File: (b) (6) Date: JAN 28 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Christopher Strawn, Esquire

ON BEHALF OF DHS: Robert F. Peck
Assistant Chief Counsel

APPLICATION: Reopening

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen his removal proceedings. In our decision dated (b) (6) which followed a remand from the United States Court of Appeals for the (b) (6) we dismissed the respondent's appeal from the Immigration Judge's January 17, 2006, decision which found him removable and denied his applications for asylum, withholding of removal, and protection under the United Nations Convention Against Torture (CAT).[1] The motion will be denied.

The respondent's motion to reopen is timely. The motion was filed on August 4, 2009, the 90th day after our May 6, 2009, decision.

PRIMA FACIE ELIGIBILITY FOR PROTECTION UNDER THE CAT

The respondent presents evidence (much of which is dated after the January 17, 2006, hearing) which he claims establishes prima facie eligibility for protection under the CAT. The respondent presents evidence that some criminal deportees to Haiti are detained for days, weeks, or even months (Motion Exh. T). However, the Board held in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), that the indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of 8 C.F.R. § 1208.18(a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture. The respondent did not present any such evidence.

The respondent presents evidence of the deplorable prison conditions in Haiti (Motion Exh. H at 119-21; Motion Exh. O at 1, 20-28). The court in *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) held that to establish a likelihood of torture for purposes of the CAT, an alien must show that

[1] Our May 6, 2009, decision, at 1-2, discusses the pertinent history of this case.

severe pain or suffering was specifically intended - that is, that the actor intend the actual consequences of his conduct, as distinguished from the act which causes these consequences. The Board held in *Matter of J-E-, supra*, that substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. § 1208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture. The respondent does not present any evidence to establish the Haitian Government's specific intent to cause severe pain or suffering for criminal deportees.

The respondent presents evidence of mistreatment of some criminal deportees in Haitian prisons (Motion Exh. H at 131; Motion Exh. K at 2; Motion Exh. O at 23). The most common mistreatment consists of physical abuse, fighting, and threats of violence. However, instances of police brutality do not necessarily rise to the level of torture. *Matter of J-E-, supra*, at 302. Less frequent mistreatment consists of burning with cigarettes, choking, hooding, and severe boxing of the ears, which may constitute acts of torture. Isolated acts of electric shock have also been reported. However, we held in *Matter of J-E-, supra*, that evidence of the occurrence in Haitian prisons of isolated instances of mistreatment which may rise to the level of torture as defined in the CAT is insufficient to establish that it is *more likely than not* that the alien will be tortured if returned to Haiti. The court in *Villegas v. Mukasey, supra*, at 988, stated that the Board's decision in *Matter of J-E-, supra*, is not lightly disregarded.

The respondent also moves to reopen proceedings so the Immigration Judge can consider a medical evaluation (Motion Exh. A) of his gunshot wound which he claims occurred in Haiti. Although the medical evaluation was done after the January 17, 2006, hearing, the respondent does not show that the evaluation could not have been done earlier and presented for the January 17, 2006, hearing. *See* 8 C.F.R. § 1003.2(c)(1). Even if we would treat the evidence as being previously unavailable, it would not rebut most of the Immigration Judge's adverse credibility finding. *See* our May 6, 2009, decision, at 2-3. We conclude that the respondent does not establish prima facie eligibility for protection under the CAT.

ADJUSTMENT OF STATUS AND A WAIVER OF INADMISSIBILITY UNDER SECTION 209

The respondent is not eligible for relief from removal pursuant to section 209 of the Immigration and Nationality Act, 8 U.S.C. § 1159. *See Robleto-Pastora v. Holder*, — F.3d ----, 2010 WL 60087, at 5-6, 8 (9th Cir. Jan. 11, 2010) (holding that an alien who acquired lawful permanent resident status ("LPR") based on a prior grant of asylum [as the respondent did] may not "re-apply" for LPR status under section 209 of the Act in order to avoid removal).

Accordingly, the following order will be entered.

(b) (6)

ORDER: The motion to reopen is denied.[2]

FOR THE BOARD

[2] A request for humanitarian parole or deferred action arising from the recent devastating earthquake in Haiti and its aftermath are matters beyond the jurisdiction of the Board and the Immigration Judges. *See Matter of Medina*, 19 I&N Dec. 734 (BIA 1988); *Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982). However, a statement released by the Department of Homeland Security on January 13, 2010, reflects that "all removals to Haiti [have been halted] for the time being in response to the devastation caused by [the] earthquake." Further, the Secretary of Homeland Security has announced that Haitians who have continuously resided in the United States since January 12, 2010, and have been continuously physically present since January 21, 2010, may apply for Temporary Protected Status ("TPS"). *See* 75 Fed. Reg. 3476-02 (January 21, 2010). Jurisdiction over applications for TPS by aliens under final orders of removal is with the U.S. Citizenship and Immigration Services (USCIS), and TPS applications must be filed with the USCIS. *See* 8 C.F.R. § 1244.7. Please contact the Department of Homeland Security for any additional questions you may have regarding how to apply for TPS (1-800-375-5283 or www.uscis.gov).

File: (b) (6) Date: MAY - 6 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christopher Strawn, Esquire

ON BEHALF OF DHS: James S. Yi
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(F)

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

APPLICATION: Convention Against Torture

This case is before us instantly pursuant to a remand from the United States Court of Appeals for th(b) (6) The case was before us initially on May 26, 2006, when we affirmed the January 17, 2006, Immigration Judge decision ordering the respondent removed to his native Haiti. The Immigration Judge pretermitted the respondent's applications for asylum and withholding of removal because he committed an aggravated felony that was a crime of violence. The Immigration Judge also found the respondent not credible and denied his request for protection under the Convention Against Torture on this basis. The Immigration Judge also alternatively denied the respondent's applications for asylum and withholding of removal due to the respondent's lack of credibility.

