Files: (b) (6)

Date:

In re: (b) (6)

SEP 23 2004

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Joseph C. Hohenstein, Esquire

ON BEHALF OF DHS: Pamela D. Ransome
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissiable at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(a)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; protection under the Convention Against Torture

ORDER:

PER CURIAM. This case involves a husband and wife who are both natives and citizens of China. The matter was last before us on November 1, 2002, when we summarily affirmed, without opinion, the results of the Immigration Judge's decision denying the respondents' applications for asylum and withholding of removal, and for protection under the Convention Against Torture. The Immigration Judge found the respondents not credible as to their claim that the female respondent was forced to undergo two abortions in China. The Immigration Judge also gave little or no weight to the two abortion certificates presented by the respondents because they had not been properly authenticated pursuant to 8 C.F.R. § 287.6

The case is now before us pursuant to the (b) (6) decision of the United States Court of Appeals for the (b)(6) The court held that 8 C.F.R. § 287.6 "is not the exclusive means of authenticating records before an Immigration Judge," and that it was error for the Immigration Judge to reject the abortion certificates on that ground alone. The court also found that most of the

inconsistencies cited by the Immigration Judge did not "amount to substantial evidence that the (b) (6) were not credible." Given these two findings, the court remanded for the agency to "reconsider and reweigh the facts."

Although the court's decision indicates that it anticipated that the Board would issue a new decision in this case, we find that a remand is appropriate. The court's order requires that new factual as well as legal determinations be made regarding the respondents' asylum case, including the admission of and weight to be given the abortion certificates. The Board does not make de novo factual determinations. 8 C.F.R. § 1003.1(d)(3). Accordingly, the decision of the Board dated November 1, 2002, is vacated, and the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision.

FOR THE BOARD

File: (b) (6)

Date: JAN 21 2005

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Joseph Hohenstein, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (both respondents)

APPLICATION: Asylum, withholding of removal

This case was last before us on September 23, 2004, when we remanded the respondents' case to the Immigration Judge for further proceedings consistent with the order of the United States Court of Appeals for the (b)(6) The respondents have now filed a motion to reconsider claiming that we have *de novo* review in the respondents' case and therefore may resolve the case without remand to the Immigration Judge. The respondents' motion will be granted, and the respondents' applications for asylum will be granted conditioned upon an administrative determination by the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) that a number is available for the grant under section 207(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1157(a)(5). The respondents' application for withholding of removal will be granted.

The respondents are natives and citizens of China, and the facts of their case are clearly set forth both in the Immigration Judge's decision and the ruling of the (b) (6) *v. Ashcroft,* (b) (6) In its ruling, the (b) (6) found that all but one of the grounds the Immigration Judge cited as a basis for his adverse credibility finding were invalid, and the court remanded the case to us for consideration of documentary evidence that the Immigration Judge had refused to accord weight and that bore directly on the sole remaining ground for his adverse credibility ruling. We, in turn, ruled that we did not have jurisdiction to make factual findings and remanded the case to the Immigration Judge. The respondent, however, has correctly pointed out that we relied on a regulation, 8 C.F.R. § 1003.1(d)(3), that applies only to appeals filed on or after September 25, 2002. *See* 8 C.F.R. § 1003.3(f). The respondents filed their appeal of the Immigration Judge's decision on March 20, 2000. Accordingly, we do have authority to conduct

a *de novo* review of the Immigration Judge's ruling in accordance with the instructions from the (b) (6) We therefore will withdraw from our decision dated September 23, 2004 and will review the respondents' case in light of the (b) (6) findings.

In doing so, we find that the record does not support the Immigration Judge's adverse credibility finding. The (b) (6) ruled that all but one of the Immigration Judge's reasons for questioning the respondents' credibility were invalid, and we find that the sole remaining basis for questioning their veracity is not sufficient to support an adverse credibility ruling. Specifically, we find that an error in translation created the mistaken impression that the female respondent had given discrepant testimony regarding the gender of the second child that was aborted. The female respondent, in fact, gave consistent testimony on this point, and we therefore need not evaluate the authenticity of the abortion certificates the respondents presented. We instead find that the respondents have presented credible and detailed testimony in support of their claim, and we find that this testimony is sufficient to establish that they are eligible for asylum under section 208(b) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b). *See Matter of C-Y-Z,* 21 I&N Dec. 915 (BIA 1997); *Matter of X-P-T-,* 21 I&N Dec. 634 (BIA 1996).

Our grant of asylum, however, is not absolute given the numerical limitations imposed by section 207(a)(5) of the Act, 8 U.S.C. § 1157(a)(5). This section restricts the number of population control-based refugees who may be granted asylum in a given year. In light of this numerical limitation, our grant of asylum to the respondents is conditioned upon a subsequent administrative determination by the DHS that numbers are available under section 207(a)(5) of the Act for the grant.

Given the conditional nature of the above grant of asylum, we must now turn to the respondents' application for withholding of removal under section 241(b)(3)(A) of the Act. In so doing, we note that an alien who has been forced to undergo an abortion and her spouse are eligible for withholding of removal as well as asylum. *See Matter of C-Y-Z, supra; Matter of X-P-T-, supra; see also* 8 C.F.R. § 1208.16(b)(2). We therefore find that the respondents are statutorily eligible for withholding of removal, and we grant their application for this form of relief.

ORDER: The respondents' applications for asylum are granted, conditioned upon an administrative determination by the DHS that a number is available for the grant under section 207(a)(5) of the Act.

FURTHER ORDER: The respondents' applications for withholding of removal to China are granted.

Frederick D'Meo

FOR THE BOARD