



[Detail](#)

Complaint Number: 759

Immigration Judge: (b)(6)

Complaint Received Date: 05/29/13

Current ACIJ
Weisel, Robert D.

Final Action Date
08/14/13

Past ACIJS:

Final Action
Written reprimand

Status
CLOSED

Base City
(b)(6)

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

Complaint Narrative: (b)(6) the Board found the judge to be hostile, partial, argumentative and badgering to the witness. The matter should be referred to a different IJ.

Complaint History		
05/29/13	Complaint referred to ACIJ	
06/07/13	Database entry created	
08/14/13	Written reprimand	

Memorandum



Subject	Date
(b) (6) (BIA May 28, 2013)	May 29, 2013

To

Brian O'Leary, Chief Immigration Judge

MaryBeth Keller, Assistant Chief Immigration Judge

From

David L. Neal, Chairman

Pursuant to a previous understanding that the Board would bring to the attention of the Chief Immigration Judge any Board decision which remands a case to a different Immigration Judge, you will find attached a copy of the Board's decision dated May 28, 2013, and relevant portions of the record of proceedings, in the above-referenced matter. Please take the necessary steps to ensure that this matter is assigned to a different Immigration Judge on remand.

Further, the Board anticipates returning the record of proceedings for this remanded case to the Immigration Court in one week. If you wish to review the record prior to its return to the Immigration Court, please contact Suzette Henderson.

Thank you for your attention to this matter.

Attachments

Falls Church, Virginia 22041

File: A (b) (6)

Date: MAY 28 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

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

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Cancellation of removal¹

The respondent, a native and citizen of Mexico, timely appeals the Immigration Judge's January 5, 2012, decision denying the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229b(b). The Department of Homeland Security has not submitted an opposition brief on appeal. The appeal will be sustained and the record remanded to the Immigration Court for further proceedings consistent with the following order.

The Immigration Judge found that the respondent did not meet her burden of proving 10 years of physical presence preceding her application and that her United States citizen children would suffer exceptional and extremely unusual hardship if she were removed to Mexico (I.J. at 11-15; 17-30). 8 U.S.C. §§ 1229b(b)(1)(A), (D). The respondent argues on appeal that the Immigration Judge's behavior throughout the proceedings deprived her of a fair hearing. She further asserts that the Immigration Judge's decision is based, in part, upon clearly erroneous factual findings, conjecture, and a failure to review the evidence (Respondent's Brief at 4-13). Upon review of the allegations raised in the applicant's brief and the transcript of the proceedings, we are troubled by the Immigration Judge's remarks and conduct. Particularly, we note that the Immigration Judge at times was partial, argumentative, hostile, and badgered witnesses (Tr. at 9-10, 30-32, 37-38). The Immigration Judge speculated that the respondent would not obey an order of removal, sarcastically implied that the respondent thought of leaving her children in (b) (6) and opined that the respondent should not fear relocating to a town other than her hometown in Mexico because she was brave enough to move from her hometown to (b) (6) before she had children. *Id.*

We are further concerned with the Immigration Judge's review of the respondent's documentary evidence. For example, in reviewing the respondent's continuous physical

¹ The respondent does not contest the Immigration Judge's denial of her applications for asylum, withholding of removal, and protection under the Convention Against Torture.

presence, the Immigration Judge concluded that the evidence for the years 2002 through 2005 was "spotty," that there was a lack of medical documentation from 2001 to 2006, and no school certificates for the year 2003 (I.J. at 13). The record, however, reveals that the respondent provided health or school records covering those years (Exh. 4 at 8-13, 38-47, 52-54, 63-66, 89-97, 103-105; Respondent's Brief at 8-10). The Immigration Judge speculated that the evidence was insufficient to meet her burden of proof because it is not uncommon for citizens of Mexico to travel back to Mexico and that she may have traveled to Mexico for a lengthy period because, among other guesses, the father of her children abandoned her (I.J. at 14-15). The respondent maintains that she has not returned to Mexico since her entry in 1996 (Respondent's Brief at 8-10). Although the Immigration Judge questioned the respondent's credibility in general, the Immigration Judge stated that parts of the respondent's claim are credible and others are not (I.J. at 7-8). Thus, it is unclear whether the respondent's testimony regarding her presence in the United States was deemed credible.

Similarly, it is uncertain whether the Immigration Judge deemed the respondent's testimony credible regarding the hardship her children will suffer. Finally, the Immigration Judge did not reach factual findings or consider the respondent's children's age, acculturation, and ability to speak or read Spanish.

In light of the foregoing, we will sustain the applicant's appeal and remand the record for another hearing on the issue of the applicant's eligibility for the relief she seeks from removal. Even when due process issues are not reached, a remand to another Immigration Judge is justified when there is an appearance of bias or hostility to ensure fairness and the appearance of impartiality. *See Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008); *Islam v. Gonzales*, 469 F.3d 53 (2d Cir. 2006). Accordingly, we will order that this matter be heard by a different Immigration Judge on remand.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings before a different Immigration Judge.


FOR THE BOARD

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

(b) (6)

File: A(b) (6)

January 5, 2012

In the Matter of

(b) (6)

RESPONDENT

)
) IN REMOVAL PROCEEDINGS
)
)

CHARGES: Section 212(a) (6) (A) (i) of the Immigration Act,
an alien who is present in the United States
without being admitted or paroled.

APPLICATIONS: Asylum and/or withholding of removal and/or
protection under the Convention Against Torture.
In the alternative, cancellation of removal under
Section 240A(b) (1) of the Immigration Act.

ON BEHALF OF RESPONDENT: (b) (6)

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

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is an adult woman from Mexico. She was placed in removal proceedings through Exhibit 1, the Notice to Appear, which was issued November 19, 2008 based on an application for asylum that the respondent had submitted to the CIS Branch of the Department of Homeland

Security and which was filed with that agency February 7, 2008. The respondent has admitted the allegations in the Notice to Appear that she is present in the United States without being admitted or paroled and the Court is satisfied that there is clear and convincing evidence to support the charge. So, I do sustain that.

Since the respondent is subject to removal, she has the burden to establish her eligibility for any relief under the Immigration Act. In general, she must do this by a preponderance of the credible evidence and her application is subject to the REAL ID Act since the application was filed after that law took affect in mid-2005.

Obviously from the record as a whole, we see that the respondent is emphasizing and concentrating on her application for relief in the form of cancellation of removal.

The respondent did affirmatively file an application for asylum under Section 208 of the Immigration Act. This was discussed previously. The Court found that the application was untimely. The Court does not believe the respondent has actually pursued her application for asylum in a diligent way through the course of the hearing and it might be considered that she has essentially abandoned it through lack of prosecuting it during the hearing on the merits.

However, the Court will say that there was some testimony from the respondent concerning problems which exist in

Mexico that might touch upon a claim for asylum or withholding of removal or potentially under the Convention Against Torture. So, the Court will briefly address these issues.

As far as the respondent's asylum application, I previously indicated I considered it to be untimely. The application for asylum references the problems that would be faced by the respondent's three U.S. citizen sons if they returned to Mexico in the event that the respondent were removed. The Court believes it is clear that the respondent has had the same types of concerns about the situation in her home country for quite some time and it appears more than a year before she actually filed the application for asylum, and the Court does not believe the record identifies any particular event or change in circumstances in Mexico that motivated the respondent to file for asylum when she did as opposed to the same concerns that she had quite some time before that.

Further, I do not believe the respondent has established any legally sufficient basis for being unable to file an application for asylum at the time when she first had such concerns and this is assuming for the sake of argument that those concerns would be a valid basis for a claim for asylum.

The Court therefore believes that the respondent has shown neither a change in her personal circumstances shortly before she filed the application, a significant material change or a qualitative change in conditions in Mexico shortly before

that time, or some type of disability such as a medical condition or other problem that prevented the respondent as a legal matter from making a timely application for asylum.

The Court therefore finds that the application under Section 208 is not timely under any interpretation of the regulations.

The Court therefore denies the application for relief under Section 208 of the Immigration Act for that reason alone.

As far as any claim for withholding of removal or protection under the Convention Against Torture, it would require a showing of a probability that either persecution for the withholding or torture for the Convention would occur to the respondent if she were returned to her country.

In particular, the case law does not recognize the fear of harm to U.S. citizen child as a basis for an asylum or withholding claim and the Court believes the same rationale extends to the Convention Against Torture. The case law includes the cases on female genital mutilation, parents who are concerned that a daughter born in the U.S. would be subjected to that procedure if they have to accompany the parent back to a country because the parent is facing an order of removal.

I do not see any distinguishable basis in reference to the facts in the respondent's case.