In 1993, the respondent was granted asylum by an asylum officer after the respondent fled Haiti. In 1995, the respondent became a lawful permanent resident. On November 4, 1999, the respondent was convicted of assault in the fourth degree, in violation of OR. REV. STAT. ANN. § 163.160 (West 1999). On May 19, 2000, the respondent was convicted of, among other things, three counts of assault in the second degree in violation of OR. REV. STAT. ANN. § 163.175 (West 1999) for which he received three concurrent 70-month sentences. The Notice to Appear for the instant removal proceedings was served on the respondent in 2005.

(b) (6)

In our May 2006 decision, we found that violations of OR. REV. STAT. ANN. § 163.175 (West 1999) are felonies that fall within the definition of crime of violence in 18 U.S.C. § 16(b), and constitute aggravated felonies under 101(a)(43)(F) of the Immigration and Nationality Act. Because the respondent's conviction is an aggravated felony known as a crime of violence that is a "particularly serious crime" (the respondent was convicted of an aggravated felony and sentenced to an aggregate term of imprisonment of at least 5 years), he is ineligible for asylum and withholding of removal. *See* sections 208(b)(2), 241(b)(3)(B) of the Act. We found the aggravated felony issue dispositive as to the respondent's eligibility for asylum and withholding and, thus, did not address his other arguments, including the Immigration Judge's alternate ruling on credibility. In addition, we found that the respondent did not appeal the denial of his request for protection under CAT and deemed the issue abandoned.

The matter is now before us pursuant to an (b) (6) remand from the United States Court of Appeals for the (b) (6) regarding our May 26, 2006, order. In its (b) (6) decision, the (b) (6) contends that the Board erred in finding that the respondent did not appeal the denial of his request for protection under CAT, and asks that we now consider this claim for relief.[1]

As requested, we will address the denial of the respondent's request for protection under CAT. The respondent's applications for asylum and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), are not at issue because the respondent conceded to the Ninth Circuit that he is removable and ineligible for those forms of relief. We point out that the respondent also is barred from receiving withholding of removal under CAT because he has been convicted of a particularly serious crime, but he may be eligible for deferral of removal under CAT. *See* section 241(b)(3)(B) of the Act, 8 C.F.R. §§ 1208.16(d)(2), 1208.17(a).

We find no reversible error in the Immigration Judge's decision to deny the respondent deferral of removal under CAT. The Board only reverses a finding of credibility by an Immigration Judge if it is "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). This clearly erroneous standard does not entitle the reviewing body to reverse the finding of a trier of fact merely because the reviewing body is convinced it would have decided the case differently. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 574 (1985). When there are two permissible views of the evidence, the fact-finder's choice between the two cannot be deemed clearly erroneous. *Id.*

---

[1] We point out that the respondent filed a motion to reopen his case with the Board, on which we issued a decision in October 2006. In relevant part, we found that the respondent had not met his burden of proof for deferral of removal under CAT. We further pointed out that the Immigration Judge did not clearly err in rendering an adverse credibility determination, but that even taking the respondent's testimony as true, he still could not meet his burden of proof. The respondent petitioned th(b) (6) to review this decision as well. The court dismissed the respondent's petition regarding his motion to reopen, but pointed out that the Board could not correct its earlier error regarding the respondent's CAT claim in a motion to reopen. Instead, the court offered, the BIA needed to *sua sponte* reconsider its earlier decision to correct the mistake.

(b) (6)

We find no clear error in the Immigration Judge's credibility determination. In the removal proceedings below, the Immigration Judge found that the respondent lacked credibility for several reasons, among them that there were material inconsistencies between his first and second asylum applications (which also constitutes the respondent's request for protection under CAT), material inconsistencies between his testimony and his asylum applications, and lack of detail in his testimony. For example, the respondent attested that his brother was an Aristide supporter who had been assassinated by opposition forces and that the respondent was shot in the leg before he left Haiti, but fails to mention these critical incidents in his twelve-page typed statement attached to his first asylum application (*Compare* Group Exh. 4, I-589, affidavit at 10-11, and Tr. at 49-52 *with* 25-27, 29-30). In addition, the respondent also attested that he had not returned to Haiti since 1992, but admitted on cross-examination that he voluntarily returned to Haiti in 1999 and did not have any problems while there (Tr. at 18, 52-53). Further, the assertion that the respondent's mother and uncle were killed by opposition forces in 2004 is implausible because their only political involvement was voting in the 1990 and 1995 elections and his uncle serving as a poll watcher at the 1990 election (*Compare* Tr. at 27-31 *with* Tr. at 36-39). Additionally, although the respondent claims that he went from town to town speaking on behalf of Aristide, the respondent was unable to provide details of what he did and when he did it (*Compare* Tr. at 19-24 *with* Group Exh. 4, I-589, attachment at 4-8). In sum, the Immigration Judge found numerous inconsistencies that the respondent was unable to reasonably explain. We find no clear error in the determination that the respondent is not credible nor with the conclusion that he failed to meet his burden of proof. We also point out that the respondent does not contend that he was arrested or detained in Haiti (Tr. at 48), and his only alleged political actions were in 1990. Based on the foregoing, we do not find that the respondent demonstrated that it is more likely than not that he will be tortured by or with the acquiescence of the Haitian government, and we will affirm the denial of the respondent's request for deferral of removal under CAT.

Accordingly, the following order will be issued:

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD