



Detail

Complaint Number: 713

Immigration Judge: (b)(6)

Complaint Received Date: 01/05/13

Current ACIJ
Fong, Thomas Y. K.

Base City
(b)(6)

Status
CLOSED

Final Action
Complaint dismissed because it was disproven

Final Action Date
01/14/13

Past ACIS:

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

Complaint Narrative: Respondent asserts in emails that "This Judge (b)(6) is very impartial. He further inquires into whether the Civil Rights Complaint and Form I-290B, got in the hands of the DHS

Complaint History

01/14/13 ACIJ completed his review
01/14/13 Complaint dismissed because it was disproven
01/18/13 Database entry created

EOIR FOIA Processing (EOIR)

From: IJConduct, EOIR (EOIR)
Sent: Monday, January 07, 2013 9:44 AM
To: Fong, Thomas (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: FW: COULD YOU TAKE A LOOK AT THE ATTACHMENTS, AND SEE IF MY PACKAGE GOT TO THE HANDS OF THE DHS OFFICD IN (b) (6)

Good Morning

Please see the below complaint on IJ (b) (6) that came into the IJ Conduct Mailbox.

Thank you
Deborah

From: (b) (6) [mailto:(b) (6)@yahoo.com]
Sent: Saturday, January 05, 2013 5:09 PM
To: IJConduct, EOIR (EOIR)
Subject: Re:COULD YOU TAKE A LOOK AT THE ATTACHMENTS, AND SEE IF MY PACKAGE GOT TO THE HANDS OF THE DHS OFFICD IN DOWN TOWN OF (b) (6)

COULD YOU TAKE A LOOK AT THE ATTACHMENTS, AND SEE IF MY PACKAGE GOT TO THE HANDS OF THE DHS OFFICD IN (b) (6)

THIS JUDGE IS VERY IMPARTIAL, (b) (6) DIDN'T EVEN LOOK AT MY APPLICATION FOR CANCELLATION OF REMOVAL AND SUPPORTING DOCUMENTS. I WAS UNJUSTLY DEPORTED.

On November 20th., 2012, Judge (b) (6) issued an impartial deportation order against me (b) (6). The first judge that I had, Judge (b) (6), had given me the opportunity to present form 42B, Cancellation of Removal, based on hardship caused to a USA citizen, my dad, and a USA Legal Permanent Resident, my mom. But Judge (b) (6) did not even look at the package I had prepared, (b) (6) just said (b) (6) had to go by what the ICE Lawyer had presented (b) (6) a report that I am sure Judge (b) (6) did not even read.

Prior to my departure from (b) (6) Detention Center, I had mailed the package I had prepared with Form 42B to the ICE office in (b) (6) if you could retrieve such package, it will help me in getting a waiver/pardon to obtain my permanent residence based on my parents' legal status.

MY WHOLE INFO I S AS FOLLOWS:

(b) (6)

Realistic Extra Income

Immigration Judge Complaint Intake Form

HQ Use Only:
complaint #: 713
source: first / subsequent

Date Received at OCIJ: _____

complaint source type	
<input type="checkbox"/> anonymous <input type="checkbox"/> respondent's attorney <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____	<input type="checkbox"/> BIA <input checked="" 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 checked="" type="checkbox"/> email <input type="checkbox"/> phone (incl. voicemail) <input type="checkbox"/> in-person <input checked="" type="checkbox"/> other: referred by IJConduct unit to ACIJ on 1/7/2013 for action__
date of complaint source	complaint source contact information
(i.e., date on letter, date of appellate body's decision) Multiple emails sent to the IJConduct, EOIR site. Dates of 1/5/2013; 12/26/2012; 12/20/2012; 12/19/2012	name: _____ address: _____ email: _____ phone: _____ fax: _____
additional complaint source details	
(i.e., DHS component, media outlet, third party details, A-number) In re (b) (6)	

IJ name	base city	ACIJ
(b) (6)		Thomas Y.K. Fong
relevant A-number(s)	date of incident	
(b) (6)	November 20, 2012	
allegations		
Complaint comes from the above Complainant/Respondent (C/R) about his Removal matter. He asserts in emails that "This Judge (b) (6) is very impartial (sic), (b) (6) didn't even look at my application for cancellation of removal and supporting documents. I was unjustly deported." Note: C/R also attached and is attempting to file a Civil Rights Complaint on a DHS Office for Civil Rights and Civil Liberties form. He further inquirers into whether this Civil Right Complaint" and Form I-290B, Notice of Appeal "got to the hands of the DHS in (b) (6)."		
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 checked="" type="checkbox"/> bias <input type="checkbox"/> legal <input type="checkbox"/> criminal

MEMORANDUM

TO: ACIJ Mary Beth Keller

FROM: ACIJ Thomas Y.K. Fong

DATE: January 14, 2013

RE: IJ Complaint In re (b) (6) (IJ (b) (6))

I. Respondent/Complainant's Assertions

- A. Did Judge (b) (6) improperly pretermite Respondent's application for cancellation of removal?
- B. Did Judge (b) (6) exhibit bias toward Respondent or otherwise act in an inappropriate or unfair manner?
- C. Did the Department of Homeland Security (DHS) receive Respondent's Form I-290B, Notice of Appeal or Motion, and Civil Rights Complaint?

II. Summary

- A. No. Respondent is statutorily ineligible for cancellation of removal because he was convicted of two crimes involving moral turpitude (CMT). However, Judge (b) (6) in making this finding failed to explain (b) (6) reasoning and the legal precedent that (b) (6) relied upon to reach this conclusion. Nothing in the audio recording (DAR) evidences an analysis of Respondent's convictions under the procedural framework outlined in Matter of Silva-Trevino, 24 I&N Dec. 687, 690 (A.G. 2008). (b) (6) may applied but did not state explicitly that (b) (6) applied the categorical and modified categorical approaches; nor did (b) (6) address whether the evidence established that Respondent had the requisite knowledge of the age of his victim to render his violation of CPC 288(a) one of moral turpitude (CMT). Judge (b) (6) simply made conclusory statements finding Respondent's crimes to be CMTs.
- B. No. The DAR of Respondent's November 2012 hearing reveals that Judge (b) (6) was both fair and respectful to Respondent throughout his proceedings.

There is no evidence in the record to suggest any impropriety or bias against the Respondent.

- C. The Court is distinct from the DHS and does not have access to information regarding Respondent's filings with that governmental agency. Respondent must contact the DHS directly to request such information.

III. Procedural History

Respondent is a native and citizen of Mexico. On November 6, 2012, Respondent filed a Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, based on the alleged hardship that his removal would cause to his father, who is a U.S. citizen, and his mother, who is a lawful permanent resident. On November 20, 2012, the DHS submitted conviction records to support its claim that Respondent was statutorily ineligible for such relief. These records include certified copies of the felony complaint, minute order, plea form, and probation officer's reports from the (b) (6) relating to both Respondent's 2006 conviction for forgery in violation of (b) (6) and his 2012 conviction for committing lewd acts upon a child in violation of (b) (6).

Based on this evidence, Judge (b) (6) found that Respondent's crimes were CIMTs. As a result, (b) (6) concluded that Respondent was statutorily ineligible for cancellation of removal, pretermitted his application for such relief, and ordered him removed to Mexico. As Respondent was unrepresented, Judge (b) (6) then clearly explained his right to appeal (b) (6) decision. However, Respondent chose to waive appeal.

Following his removal to Mexico, Respondent sent four emails to the IJConduct internet site. Therein, he alleged that Judge (b) (6) had failed to consider his cancellation of removal application and that (b) (6) was "very impartial" (sic) during his proceedings. See Respondent's emails. In addition, Respondent asked the Court to verify if the DHS had received his Form I-290B and Civil Rights Complaint and, if so, to assist him in retrieving these documents.

IV. Analysis

A. Respondent's Eligibility for Cancellation of Removal

Respondent claims that Judge (b) (6) "unjustly deported" him without "even look[ing] at [his] application for cancel[l]ation of removal and supporting documents." Id. In his Form I-290B, Respondent further claims that Judge (b) (6) "just said (b) (6) had to go by what the ICE Lawyer had presented (b) (6) a report that . . . (b) (6) did not even read." See Form I-290B.

The audio recording (DAR) of Respondent's proceedings belies these claims. On November 20, 2012, while on the record, Judge (b) (6) reviewed and considered the evidence submitted by the DHS. Based on this evidence, (b) (6) concluded that Respondent's two criminal convictions constituted CIMTs, which therefore rendered Respondent statutorily ineligible for cancellation of removal. Given Judge (b) (6)'s findings, it was proper for (b) (6)

to pretermite Respondent's cancellation application without considering the substantive merits of his claim.

It is important to note, however, that Judge (b) (6) made such findings without providing a thorough analysis on the record to support (b) (6) decision. (b) (6) did not indicate why (b) (6) considered Respondent's crimes to be morally turpitude, nor did (b) (6) explain what case law or regulations (b) (6) relied upon to reach such a conclusion. Instead, Judge (b) (6) simply agreed with the DHS trial attorney and informed Respondent that he was statutorily ineligible for relief.

Judge (b) (6) lack of providing (b) (6) legal analysis is particularly relevant given that a conviction under (b) (6) is not categorically a CIMT. The Board of Immigration Appeals has held that "any intentional sexual conduct by an adult with a child involves moral turpitude, *as long as the perpetrator knew or should have known that the victim was under the age of 16.*" Matter of Guevara Alfaro, 25 I&N Dec. 417 (BIA 2011) (emphasis added). However, (b) (6) does not require that the perpetrator know the age of his victim. (b) (6) Therefore, under the administrative framework laid out in Silva-Trevino, Judge (b) (6) would have had to conduct a modified categorical analysis to determine if Respondent knew or should have known that his victim, (b) (6) was under the age of sixteen. See 24 I&N Dec. at 690 (holding that where the categorical analysis does not resolve the moral turpitude inquiry, "an adjudicator should proceed with a 'modified categorical' inquiry" by examining "whether the alien's record of conviction—including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript—evidences a crime that in fact involved moral turpitude"). (b) (6) did not indicate that (b) (6) did this analysis, however, or suggest that the judicially noticeable documents in the record showed the requisite level of knowledge to render Respondent's crime a CIMT.

Upon further review of the record, it is clear that the conviction documents considered under the modified categorical approach do not establish in and of themselves that Respondent knew or should have known that (b) (6) was under the age of sixteen. The felony complaint simply states that Respondent was charged with the following:

COUNT 1: On or between January 27, 2002 and January 26, 2004, in the (b) (6) the crime of LEWD ACT UPON A CHILD, in violation of (b) (6) a Felony, was committed by (b) (6) who did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of (b) (6) a child under the age of fourteen years, with the intent of arousing, appealing to, and

(b) (6)

gratifying the lust, passions, and sexual desires of the said defendant and the said child.

See Complaint, Case No (b) (6). The plea form states that Respondent pleaded no contest to count one and that, based on his plea, he was sentenced to probation and 365 days in the county jail. See Felony Advisement of Rights, Waiver, and Plea Form. Finally, the minute order states that Respondent was convicted of count one in the (b) (6) on June 6, 2012. See Minute Order. However, none of these documents describe the circumstances underlying Respondent's crime or whether he knew the age of his victim.

Thus, to determine whether Respondent's offense constituted a CIMT, Judge (b) (6) must have proceeded to the third step of Silva-Trevino. 24 I&N Dec. at 690 ("When the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction . . . to discern the nature of the underlying conviction . . ."); see also Guevara Alfaro, 25 I&N Dec. at 420 (holding that, absent otherwise controlling authority, immigration judges are bound to apply all three steps outlined in Silva Trevino). Once again, (b) (6) did not clearly indicate that (b) (6) did so.

Nevertheless, a review of the remaining documents in the record under the third step of Silva-Trevino demonstrates that Respondent did in fact know that (b) (6) was under the age of sixteen when he sexually abused him. The probation officer's report states that Respondent informed detectives that he had sexual encounters with (b) (6) when (b) (6) "was seven or eight years old." See Probation Officer's Report at 4. Thus, Judge (b) (6) was correct to conclude that Respondent's conviction under section 288(a) constituted a CIMT.

Judge (b) (6) was also correct to conclude that Respondent's conviction under (b) (6)

(b) (6)

(b) (6)

Therefore, as Respondent was convicted of two CIMTs, Judge (b) (6) properly found that he was statutorily ineligible for cancellation of removal.² INA § 240A(b)(1)(C) (noting that applicants are ineligible for cancellation of removal if they have been convicted of an offense under section 237(a)(2) of the INA); see also INA § 237(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable."). The only shortcoming in (b) (6) decision was (b) (6) failure to explain the reasoning, legal precedent, and evidence that led (b) (6) to reach this conclusion.