Therefore, the Court considers that the respondent has failed to prove assuming she was actually trying to prove that

she qualifies for withholding of removal or relief under the Convention Against Torture on this basis.

The respondent did also testify as to certain problems that exist in Mexico such as an increased rate of criminal activity, the more prevalent practice of kidnapping for ransom, et cetera.

The best the Court can say in reference to these claims is I believe they are untimely as to asylum for the reasons I discussed and I do not believe the respondent has identified a particular social group that would qualify her for withholding under Section 241 in regard to such problems, nor do I think the respondent has established a probability, meaning greater than a 50 percent chance, that she would in fact be subjected to torture due to such problems in Mexico. The mere possibility that it might occur is clearly not sufficient to justify withholding or Convention Against Torture relief.

The Court therefore passes on to what was clearly the more important claim for relief that the respondent was placing almost all her efforts in. Further, I note that the respondent did indicate through counsel at a master calendar hearing that the respondent was not seeking to make any application for voluntary departure. On this basis the Court did not raise that issue at the end of the hearing and does not discuss it further.

As far as the application for cancellation of removal, the respondent must prove four separate criteria to exist and

must do so by a preponderance of the credible evidence. If the respondent proves that each of these four requirements does exist, then the Court would go on to consider whether the respondent deserves the relief of cancellation as a matter of discretion. See Mendez v. Holder, 566 F.3d 316 (2nd Cir. 2009); Rodriguez v. Gonzales, 451 F.3d 60, 62 (2nd Cir. 2006).

As to the four factors, they may be simply described as a requirement for 10 years of continuous physical presence, a requirement for 10 years of good moral character, a showing that the applicant is not removable for certain grounds related to criminal or terrorist activity, and showing that removal of the respondent would result in exceptional and extremely unusual hardship to a qualify relative.

There is no provision for carrying over a strong showing on one category to compensate for a less strong showing on different criteria for relief. In other words, a person might establish by crystal clear evidence that they have been physically in the U.S. for 45 years before the issuance of the Notice to Appear, but the fact that they met their burden in terms of a much longer period of physical presence than necessary would not make up for a possible weakness on one of the other four requirements.

The lengthy period of physical presence certainly could be a factor that would come into consideration in reference to discretion, but it does not compensate for weakness

in one of the other four "objective" requirements.

As far as the credibility of the respondent, the Court has noted that it is subject to the REAL ID Act. Under the REAL ID Act the applicant does not begin with a presumption that her testimony is credible and the Court may assess the applicant's credibility taking into consideration issues such as discrepancies which may be minor or relate to collateral issues and the respondent has affirmative duty to corroborate her case to the extent possible without other evidence even if she thinks that her own testimony is quite clear, consistent, and should be sufficient as a basis for relief. Finally, the Court can take into consideration the demeanor of the respondent during her testimony and also the plausibility or lack of plausibility in various assertions or statements that the respondent makes as affecting the credibility of the respondent's testimony.

In the present case, I would not say that the respondent's demeanor was either significantly positive or significantly negative as it affects her credibility. However, the content of her testimony in certain respects gave the Court significant concern about whether the respondent was trying in a clear thinking way to give answers that were in fact realistic as opposed to answers that would be most helpful in her presentation of the case. Examples of this which I will discuss include the question of whether the respondent's three U.S. citizen children would go to Mexico if the respondent were

removed there and also the respondent's assessment or statements concerning the educational and health problems that may exist for one son or the other.

As I say, I will discuss those later in the decision but they did have a bearing on the Court's assessment of the respondent's credibility.

The Court believes in fact that the respondent's credibility is in a sense variable. There are certain subjects in which the respondent seems to be reasonably straightforward and her testimony can be taken more or less at face value, but there are others where her testimony involves more of a statement of conclusions or assertions of facts that are not established by any particular document, that are not simply a question of what happened on what date and there the Court does have real reservations about the subjective credibility of the respondent, whether she is in fact trying to give the most accurate answers possible as well as the reliability of the respondent's testimony. That is, whether a reasonable person can actually count on a statement made by the respondent on certain issues to be close to objective fact.

However, the Court would not say that the respondent's credibility is the turning point in the case. It does affect the Court's assessment of the weight that certain evidence deserves including testimonial evidence.

The requirement under the REAL ID Act that a

respondent present corroboration of her testimony is not met properly in this case in two general respects I would say. First, I would say that the respondent has failed to corroborate her family situation in the United States as clearly as she could and also that the respondent has failed to corroborate her testimony about her family's situation in Mexico as it is at this time.

Specifically, the respondent has three U.S. citizen children. The father of the children is not "in the picture" at this time. He has not attended a hearing. He has not submitted a statement. We have very little in the way of documentation that relates to the father, although we do have an early evaluation which lists him as the father of the children being evaluated and speaks about how "the parents" in the plural are concerned about this or that, et cetera. This would indicate that at one time the father of the children was involved in a meeting about the children's welfare and did have ties to the children while the children were at least in the preschool stages.

We have only testimony from the respondent and to some extent from her boyfriend who presumably knows this by hearsay from the respondent herself that the father has no contact with the children at this time, that he does not provide any financial support, that he might be living in (b) (6), and that there is no real tie between him and the respondent at this

time. It would seem that close friends of the respondent would be well aware of this situation even from a period predating the beginning of a romantic relationship between the respondent and her current boyfriend, the gentleman who testified in Court. We do not have such corroboration. We do not have any Court documents relating to the separation of the parents or the fact that the father pays no child support either through the legal process or in cash to the mother and it seems to the Court that in fact we should.

Likewise as far as the respondent's description of her family's circumstances in Mexico, the various siblings that she has there and her mother, the respondent has simply told us what the situation is but she has done almost nothing to corroborate it. As far as the Court is concerned, this is a weakness in the record. It is typical of the type of record that we might have in a suspension of deportation proceeding from 1996 or so where an alien comes and tells the Court what the facts are about the case. I believe it is clear that Congress was not satisfied with that type of record and therefore enacted the REAL ID Act which includes the requirement for corroboration through available evidence. I do not believe the respondent has proven that there is no evidence available to back up her assertions of fact about her family's situation in the U.S. and in Mexico and I do believe this is a weakness in the record in general.

Taking the case though at the face value for the sake

of discussion as the respondent has explained her situation, then the Court would say that the four required factors have been dealt with through the evidence as follows.

As far as physical presence for the necessary period of at least 10 years before the issuance of the Notice to Appear, this would take the respondent back to November 1998.

The respondent does have documentation concerning her presence in the United States. A fair amount of this documentation actually reflects the presence of the children in the United States which obviously is a reasonable basis to assume that the mother was here as well. The respondent does have affidavits from friends who make statements such as I have known the respondent for 10 years or 7 years or some other period, and express a good opinion of her as a mother, as a neighbor, et cetera. These documents are of little weight to the Court because they do not give specific information about how the person met the respondent, how often they have see her, how they know that she has been in the United States during that period which is more or less taken for granted in these statements, and of course such statements are not subject to cross-examination. They are really just a general conclusory statement which does not deserve a great deal of weight.

There was a specific question raised on cross-examination concerning whether the respondent had documentation of her presence in the United States for the period 2004 and

2005. Having reviewed the record, the Court would say that there is also a scarcity of evidence relating to the year 2003.

If we look at the tax returns which have been filed as part of Group Exhibit 4 and also updated to some extent in Exhibit 6, we see tax returns for the respondent's earnings during the period 1999 and 2000, et cetera. However, these tax returns were not in fact filed during those years. The respondent is not claiming that she did file tax returns during those years. Instead, she filed all these tax returns in 2009 as part of the process to show that she qualified for relief. So, the fact that these tax returns have been filed and also the consideration that they are generally not supported by any type of W-2 form from an employer that would be independent corroboration of the income earned that year indicates that the Court really cannot count on the late filed tax returns as proof that the respondent actually was in the U.S. during a certain year.

This is especially so since the respondent generally is not paying any significant amount of back taxes for the tax returns that she filed in 2009. There is no financial cost to her to turn in these documents at this time.

The Court does see that there is in fact an IEP or Individualized Education Plan for one of the children which was prepared in May 2004. So, this covers that particular period or point in time and it also suggests that the son was in the U.S.

during the school year fall 2003 to spring 2004.

There are immunization records which give dates when the children received certain vaccines, et cetera. However, after 2001 and until 2006 the Court has not been able to find any notations for medical treatment or immunization during that period. Also, I have looked through the school certificates that the different children have which are included in Group Exhibit 4, but I have not actually noticed one which appears to be from the year 2003.

The court would note in reference to the recently filed tax returns that these tax returns are problematic in another way in terms of their reliability as a statement of fact because the respondent did not claim her oldest son who was born in 1997 on any of her tax returns that the Court has seen. Instead, she has always claimed the two younger sons who are twins born in 1999. It appears although it is not crystal clear, but it appears to the Court from the testimony and the tax returns taken together that the respondent has allowed her present boyfriend to claim the oldest son as a tax deduction on his tax returns. We know that he did this on some tax returns and I believe the respondent was indicating that he had done so on others even though both of them testified that they did not know each other as early as 1999 and they gave different estimates as to whether they had met each other eight years before their testimony, seven years before, or perhaps five

years before. There was also a variance in the estimate of how long they have been involved in an intimate or romantic relationship, the respondent indicating only about two years and the gentleman as I understood his testimony indicating four or five years.

The Court therefore concludes that the documentary evidence for the respondent's presence in the United States during a period in 2003, 2004, and 2005 is very spotty and that both early 2003 and 2005 are problem areas in terms of documentation of respondent's presence. It is not clear why this is so. It is not clear why the respondent did not have bills or receipts or records of her children's medical treatment, et cetera, during that period, and in particular in 2005. There are some school certificates from 2005.

The Court would conclude from this record which I believe is somewhat patchy in its quality that it is possible the respondent was here the entire period since her first son was born in 1997 up until the time the Notice to Appear was issued. It is however not unusual for citizens of Mexico to make a trip back to Mexico for some period of time and obviously this is perhaps most common among Mexican citizens because their country is physically adjacent to the United States and, of course, they make up a large segment of immigrants in the United States. The respondent might have made a trip back to Mexico in the period between 2003 to 2005 and might have been in Mexico

for a substantial period, four months, five months, six months, without her absence being noticeable from the record that we have before us, but the respondent's burden is to establish that she was present during these periods. It is not the burden of the Department of Homeland Security to seek out some tangible proof that she was gone from the United States.

The Court would note that it seems as though the respondent is indicating that the father of her children abandoned the family some time in that period, perhaps around 2003, and it is possible that the respondent might have gone to Mexico with the children at that time not knowing exactly what else to do. Or, she might have done so, as certainly many people have, due to some type of family emergency with her mother, a funeral, some other urgent need to return to Mexico.

In summary, although there are many indications that the respondent has been in the U.S. frequently during the 10-year period which she needs to establish, I do not believe the respondent has actually established by competent evidence that she has been physically present without a lengthy interruption, specifically without an absence of more than 90 days which would ~~interruption. Specifically, without an absence of more than 90 days which would~~ interrupt her period of ~~period of~~ physical presence under the rules at Section 240A(d) of the Immigration Act.

(b) (6)

For this reason, the Court reaches the conclusion that

the respondent has not met her burden on this point as required by the application.

If this were the only concern the Court had, I would probably be trying to give the respondent another opportunity, more than she is technically entitled to under the procedures, to try to come up some other documentation to show physical presence during those periods.

Because the Court has another issue in which I am concerned, I do not believe it is justified to reset the case again for that purpose. The respondent certainly had this brought to her attention by the questions on cross-examination.

As far as the second required factor, the respondent needs to show good moral character for a period of 10 years up to the date of the final administrative decision. For this Court's purposes, that means today.

The respondent has no known arrests. There are issues concerning her tax returns including the late filing of many tax returns and even more noticeably, the respondent's failure to actually file the tax returns for the two year period during which she was appearing before the Court on her relief application, although by that time she had a Tax Identification Number and was legally capable of filing such a tax return. The respondent's explanation for this was that she was too busy or too occupied with other concerns. As far as the Court is concerned, the fact that the respondent brought her backdated or

retroactive tax returns in as evidence to cover the period up to 2008, would certainly indicate that she would be capable of filing tax returns for 2009 and 2010 before the final hearing in this case.

Despite this failure to file tax returns which has not been properly explained, the Court will conclude that the respondent appears to be a person of good moral character. It does appear the respondent has been working on a regular basis, supporting her children and caring for her children. These are usually considered to be clear indications of good moral character.

As to whether the respondent is removable for criminal conduct or some involvement in terrorism, there is no issue raised about this. There is no evidence to suggest she is. So, the Court does find she meets that third requirement.

The remaining requirement is that the respondent establish that her removal would relate an exceptional and extremely unusual hardship to a qualifying relative.

The Court will just briefly discuss the framework in which I believe this requirement has to be assessed.

First of all, the statute speaks of establishing the necessary hardship to a relative. That is to say, to one person. It does not speak of showing that the respondent's removal would result in exceptional and extremely unusual hardship to the respondent and her family taken altogether or

what we might consider as a global view of the family. It is not clear to the Court nor am I aware of any decision which indicates that some hardship to qualifying relative A, some hardship to qualifying relative B, and some hardship to qualifying relative C, none of which reach the level of exceptional or extremely unusual, can be somehow added together to reach the requirement set by the statute.

The Court also believes that the language of the statute refers to showing that such hardship "would result". The Court does not believe it would be reasonable to interpret that language to mean that there is a 100 percent certainty that the hardship would occur to the relative. I think that would plainly be unreasonable and more than Congress intended. But, I do believe that the language that the hardship would result is clearly different from what we might call the "well-founded standard" that applies in an asylum case. For example, in an asylum case if a person has a reasonable basis to fear a chance of persecution, that may be sufficient for a grant of relief even if the chance of persecution in numerical terms seems to be only a 10 or 20 percent chance of persecution. Of course, I realize how hard it is to quantify or give a number value, but some Court decisions have discussed the matter in this fashion.

Compared to an asylum standard of a well-founded fear or a reasonable fear, we have a well-known standard for other relief applications including the analogous form of relief which

is withholding of removal. For withholding of removal the applicant needs to establish that the persecution is more likely than not to occur. That is to say, the chance the persecution will occur is greater than 50 percent.

I believe this is in fact the appropriate standard or the measure to use in applying the hardship requirement in Section 240A(b) (1) of the Immigration Act. Not that it is inevitable or certain, but that it is more likely than not. I do not believe any other standard comes close to meeting the meaning of the phrase would result as used by Congress in the statute.

Therefore, a parent might have a very strong subjective concern about hardship to a U.S. citizen relative, but that strong emotional subjective concern would not in itself be sufficient to qualify the applicant for relief.

In assessing hardship to the qualifying relatives, the only qualifying relatives are the three U.S. citizen sons. There are slight differences that might be seen between the possible hardship. The oldest son has lived in the U.S. longer by definition and also appears to be doing somewhat better in school and perhaps would be more deprived of educational opportunities in a functional sense than the two younger children. The younger children who are twins have had some problems in education and have received some types of special educational assistance from the school system.

The respondent has made equivocal statements as to whether her sons would in fact go to Mexico if the respondent were deported.

In Exhibit 2, the asylum application, the respondent states quite clearly that if she is removed to Mexico she will have to take her children to Mexico with her. In Exhibit 3, the cancellation application, the respondent states that if she is removed to Mexico her children will accompany her and given their age this means she will take them.

On direct testimony, however, the respondent testified that if she is removed from the United States to Mexico, she would have to leave her children in the United States, although she was at some loss to indicate where exactly she would leave them or under what circumstances. On cross-examination and to some extent because the Court felt the respondent's answers were not really factually responsive to the questions she was being asked, the Court became involved in this discussion as well and the respondent then was indicating more or less an agreement or an acceptance that if she is removed from the United States to Mexico she would in fact take her sons with her, although I do not believe she ever made a definite commitment to do so.

In assessing what the hardship will be to the U.S. citizen sons, it is really quite essential for the Court to have a clear statement of what their situation would be to the extent that is possible.

In Matter of Ige, 20 I&N Dec. 880, 885 (BIA 1994) the Board of Immigration Appeals considered an appeal from a denial of a motion to reopen deportation proceedings for two citizens of Nigeria, married, who had a child born in the U.S. and the applicants, the persons making the motion to reopen their deportation proceedings, stated in their motion that if they were deported from the U.S. they would leave the U.S. citizen son who was quite young in the United States and that this would cause a very strong hardship to the son.

The Board there indicated that when a parent or parents make such allegation that there would be hardship to the child because the child would be left in the United States when the parents were deported "the Board will not give such a claim significant weight based on either the mere assertion that the child would remain here or an indirect reference to such a possibility. The claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality." The Board then explained what it would require as their minimum showing in a motion to reopen that such a plan would be followed. They said they would need an affidavit from the parent or parents stating this intention and it should be accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support such as staying with a relative or in a boarding school. The Board of

Immigration Appeals noted further on the same page of its decision "children of a tender age ordinarily desire to be with their parents. Furthermore, it is generally preferable for children to be brought up by their parents. In fact, we are concerned that the emotional trauma imposed on the older child by the threat to leave him here alone in the hopes that his parents would thereby obtain legal status in the United States is more damaging than anything that could happen to him in Nigeria." The Court is setting out this language that the Board used in this decision in 1994. I am not actually expressing a commitment to the same conclusions, but obviously this is a matter that was of some concern to the Board in that case. Another Court or perhaps the Board in another decision might view the issues somewhat differently, but obviously they are issues of concern here.

The Court believes that the respondent has failed to really establish a clear plan of what she would do. The Court does understand that it would be difficult for a parent to make plans about what the parent would do in the event that an order of removal is about to be carried out. As far as the Court is concerned, however, when the applicant files an application for asylum based on the harm that would occur to her children if she takes them back to Mexico when she is deported, the parent is indicating some awareness, some tentative plan at least to take the children back to Mexico. The application for cancellation

of removal is similar in terms of the answer given there which is a shorter answer and the respondent's testimony on direct left the Court with an unsatisfactory impression of the respondent's sincerity in her testimony that she was going to leave three U.S. citizen children in the United States even though she had not made any definite plan as to who could take care of them.

In this regard, there was a discussion of whether the respondent's current boyfriend could in fact take care of the three boys, but both witnesses, both adults, indicated that this would be somewhat difficult and the gentleman indicated that he thought it would not actually work out. As far as the Court is concerned, I do not know the people in question from outside the courtroom, but one would suppose that both of them would probably reconsider the wisdom of such a plan at some point before they actually put such a plan into action.

The Court for these reasons tends to think that the appropriate approach for this decision is to accept what the respondent seemed to be indicating in the later part of her testimony which is that mostly likely she would take the boys to Mexico or that this was more likely than not. It left the Court without a clear basis to make such a ruling, but as the respondent has presented the situation, there is really little indication that there is a firm plan in place of the type that the Board seemed to indicate was required by its decision in

Matter of Ige to have the children stay in the U.S. indefinitely if the respondent were removed from the country.

As far as the issue of hardship to any of the three sons, the hardship has to be exceptional and extremely unusual.

In interpreting this phrase, the Court believes we have to take it in the context of the enactment of the cancellation of removal statute. It is often said that provisions for relief from deportation or removal in the situation where they seem ambiguous or unclear should be interpreted to give the benefit of the doubt to the interpretation more favorable to the relief applicant because the consequences of removal or deportation are so severe. This is an analysis that is based on the analysis of criminal statutes for similar reasons.

In the present case, we have a cancellation statute that was enacted by Congress apparently quite deliberately to take the place of the prior statute for suspension of deportation under Section 244 of the prior Immigration Act.

When Congress enacted the cancellation of removal provisions for non-residents, it made several changes between suspension of deportation and the new relief provisions and the Court believes that essentially all of these changes were to make the relief more difficult to qualify for.

Whereas suspension of deportation usually required only 7 years physical presence, cancellation always requires at

least 10 for a non-resident. Whereas suspension of deportation could be granted based on hardship to the applicant himself or herself, that is not possible in cancellation of removal. The hardship that is important is the hardship to the relative and hardship to the applicant is only a discretionary factor. Further, for cancellation of removal Congress provided that the service of the charging document on the alien would stop credit for any further time spent in the United States which was not true for suspension of deportation. And at the same time Congress was enacting the cancellation statute, it was increasing the number of criminal offenses that were a basis for removal or excludability and thereby making it more difficult for anyone with a criminal record to qualify for such relief. Finally, and perhaps most obviously, the change in the level of hardship was significant. Suspension of deportation for most applicants such as this applicant would require a showing of "extreme hardship" whereas cancellation requires a showing of exceptional and extremely unusual hardship.

The case law in the immigration law field has interpreted these two terms in reference to these applications and also other forms of relief in which they are important and it is clear that there is a significant difference.

When the Board interpreted the cancellation statute shortly after its passage in a series of three decisions, the Board put a great deal of emphasis on the nature of this change

in the hardship level.

Specifically, in decisions of Matter of Monreal, 23 I&N Dec. 56 (BIA 2001); Matter of Andazola, 23 I&N Dec 319 (BIA 2002); and Matter of Recinas, 23 I&N Dec. 467 (BIA 2002) the Board held that the phrase extremely unusual by its nature meant that hardship that would be incurred by most qualifying relatives who face returning to the parent's home country in the event the parent is removed would not be sufficient as a matter of definition because such hardship if it was common could never be extremely unusual, and the Board gave other explanations about the nature of the hardship in question and the factors that area significant. The Court does understand that the hardship in question need not be unconscionable but it does need to be a substantial, high level of hardship which is quite different from the type of hardship usually incurred in such situations.

Considering the evidence in this case in light of those standards, the Court would say that the respondent's testimony gives a picture of the problems of her three sons which seems more serious, more dire, than that shown in the rest of the record for the most part. For example, the mother referred to a son suffering from asthma. However, there is no convincing evidence of recent problems for the son concerning asthma. There is an IEP report from the school from several years earlier which indicates that the child used to suffer from

asthma but has not had an attack in two years as of that time and I believe that report is actually almost four years old at this time.

The respondent has also testified concerning the need of her sons for special educational help, in particular the two younger sons, the twins, and it seems in particular one of those.

The Court has tried to review the Individualized Educational Plan from the school district and other documents on this issue. The Court believes that in fact the IEP report reflect fairly steady progress by the children through special educational assistance they were given in the public schools and the Court would say that such educational assistance was not exceptionally unusual or that the type of assistance given was particularly major in its quality. At one time, for example, one of the sons was receiving speech therapy three times a week, but it seems that the speech therapy is now down to about once a week. Further, the evidence as a whole including the IEP's tends to suggest that the sons are doing fairly well and are at least close to grade level in their academic work at the present time. Looking at their most recent report cards, et cetera, the son who might perhaps have the most problem is indicated to be somewhat behind in reading and verbal type skills, but to be quite good in math and actually involved in the math club as well as other activities in the school.

Further, we have letters supposedly written by the

three children themselves to the Court and these letters seem to be reasonably articulate, written in reasonably good English, not necessarily grammatically perfect but certainly at least acceptable for children of that age.

As far as the evaluation by the psychologist, (b) (6) (b) (6) at Exhibit 4-T, the Court has real reservations about the objectivity of this report and consequently of the value that it deserves as evidence. The Trial Attorney on cross-examination raised the issue of whether the psychologist had performed very many such evaluations for Immigration Court cases or immigration cases and the psychologist indicated a substantial number, about 150 as I understood her estimate. She was unable to recall any one evaluation of that large number in which she had not reached the conclusion that there would be significant hardship to U.S. citizen child that would justify granting relief to the parent in question.

The psychologist did suggest that her study group, so to speak, was somewhat self selected because if there wasn't some type of hardship likely, the person would not have the evaluation done. The Court does not believe that this is a safe conclusion. Further, the Court notes in terms of the wording of the report itself by the psychologist in Exhibit 4-T at page 273 of Group Exhibit 4, that in the heading background information and interviews, the psychologist indicates the following, "the primary purpose of this evaluation is to determine individual

psycho-emotional profiles and family dynamics and explore the psychological affects and exceptional and extremely unusual hardship that (b) (6) deportation to her country of origin, Mexico, would cause her three American-born children."

The Court believes that the report is actually indicating in other words that the purpose of the evaluation is to show why there would be exceptional and extremely unusual hardship, not whether there would be, which I believe is a significant point that a psychologist might be more aware of than most of this in terms of what it reflects about the intention of the person doing the evaluation.

The Court further notes that the source for much of the psychologist's information and the basis for her conclusion appears to be solely the respondent. In the same report at page 2, which is at the top of 274 of the Group Exhibit, the psychologist states that the IEP reports from the school district "reportedly" show certain things. It does not appear that the psychologist reviewed these reports or actually saw the "raw data", but rather that she received all of this information through the filter of the respondent's explanations during the interview at the psychologist's office.

Since the Court has already explained why I am concerned about the objectivity or devotion to factual accuracy of the respondent's statements on these matters about her children's possible hardship, I think it is even more of a

problem for a professional to get the information secondhand from a witness that does not seem to be accurate or objective on this subject, and obviously it might be difficult for any parent to be totally accurate and objective on these issues.

For these reasons, the Court believes that the respondent has failed to establish that there will in fact be an exceptional and extremely unusual hardship to any of the three children if the children have to accompany their mother to Mexico.

There was less discussion in the testimony and less in the way of expert opinion concerning country conditions in Mexico. The Court feels that it is reasonably well aware of general problems in Mexico and there is documentary evidence in the record about this. What the Court believes is missing is a showing that the respondent is in fact bound to encounter these problems partly as the Court said because the respondent has not corroborated her own testimony about where she would have to go and how she would have to live if she returned to Mexico, partly because that testimony seemed to the Court to be the most negative possible. That is to say, the respondent is indicating she would have to return to the place where her mother lives, a small rural village. As far as the Court is concerned, this is another example of an assertion by the respondent that is not backed up by any objective evidence. The respondent came to (b) (6)

(b) (6) She has lived here for quite some time and in fact has

survived, raised a family, et cetera. There is no indication that the respondent could only live in Mexico by living next door to her mother or in the same house, et cetera.

For these reasons, the Court thinks the respondent has failed to meet the requirements on the hardship requirement and also to some degree has failed to meet her burden of proof on the physical presence question as I have indicated earlier.

Because I believe the respondent did not meet these requirements, the Court therefore does not go on to discuss the issue of dissection as I have indicated earlier in this decision.

For the reasons stated, the Court therefore orders that the respondent's applications for relief are all hereby denied.

Further, the Court orders that the respondent be removed from the United States to Mexico on the charge in the Notice to Appear.

(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.



EVALENA E. CLARK (Transcriber)

DEPOSITION SERVICES, Inc.

JANUARY 31, 2012

(Completion Date)

F.3d 478 (2d Cir. 2008); *Singh v. Mukasey*, 2008 WL 833099 (2d Cir. 2008); *Xianghao Lin v. Gonzales*, 240 Fed.Appx. 914, 915-16 (2d Cir. 2007); *Mei Zhen Huang v. Mukasey*, 256 Fed.Appx. 406, 408 (2d Cir. 2007); *Rui Zhong Li v. U.S. Dept. of Justice*, 217 Fed.Appx. 44, 46-47 (2d Cir. 2007); *Gui Lin v. BIA*, 200 Fed.Appx. 49, 52 (2d Cir. 2006); *Zhen Tong Weng v. Gonzales*, 193 Fed.Appx. 15, 16 (2d Cir. 2006). These admonishments, apparently, have not been heeded.

At the master calendar hearing held on September 29, 2009 - - the very first held before IJ (b) (6) - - when counsel indicated that the appellant would not be seeking the alternative relief of voluntary departure, the Court then engaged in a somewhat bizarre colloquy regarding that decision.

IJ: *No. If she loses both of her claims, she wants an order of deportation?*

Counsel ["C"]: *That is correct, Your Honor.*

IJ: *Why would that be? I'm just curious.*

C: *Well, because at this point since she is raising three children, Your Honor, who have been here their lives and the significant, we'll probably be requesting deferred action. I mean, we do that through the Service at the end. But it would be very hard for her to just uproot her family and, so, it just wouldn't be practical. She's trying to raise a family, if you will.*

IJ: *She basically would not obey the order is what you mean?*¹

C: *Pardon me? I don't think, she would not be in a position to do that. She's raising a family here and it would be, it wouldn't be feasible. So - -*

IJ: *If she has a full hearing, she wouldn't leave the country if she loses every appeal? She would hide from Immigration? That's what - -*

C: *I'm sorry?*

IJ: *She would hide from Immigration?*

¹ Please note that all bold face type used when referencing portions of the transcript is used for emphasis only.

C: Well, Judge, I really, I'm not here to discuss that right now with you and –

IJ: Well, I just want to be sure I understand why she's not applying for voluntary departure which she would seem to be eligible for.

C: Well, it's her right, Your Honor. And like I said, she's raising a family. It wouldn't be feasible. She has children. They are disabled. They have needs.

IJ: *No offense. No offense. Excuse me. That's the reason she's making the claim for relief.*

C: Yes.

IJ: *If she loses under the legal system, she's going to ignore the result. That's what you mean.*

(Transcript [hereinafter "T"] at 9-11).

This unrelenting badgering by the Court is clearly indicative of the Court's bias and prejudicial attitude toward the appellant, her counsel and her claim from the very initial master calendar hearing. The Court already viewed the appellant as someone without regard for the law. This is despite the fact that there could be many reasons an alien would elect not to seek voluntary departure. Preferring to fully litigate a claim for relief even with the prospect of losing does not equate to an alien "hiding from Immigration" or "ignoring" the Court's order. An alien could simply leave on their own accord if their appeal was denied and that would be fully in accordance with the law.

Another example of the Court's bullying and intimidation of the appellant – a woman with six (6) years of formal education (T. 17-18) – is found in the portion of the hearing regarding whether the children would travel with her to Mexico if she were removed. The Court preyed upon a statement which might have suggested that she would leave the children here (T. 28). However, this statement was immediately followed by the assertion that the appellant does "not have anyone to leave them here

with." (T. 28). Rather than take this for what it clearly is, the Court interrupted direct examination to embark on a discourse designed to intimidate and confuse the appellant:

IJ: *Let me just interrupt for a minute. Ma'am, you signed your application under oath 20 minutes ago and in that it says that if you return to Mexico your children will go with you. So, are you saying you would leave them on the streets of (b) (6) at their age alone?*

Appellant ["A"]: No, I'm not saying that, but - -

IJ: *So, what plan would you make, ma'am? You're going to, if you are going to leave them in the U.S. by themselves, what are you going to do? How are you going to do that?*

A: I would never leave them alone here. With just even the thought of my having to take them over there, it just - -

IJ: *Ma'am, look at me. If what you're saying is you don't want to take them to Mexico, I understand that you don't want to take them to Mexico. But you're not making a statement I can understand or believe that you're seriously talking about. You seem to be fond of your children. When the attorney says if you have to leave and go to Mexico will you take your children, you said no, I will leave them here. Now, if what you really mean is you're not going to leave, that would be the correct answer. But the application that you signed asks whether you would take them or not. The written application says yes, but you should give me the actual answer. If you are going to leave your three children here in the U.S. without any immediate relatives, what exactly, what plan are you talking about? Are you going to leave them in (b) (6)? Are you going to leave them in front of City Hall? What are you talking about?*

A: What I really meant to say with that was that I really cannot put my mind around the thought of having to take them there with me because I have absolutely nothing at all to offer them down there. I have nothing.

IJ: *Well, ma'am, you've had almost two years to think about it. Your case started in November of 2008. What I'm trying to explain to you is give a specific answer that's true as to the facts. Do not say something just because it sounds good. Now, I'll let the attorney go and ask you more questions. It's just that I couldn't quite pay attention to what you were saying because it made no sense that you would just leave your children by themselves.*

(T. 30-32).

Comments such as the references above to leaving her three young children in (b) (6) or at City Hall are similar to the inappropriate questioning and sarcastic

remarks previously noted by the Second Circuit in *Silva v. Mukasey*, 303 Fed. Appx. 22 (2008)(unpublished) and *Zhang v. Gonzales*, 227 Fed. Appx. 12 (2007)(unpublished).

The foregoing colloquy served no other purpose than to intimidate the appellant. It should have been very clear what the appellant had meant in her earlier answers. If it had not been, then it certainly would have been when the appellant clearly indicated that if there was no more chance, then, yes, the children would go to Mexico with her (T. 32). Nonetheless, the Court would ponder this question several times in its' Decision.

A similar disregard for its' role as arbiter of the facts, rather than prosecutor for the government, became evident on the question of where the appellant would live if removed to Mexico:

JJ: *Ma'am, no offense. You, if you came from Mexico to the United States don't you think you could go to a different part of your own country? I mean, you made the trip to the U.S., you settled down here, and you've supported yourself for many years. I would recommend that you try to answer the questions on a more factual basis instead of making statements that sound dramatic. I don't understand why you would say that you're sure you could go anyplace else because it's been a long time. It was a long time ago that you left your home and came to a very different place. I myself, I myself don't know of a reason why a person who could leave Oaxaca and come to the (b) (6) city in the United States would not be able to go to another city in Mexico. If you know a reason, tell us.*

(T. 37-38). After a prelude that seems to be common throughout this transcript - - "no offense" - - which in the eyes of counsel seem to indicate the Court is about to offend the appellant, the Court actually asks a question - - *don't you think you could go to a different part of your own country?* Then, rather than give the appellant an opportunity to respond, the Court just continues to rant - - accusing the appellant of making dramatic statements and generally disparaging her and her answers.

Then, when counsel attempted to give the appellant an opportunity to fully express her response, the Court again tried to limit the record.

