal Assistant (b) (6) and the court's in-house Spanish Interpreter (b) (6) were identified from court records as those being present that day.

(b) (6) & (b) (7)(C) when asked to relate what he knew of this situation specifically recalled, without any prompting, that prior to IJ (b) (6) entering the court, that he overheard a conversation between the court clerk and an attorney (b) (6). Although (b) (6) never filed a Notice of Attorney Representation (Form EOIR-28), he approached the court clerk's desk and stated that he was appearing on behalf of the Respondent and also substituting that day for attorney (b) (6). (b) (6) & (b) (7)(C) further elaborated that the court clerk (b) (6) informed (b) (6) that the judge had in fact already granted the Motion for Continuance. When (b) (6) asked whether a bond re-determination hearing could take place despite the continuance motion being granted, (b) (6) stated that it could not. The attorney then departed without ever submitting a notice of representation or seeing or discussing the matter with Judge Munoz.

(b) (6) was also subsequently interviewed by this ACIJ. She related the same information, noting that IJ (b) (6) never was approached or spoke to (b) (6). She stated she explained to the attorney that initial First-time Detained Master Calendar are set for other than bond purposes (initial advisal of rights, determination of representation, etc.). But she stated that she further told the attorney that the respondent's case had in fact been reset by Judge (b) (6) for the court's separate Bond calendar for the following week, May 22 (one of dates wherein you stated in your motion that you would be available). This is in fact what ultimately occurred on May 22.

Spanish Interpreter (b) (6) on questioning stated that she had no recollection of seeing (b) (6) on May 14 or overhearing any conversation between (b) (6) and (b) (6). She assumed she was not yet in court at the time of this conversation.

At the May 22 hearing you appeared and a bond hearing was held with a grant of release of respondent on a posted bond amount. A review of the DAR for that hearing finds no mention of the May 14 events. You never raised any issue with the IJ about why the case was not called or heard on May 14, nor did you raise to (b) (6) any of the assertions brought forward in this complaint to me. The case is now in the process of being transferred back to IJ (b) (6) Non-Detained docket for further hearing.

### III. Conclusions

I cannot find any merit to your complaint that the continuance of the case was over the objection of Respondent's co-counsel (b) (6). He in fact never filed a Notice of Representation (Form EOIR-28) nor did he ever raise the issue before Judge (b) (6) who was unaware of his appearance before (b) (6) took the bench or his desire to hold a bond/custody re-determination hearing that day. IJ (b) (6) granted your Motion to

Continue as soon as (b) (6) was available to review and consider the motion. Nevertheless, you could have requested that another judge rule upon your motion in Judge (b) (6) absence; but regardless I have instructed the Supervisory Legal Assistant over your matter to remind all her staff that if an IJ is unavailable to timely rule upon a Motion for Continuance that it should be referred to another judge for action.

Sincerely,

Thomas Y.K. Fong  
Asst. Chief Judge

TYKF/sk