² Respondent is also ineligible for cancellation of removal pursuant to section 237(a)(2)(A)(iii), as an alien convicted of an aggravated felony at any time after admission. INA § 237(a)(2)(A)(iii); see also (b) (6)

(b) (6)

(b) (6)

Although the Government argued that Respondent's conviction under (b) (6) constituted an aggravated felony, Judge (b) (6) did not pretermit Respondent's application on this basis.

B. Alleged Bias in Respondent's Proceedings

Respondent also claims that Judge (b) (6) was "very impartial" throughout his proceedings. See Respondent's emails. Based on the content of his emails, the Form I-290B, and the Civil Rights Complaint, I assume that Respondent meant to allege that Judge (b) (6) was biased against him and incorrectly used the word "impartial".

However, this claim is wholly unsubstantiated and lacks merit as it is rebutted by the DAR. To begin, Respondent has not provided nor points out any specific details or evidence to support this allegation. In fact, his only criticism of Judge (b) (6) conduct appears to be that (b) (6) pretermitted his cancellation of removal application without considering the merits of his claim. As discussed above, Judge (b) (6) was correct in doing so, as Respondent is statutorily ineligible for such relief. Respondent simply is claiming that Judge (b) (6) was biased against him because he is unsatisfied with the outcome of his case.

Further, the DAR of Respondent's November 2012 hearing does not suggest that Judge (b) (6) was biased against him or that (b) (6) acted inappropriately during his proceedings. Rather, the record reflects that Judge (b) (6) addressed Respondent in a neutral and respectful manner and maintained a calm demeanor throughout his hearing. (b) (6) also spent a significant amount of time patiently and thoroughly explaining the consequences of (b) (6) ruling and Respondent's right to appeal. At the conclusion of proceedings, Respondent waived appeal without expressing any concerns regarding the nature of his hearing or Judge (b) (6) conduct. This further suggests that Respondent's proceedings were conducted in an appropriate and fair manner.

C. Respondent's Request for Information and Documents from the DHS

Finally, Respondent requests that the Court verify whether the DHS received his Form I-290B and Civil Rights Complaint and, if so, assist him in retrieving these documents. However, Respondent's requests are misplaced. The Court is not part of the DHS and does not have access to information regarding Respondent's submissions to another governmental agency. Nor is it the Court's responsibility to check on the status of Respondent's filings with other agencies of government. To request such information or assistance, Respondent must contact the DHS directly.

1/16/2013 EMAIL Reponse sent to Complainant/Respondent:

Re: (b) (6)

(b) (6)

Your complaint emails of January 2013 and December 2012 were referred to me for review and action. Your emails state that Immigration Judge (IJ) (b) (6) who presided over your removal proceeding in November of 2012 was bias and otherwise acted in an inappropriate and unfair manner. You specifically assert that (b) (6) failed to even examine or consider your application to stay in the United States and simply pretermitted your application for Cancellation of Removal. Finally, you request the court verify or obtain from the Department of Homeland Security (DHS) your purported filings of a Form I-290B, *Notice of Appeal or Motion*, and a separate submission of a *Civil Rights Complaint*.

Procedural History

You are a native and citizen of Mexico. On November 6, 2012, you filed a Form EOIR-42B, *Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents* (cancellation of removal application), based on the alleged hardship that your removal would cause to your father, who is a U.S. citizen, and your mother, who is a lawful permanent resident. On November 20, 2012, the DHS submitted conviction records to support its claim that you were "statutorily ineligible" for such relief. These records included certified copies of the felony complaint, minute order, plea form, and probation officer's reports from the (b) (6) (b) (6) relating to both your 2006 conviction for forgery in (b) (6) and your 2012 conviction for committing lewd acts upon a child in violation of (b) (6).

Based upon this evidence, Judge (b) (6) found that your crimes were Crimes Involving Moral Turpitude (CIMTs) and proved your removability as charged by the government. (b) (6) further concluded that you were also statutorily ineligible for the cancellation of removal application, pretermitted and denied this application, and ordered your removal to Mexico. Judge (b) (6) then proceeded to clearly explain your right to appeal her decision. However, you chose to waive appeal and accepted a final order of removal and deportation to Mexico.