C: Well, if she wanted to continue her answer, I am just going to ask her to - -

IJ: *Okay, I'm afraid that the answer is another answer like the last time which I asked her about, which is basically I don't want to leave the U.S., so my answer is no I can't. But I don't think it's really a, it's not an objective answer and I'm trying to encourage her to give a, objective answers - -*

C: To speculate - -

IJ: *That's what I'm interested in.*

C: To speculate what the answer would be that hasn't come out of her mouth yet, I think might be a little bit inappropriate.

(T. 38-39). Counsel would respectfully ask the Board to take note of the number of times the Court interrupted either the appellant or counsel during the course of this hearing. It is disturbing.

Based upon the issues noted hereinabove, especially when viewed against the history as memorialized in the above cited cases, it is respectfully argued that the appellant did not receive a full and fair opportunity to present her case. The Court prejudged her and her claim from the very first master calendar hearing. As will be set forth below, the Court took a jaundiced view of the appellant's testimony and evidence with an eye towards justifying denial of relief. This matter must be remanded and assigned to a new Immigration Judge as a matter of due process and fundamental fairness.

The appellant established that she maintained continuous physical presence

At the time of her hearing, the appellant had spent nearly fifteen (15) years in the United States, never having left since her entry in 1996 (T. 19, 59, 64-66). The Board should note that District Counsel seemed to take little issue with the appellant's continuous presence. Rather, it was the Court that ventured into this topic, characterizing

the evidence as "spotty" for the years 2002 – 2005 (D. 11). However, in doing so, the Court clearly mischaracterized the record. For instance, although the Court held that there were no school certificates for the children for 2003 (D. 13), that simply is not correct, as can be seen below. Likewise, the Court's determination that there were no medical record entries "after 2001 and until 2006" is similarly erroneous (D. 13). The appellant had provided extensive documentary evidence establishing her presence which included the following:

- Her son (b) (6) was born in (b) (6) in 1997 and health records show entries in 1997, 1998, 1999, 2000, 2001, 2002, 2006 and 2008 (Ex. 4, pp. 8-10).
- Her twin sons, (b) (6) were born in 1999 and health records show entries in 1999, 2000, 2001, 2003, 2006, 2007, 2008 and 2009 (Ex. 4, pp. 11-13; 14-16).
- In the record, there exist school and therapy reports for the years 2002 (Ex. 4, pp. 52-53; 63; 100), the year 2003 (Ex. 4., pp. 41-44; 45-47), the year 2004 (Ex. 4, pp. 38-40; 54; 64; 89-97), the year 2005 (Ex. 4, p. 65-66; 103-105).

Despite the appellant's uncontroverted testimony regarding her presence (T. 19, 59, 64-66), the Court elected to engage in idle speculation and conjecture to conclude that she may have left the country (D. 14-15). The Court first makes the generalized and unsupported assertion that many Mexicans travel back to Mexico (D. 14); the Court speculates that maybe she would have stayed in Mexico for "four months, five months, six months" (D. 15); the Court proceeds to wonder whether the appellant would have returned to Mexico with her children in 2003 when the father of her children abandoned her, "not knowing exactly what else to do" (D. 15); or maybe, the Court suggests, there was a "family emergency with her mother, a funeral, some other urgent need to return to Mexico." (D. 15).

This type of unfounded speculation calls into question the entire rationale of the Court's decision. The obvious problem with this reasoning, of course, is that it **lacks any basis in the record**. It has been held that when a Court is addressing issues of plausibility, the Court's finding "will be properly grounded in the record only if it is made against the background of the general country conditions." *Gao v. Ashcroft*, 299 F.3d 266, 271 (3d Cir. 2002). Such support does not exist in the present case. Indeed, the overwhelming evidence supports the appellant's contention that she has maintained the requisite continuous presence.

It is clear that the Court did not fairly and properly consider the testimony in the case at bar. Rather, it would appear that the Court viewed the testimony of the appellant from its' own perspective, interposing its' personal considerations as to what is likely or unlikely. Such considerations have been held to be improper in weighing the testimony and evidence presented by an applicant. *See Matter of B-*, Int. Dec. 3251 (BIA 1995); *Lopez-Reyes v. I.N.S.*, 79 F.3d 908 (9th Cir. 1966). This is further evidence of the appellant being denied a full and fair hearing and her rights to due process and fundamental fairness.

The appellant established that her children will suffer exceptional and extremely unusual hardship if she were removed to Mexico

The Court's decision in the present case that denied the appellant's application for cancellation of removal is clearly erroneous as the Court "totally overlooked and . . . seriously mischaracterized" evidence. *See Mendez v. Holder*, 556F.3d 316 (2d Cir. 2009). While the Court alluded to the loss of educational opportunities, the obvious economic hardship, the fact that the children – particular (b) (6) – was not literate in Spanish and issues of crime and violence, the Court seemed to focus solely on the issue

of the children's health. In doing so, the Court's decision is clearly erroneous when it failed to consider the totality of the factors related to hardship as is required under *Matter of Andozola*, 23 I & N Dec. 319 (BIA 2002). The Court erroneously focused on each separate factor and concluded that no single factor met the hardship standard for cancellation of removal.

Moreover, the Court held that it could not look at the cumulative hardship that would be suffered by the three qualifying relatives but instead had to focus on each child separately (D. 17-18). *This is clear and reversible error.* The entire analysis engaged in by the Board in *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), was one which focused on the cumulative effect the applicant's removal would have on the qualifying relatives. The Board specifically held, as follows:

In considering the hardship that the United States citizen children would face in Mexico, we must also consider the totality of the burden on the entire family that would result when a single mother must support a family of this size.

Recinas, at 472.

If the record had been fully and fairly viewed, the exceptional and extremely unusual hardship that the children will suffer would be obvious.

* The Court's suggestion that there should have been corroboration of the absence of the father of the appellant's children makes no sense (D. 9). The appellant clearly and unequivocally testified that the father is entirely out of the picture, that he provides no support, that she is unsure of his whereabouts but believes that he is in (b) (6) (T. 23). The appellant clearly testified that she has not instituted any judicial proceedings to force him to pay support and that she is not aware of him having any lawful status in this country (T. 23). In light of that fact, what, exactly, would the Court

want by way of corroboration? The fact is that the appellant is the sole parent that these children have to rely upon (T. 24) in that she has no family in the United States (T. 28).

* The appellant provided voluminous records (Ex. 4, pp. 17-100; 273-280) and gave credible and consistent testimony regarding the cognitive issues facing her children, particularly (b) (6) (T. 24-29). She explained how (b) (6) cannot communicate in Spanish and how he was taken out of a bilingual program due to his regression (T. 29). She testified to the fact that the twins continue to get special therapy at school for their struggles (T. 27). She testified to the fact that the type of treatment that they receive would not be available in Mexico (T. 32-33). Frankly, it is as if the Court chose to ignore the letters from the children's therapists (Ex. "4", p. 17), the Individualized Education Program for (b) (6) for the years 2009-2010 (Ex. "4", pp. 18-33), and all of the reports establishing (b) (6) continued need for speech and occupational therapy beginning in 2002 through the present time (Ex. "4", pp. 34-54).

* The Court further ignored the evidence of (b) (6) Individualized Education Programs (Ex. "4", pp. 77-98) and the clear indication that he has suffered from a history of asthma (Ex. "4", pp. 77, 98). Asthma is a very serious condition which, while it may currently be considered mild and intermittent, would certainly be exacerbated if the appellant's son were exposed to the conditions that exist in Mexico. The testimony and documentary evidence in the record support this contention. The appellant provided uncontroverted testimony regarding the substandard health care in Mexico (T. 33-34) and the objective evidence in the record supports this concern (Ex. "4", pp. 119-128, 157).

* In addition to ignoring the objective evidence in the record and the appellant's testimony, the Court likewise discounted the report and testimony of Social Worker (b) (6) (D. 28). Rather than address the actual clinical observations made by (b) (6) the Court instead focused on trying to undermine her credibility by questioning her objectivity (D. 28-29). Once again, it was the Court that engaged in aggressive cross-examination, not District Counsel. It was quite clear that the Court was attempting to establish a record that would justify its' preordained decision to deny relief in this case. (b) (6) professional opinion that the children would suffer exceptional and extremely unusual hardship if the appellant was removed to Mexico was largely swept aside.

Relying primarily on *Matter of Monreal* the Court held that there are no serious health issues or compelling special needs in school at this time for the appellant's children individually. If the Board carefully scrutinizes the Court's decision, it will find that there was a failure to consider all relevant evidence cumulatively. Under the precedent cases cited by the Court, *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), the Court was required to consider the totality of the circumstances. This was not done. The Court erroneously isolated each factor it considered as opposed to explaining the impact that one factor had on another factor. The Court's failings in this case require that the decision be vacated.

It is acknowledged that the Board has reasoned that "[w]e have long held that reduced economic and educational opportunities, without more, do not rise to the level

1 (OFF THE RECORD)

2 (ON THE RECORD)

3 JUDGE FOR THE RECORD

4 All right, so, as far as I'm aware, I can go ahead and
5 set this for an individual concentrating on the cancellation
6 claim and potentially there might be a voluntary departure
7 application.

8 (b) (6) TO JUDGE

9 Q. Your Honor, we would not be pursuing that.

10 A. No. If she loses both of her claims, she wants
11 an order of deportation?

12 Q. That is correct, Your Honor.

13 A. Why would that be? I'm just curious.

14 Q. Well, because at this point since she is raising
15 three children, Your Honor, who have been here their lives and
16 the significant, we'll be probably be requesting deferred
17 action. I mean, we do that through the Service at the end. But
18 it would be very hard for her to just uproot her family and, so,
19 it just wouldn't be practical. She's trying to raise a family,
20 if you will.

21 A. She basically would not obey the order is what
22 you mean?

23 Q. Pardon me? I don't think, she would not be in a
24 position to do that. She's raising a family here and it would
25 be, it wouldn't be feasible. So --

1 A. If she has a full hearing, she wouldn't leave the
2 country if she loses every appeal? She would hide from
3 Immigration? That's what --

4 Q. I'm sorry?

5 A. She would hide from Immigration?

6 Q. Well, Judge, I really, I'm not here to discuss
7 that right now with you and --

8 A. Well, I just want to be sure I understand why
9 she's not applying for voluntary departure which she would seem
10 to be eligible for.

11 Q. Well, it's her right, Your Honor. And like I
12 said, she's raising a family. It wouldn't be feasible. She has
13 children. They are disabled. They have needs.

14 A. No offense. No offense. Excuse me. That's the
15 reason she's making the claim for relief.

16 Q. Yes.

17 A. If she loses under the legal system, she's going
18 to ignore the result. That's what you mean.

19 Q. Well, she's not seeking voluntary departure and
20 that's her right not to seek that --

21 A. And that's the reason?

22 Q. -- right to appeal that, Your Honor, in the event
23 that it's denied.

24 A. But, she, excuse me. But she can appeal her
25 claim whether she applies for voluntary departure or not. I

1 A. Because my children have always been with my
2 exclusively and they themselves have told me that there's
3 nothing to do with their dad. And I really do not have any
4 trust at all to let him take charge of them. No.

5 Q. Well, if there's no one here in the United States
6 to care for the children, couldn't you simply bring them to
7 Mexico with you?

8 A. I've nothing to offer them there.

9 Q. What do you mean by that?

10 A. What I mean is I don't have anything there to
11 give them at all. I don't have a house or a home. There's a
12 very, very slim chance to find any kind of job or work. They'd
13 never get the same kind of education they get here in the
14 schooling. Here they have a good education. They have their
15 medical care insurance. They, you know, they have good school.
16 And here I can have better opportunities to put myself to work
17 and make the money to keep them going.

18 JUDGE TO (b) (6)

19 Q. Let me just interrupt for a minute. Ma'am, you
20 signed your application under oath 20 minutes ago and in that it
21 says that if you return to Mexico your children will go with
22 you. So, are you saying you would leave them on the streets of
23 New York at their age alone?

24 A. No, I'm not saying that, but --

25 Q. So, what plan would you make, ma'am? You're

1 going to, if you are going to leave them in the U.S. by
2 themselves, what are you going to do? How are you going to do
3 that?

4 A. I would never leave them alone here. With just
5 even the thought of my having to take them over there, it
6 just --

7 Q. Ma'am, look at me. If what you're saying is you
8 don't want to take them to Mexico, I understand that you don't
9 want to take them to Mexico. But you're not making a statement
10 I can understand or believe that you're seriously talking about.
11 You seem to be fond of your children. When the attorney says if
12 you have to leave and go to Mexico will you take your children,
13 you said no, I will leave them here. Now, if what you really
14 mean is you're not going to leave, that would be the correct
15 answer. But the application that you signed asks whether you
16 would take them or not. The written application says yes, but
17 you should give me the actual answer. If you are going to leave
18 your three children here in the U.S. without any immediate
19 relatives, what exactly, what plan are you talking about? Are
20 you going to leave them in (b) (6)? Are you going to leave
21 them in front of City Hall? What are you talking about?

22 A. What I really meant to say with that was that I
23 really cannot put my mind around the thought of having to take
24 them there with me because I have absolutely nothing at all to
25 offer them down there. I have nothing.

1 Q. Well, ma'am, you've had almost two years to think
2 about it. Your case started in November of 2008. What I'm
3 trying to explain to you is give a specific answer that's true
4 as to the facts. Do not say something just because it sounds
5 good. Now, I'll let the attorney go and ask you more questions.
6 It's just that I couldn't quite pay attention to what you were
7 saying because it made no sense that you would just leave your
8 children by themselves.

9 A. (Untranslated.)

10 Q. Listen to the next question.

11 JUDGE TO (b) (6)

12 Q. Go ahead.

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

14 Q. Now, ma'am, I think I understand your testimony
15 to mean that there is no one in the United States that you'd be
16 able to leave the children with. Is that fair to say?

17 A. Yes, that's correct.

18 Q. So, if you really had to leave and go back to
19 Mexico, would the children be going with you?

20 A. If that was the last chance, yes. But they would
21 not have the future that they dream of having when they're here.

22 Q. Now, you did mention something about the
23 education that they wouldn't be able to receive in Mexico. What
24 did you mean by that?

25 A. I have relatives, you know, my siblings. My

1 Q. And if you, withdrawn. You mentioned that if you
2 were to return to Mexico with the children you'd have nothing to
3 offer them like a home. Well, wouldn't your family be able to
4 support you?

5 A. Where my mother lives is out in the countryside
6 in one little place that has a total of two rooms. Would that
7 be where I would take them where there's no schools? My mother
8 has nothing. She stays alive by planting beans and corn there
9 in the country. She's diabetic and I'm the one who sends her
10 some money her medication there.

11 Q. Well, Mexico is a fairly large country. Couldn't
12 you go someplace else where you might be able to find a job and
13 support your children?

14 A. I wouldn't be able to tell you because I've been
15 here for so many years.

16 JUDGE TO (b) (6)

17 Q. Ma'am, no offense. You, if you came from Mexico
18 to the United States don't you think you could go to a different
19 part of your own country? I mean, you made the trip to the
20 U.S., you settled down here, and you've supported yourself for
21 many years. I would recommend that you try to answer the
22 questions on a more factual basis instead of making statements
23 that sound dramatic. I don't understand why you would say that
24 you're sure you could go anyplace else because it's been a long
25 time. It was a long time ago that you left your home and came

1 to a very different place. I myself, I myself don't know of a
2 reason why a person who could leave Oaxaca and come to the
3 (b) (6) city in the United States would not be able to go to
4 another city in Mexico. If you know a reason, tell us.

5 A. When I came to this country I came alone. I came
6 here alone and then I had my children here and more than
7 anything and above all else I am thinking of the future of my
8 children here.

9 JUDGE TO (b) (6)

10 Q. You can go ahead.

11 (b) (6) TO JUDGE

12 Q. (Untranslated.)

13 A. I mean, ma'am, let the attorney ask you another
14 question.

15 (b) (6) TO JUDGE

16 Q. Well, if she wanted to continue her answer, I am
17 just going to ask her to --

18 A. Okay, I'm afraid that the answer is another
19 answer like the last time which I asked her about, which is
20 basically I don't want to leave the U.S., so my answer is no I
21 can't. But I don't think it's really a, it's not an objective
22 answer and I'm trying to encourage her to give a, objective
23 answers --

24 Q. To speculate --

25 A. That's what I'm interested in.



U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

Assistant Chief Immigration Judge

*26 Federal Plaza, 12th Floor Room 1237
New York, NY 10278*

August 14, 2013

(b) (6)
Immigration Judge

(b) (6)

Dear IJ (b) (6):

You are hereby reprimanded for inappropriate demeanor as the presiding administrative judge, in (b) (6). This matter came to my attention in connection with a related decision of the Board of Immigration Appeals (BIA), issued May 28, 2013. (See enclosed BIA decision, together with a copy of pertinent transcript entries.)

The conduct at issue concerns your inappropriate behavior with the respondent. More specifically, during a hearing you questioned her in a manner that demonstrated lack of impartiality. (Id.) As a consequence of your failure to show the kind of detached, equitable demeanor that I would expect of you as an Immigration Judge, the BIA found that your argumentative remarks raised an appearance of bias, and that you therefore deprived the respondent of the opportunity of a fair hearing.