Subsequent to your physical removal to Mexico by DHS, you sent four emails to the IJConduct internet site. Therein, you alleged that Judge (b) (6) had failed to consider your cancellation of removal application and that (b) (6) was "very impartial" (sic) during your proceedings. In addition, you requested that the Court verify if the DHS received your Form I-290B, *Notice of Appeal or Motion* and a separate *Civil Rights Complaint* and, if so, asked that the Court assist you in retrieving these documents.

Analysis

Respondent's Eligibility for Cancellation of Removal

You claim that Judge (b) (6) “unjustly deported” you without “even look[ing] at [your] application for cancel[l]ation of removal and supporting documents.” *Id.* In your Form I-290B, you further claim that Judge (b) (6) “just said (b) (6) had to go by what the ICE Lawyer had presented (b) (6) a report that . . . (b) (6) did not even read.” *See* Form I-290B, attached to your email complaint.

The audio recording (DAR) of your proceedings contradicts these claims of partiality and bias. On November 20, 2012, while on the record, Judge (b) (6) properly accepted, reviewed and considered the evidence submitted by the DHS. Based on this evidence, (b) (6) concluded that you had two criminal convictions constituting CIMTs, which therefore rendered you statutorily ineligible for the relief you filed for cancellation of removal. Given Judge (b) (6) correct findings, it was proper for (b) (6) to pretermit and deny your cancellation application without considering the substantive merits of your claim. A pretermitted application negates any need to consider the substance of the application itself.

My independent review of your record comes to these same conclusions. It is clear that the conviction documents were considered under the appropriate case law, statute and regulations and precluded cancellation of removal relief. Judge (b) (6) was correct to conclude that your conviction under (b) (6) Judge (b) (6) was also correct to conclude that your conviction under (b) (6) qualifies as a CIMT. Therefore, as a Respondent convicted of two CIMTs, Judge (b) (6) properly found that you were statutorily ineligible for cancellation of removal. INA § 240A(b)(1)(C) (noting that applicants are ineligible for cancellation of removal if they have been convicted of an offense under section 237(a)(2) of the INA); *see also* INA § 237(a)(2)(A)(ii) (“Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable.”).

Alleged Bias in Respondent’s Proceedings

You also claim that Judge (b) (6) was “very impartial” (sic) throughout your proceedings. Based on the content of your emails, the attached Form I-290B, and the Civil Rights complaint, I assume that you actually meant to allege that Judge (b) (6) was biased against you, but you incorrectly used the word “impartial”.

However, this claim is wholly unsubstantiated and lacks any merit as it is rebutted by the content of the Record of Proceeding and audio recording (DAR). To begin, you have not provided nor pointed out any specific detail or issue to support this allegation. In fact, your only criticism of Judge (b) (6) conduct appears to be that (b) (6) pretermitted your cancellation of removal application without considering the contents of this claim. As discussed above, Judge (b) (6) was correct in doing so, as you are statutorily ineligible for such relief. Simply claiming Judge (b) (6) was biased against you because you disagree with the outcome of your case is not ground for bias or misconduct by a judge.

The DAR review reflects that Judge (b) (6) addressed you in a neutral and respectful manner and maintained a calm demeanor throughout your hearing. (b) (6) also spent a significant amount of time patiently and thoroughly explaining the consequences of (b) (6) ruling and your rights to appeal. At the conclusion of the proceeding, you waived appeal

without expressing any concerns regarding the nature or conduct of the IJ. This further supports my conclusion that your proceedings were conducted in an appropriate and fair manner.

Respondent's Request for Information and Documents from the DHS

Finally, your requests that the Court verify whether the DHS received your Form I-290B *Notice of Appeal or Motion* and the separate *Civil Rights Complaint*; and, if so, to assist you in retrieving these documents. This request is misplaced. The Court is not part of the DHS and does not have access to information regarding your submissions to another government agency. Nor is it the Court's responsibility to check on the status of your filings with other agencies of the government. To request such information or assistance, you must contact the DHS directly.

Sincerely,

Thomas Y.K. Fong
Asst. Chief Immigration Judge
Los Angeles, CA