I agree with the Board's findings related to the inappropriateness of your demeanor with the respondent. In particular, I am disappointed that you would employ a badgering, argumentative method of questioning any respondent, and resort to sarcasm when speculating about what fate might befall this respondent's children, a particularly sensitive topic in this matter.

In sum, your inappropriate demeanor amounted to a serious lapse in your obligation to conduct yourself as a fair and disinterested adjudicator. By this letter, I have elected to reprimand you, as opposed to taking severe disciplinary action.

However, please note that I am mindful of recent administrative actions involving similar misconduct on your part, including a counseling (February 2013) and a reprimand (November 2011)-similarly, I am aware of even earlier counseling and training. That history leads me to conclude that you have received ample prior

notice of the Agency's expectations of your demeanor as an adjudicator, and that you have received several opportunities to improve your conduct, short of the Agency imposing more significant corrective action.

For all the foregoing reasons, you must not engage in this type of behavior in the future, as any further misconduct by you may not be treated as leniently.

A copy of this letter of reprimand will remain in your Official Personnel Folder (OPF) for a period not to exceed three years from the date of this letter. Any recurrence of similar misconduct, particularly during this three-year period, may result in further disciplinary action, up to and including removal.

Should you have any questions related to this matter, please feel free to contact me.

Sincerely,


Robert Weisel
Assistant Chief Immigration Judge

Encl. (BIA decision, together with supporting documents)

CC: Official Personnel Folder.

1 (OFF THE RECORD)

2 (ON THE RECORD)

3 JUDGE FOR THE RECORD

4 All right, so, as far as I'm aware, I can go ahead and
5 set this for an individual concentrating on the cancellation
6 claim and potentially there might be a voluntary departure
7 application.

8 (b) (6) TO JUDGE

9 Q. Your Honor, we would not be pursuing that.

10 A. No. If she loses both of her claims, she wants
11 an order of deportation?

12 Q. That is correct, Your Honor.

13 A. Why would that be? I'm just curious.

14 Q. Well, because at this point since she is raising
15 three children, Your Honor, who have been here their lives and
16 the significant, we'll be probably be requesting deferred
17 action. I mean, we do that through the Service at the end. But
18 it would be very hard for her to just uproot her family and, so,
19 it just wouldn't be practical. She's trying to raise a family,
20 if you will.

21 A. She basically would not obey the order is what
22 you mean?

23 Q. Pardon me? I don't think, she would not be in a
24 position to do that. She's raising a family here and it would
25 be, it wouldn't be feasible. So --

1 A. If she has a full hearing, she wouldn't leave the
2 country if she loses every appeal? She would hide from
3 Immigration? That's what --

4 Q. I'm sorry?

5 A. She would hide from Immigration?

6 Q. Well, Judge, I really, I'm not here to discuss
7 that right now with you and --

8 A. Well, I just want to be sure I understand why
9 she's not applying for voluntary departure which she would seem
10 to be eligible for.

11 Q. Well, it's her right, Your Honor. And like I
12 said, she's raising a family. It wouldn't be feasible. She has
13 children. They are disabled. They have needs.

14 A. No offense. No offense. Excuse me. That's the
15 reason she's making the claim for relief.

16 Q. Yes.

17 A. If she loses under the legal system, she's going
18 to ignore the result. That's what you mean.

19 Q. Well, she's not seeking voluntary departure and
20 that's her right not to seek that --

21 A. And that's the reason?

22 Q. -- right to appeal that, Your Honor, in the event
23 that it's denied.

24 A. But, she, excuse me. But she can appeal her
25 claim whether she applies for voluntary departure or not. I

1 A. Because my children have always been with my
2 exclusively and they themselves have told me that there's
3 nothing to do with their dad. And I really do not have any
4 trust at all to let him take charge of them. No.

5 Q. Well, if there's no one here in the United States
6 to care for the children, couldn't you simply bring them to
7 Mexico with you?

8 A. I've nothing to offer them there.

9 Q. What do you mean by that?

10 A. What I mean is I don't have anything there to
11 give them at all. I don't have a house or a home. There's a
12 very, very slim chance to find any kind of job or work. They'd
13 never get the same kind of education they get here in the
14 schooling. Here they have a good education. They have their
15 medical care insurance. They, you know, they have good school.
16 And here I can have better opportunities to put myself to work
17 and make the money to keep them going.

18 JUDGE TO (b) (6)

19 Q. Let me just interrupt for a minute. Ma'am, you
20 signed your application under oath 20 minutes ago and in that it
21 says that if you return to Mexico your children will go with
22 you. So, are you saying you would leave them on the streets of
23 New York at their age alone?

24 A. No, I'm not saying that, but --

25 Q. So, what plan would you make, ma'am? You're

1 going to, if you are going to leave them in the U.S. by
2 themselves, what are you going to do? How are you going to do
3 that?

4 A. I would never leave them alone here. With just
5 even the thought of my having to take them over there, it
6 just --

7 Q. Ma'am, look at me. If what you're saying is you
8 don't want to take them to Mexico, I understand that you don't
9 want to take them to Mexico. But you're not making a statement
10 I can understand or believe that you're seriously talking about.
11 You seem to be fond of your children. When the attorney says if
12 you have to leave and go to Mexico will you take your children,
13 you said no, I will leave them here. Now, if what you really
14 mean is you're not going to leave, that would be the correct
15 answer. But the application that you signed asks whether you
16 would take them or not. The written application says yes, but
17 you should give me the actual answer. If you are going to leave
18 your three children here in the U.S. without any immediate
19 relatives, what exactly, what plan are you talking about? Are
20 you going to leave them in Times Square? Are you going to leave
21 them in front of City Hall? What are you talking about?

22 A. What I really meant to say with that was that I
23 really cannot put my mind around the thought of having to take
24 them there with me because I have absolutely nothing at all to
25 offer them down there. I have nothing.

1 Q. Well, ma'am, you've had almost two years to think
2 about it. Your case started in November of 2008. What I'm
3 trying to explain to you is give a specific answer that's true
4 as to the facts. Do not say something just because it sounds
5 good. Now, I'll let the attorney go and ask you more questions.
6 It's just that I couldn't quite pay attention to what you were
7 saying because it made no sense that you would just leave your
8 children by themselves.

9 A. (Untranslated.)

10 Q. Listen to the next question.

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12 Q. Go ahead.

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

14 Q. Now, ma'am, I think I understand your testimony
15 to mean that there is no one in the United States that you'd be
16 able to leave the children with. Is that fair to say?

17 A. Yes, that's correct.

18 Q. So, if you really had to leave and go back to
19 Mexico, would the children be going with you?

20 A. If that was the last chance, yes. But they would
21 not have the future that they dream of having when they're here.

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23 education that they wouldn't be able to receive in Mexico. What
24 did you mean by that?

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2 were to return to Mexico with the children you'd have nothing to
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4 support you?

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6 in one little place that has a total of two rooms. Would that
7 be where I would take them where there's no schools? My mother
8 has nothing. She stays alive by planting beans and corn there
9 in the country. She's diabetic and I'm the one who sends her
10 some money her medication there.

11 Q. Well, Mexico is a fairly large country. Couldn't
12 you go someplace else where you might be able to find a job and
13 support your children?

14 A. I wouldn't be able to tell you because I've been
15 here for so many years.

16 JUDGE TO (b) (6)

17 Q. Ma'am, no offense. You, if you came from Mexico
18 to the United States don't you think you could go to a different
19 part of your own country? I mean, you made the trip to the
20 U.S., you settled down here, and you've supported yourself for
21 many years. I would recommend that you try to answer the
22 questions on a more factual basis instead of making statements
23 that sound dramatic. I don't understand why you would say that
24 you're sure you could go anyplace else because it's been a long
25 time. It was a long time ago that you left your home and came

1 to a very different place. I myself, I myself don't know of a
2 reason why a person who could leave Oaxaca and come to the
3 biggest city in the United States would not be able to go to
4 another city in Mexico. If you know a reason, tell us.

5 A. When I came to this country I came alone. I came
6 here alone and then I had my children here and more than
7 anything and above all else I am thinking of the future of my
8 children here.

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10 Q. You can go ahead.

11 (b) (6) TO JUDGE

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14 question.

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17 just going to ask her to --

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19 answer like the last time which I asked her about, which is
20 basically I don't want to leave the U.S., so my answer is no I
21 can't. But I don't think it's really a, it's not an objective
22 answer and I'm trying to encourage her to give a, objective
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