File: (b) (6) Date: NOV 10 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence H. Rudnick, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

ORDER:

This case is before the Board pursuant to a (b) (6) order of the United States Court of Appeals for the (b)(6) directing the Board to grant the respondent's application for withholding of removal. Accordingly, pursuant to the court's order, the respondent is granted withholding of removal to Uzbekistan under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1231(b)(3), and under the Convention Against Torture.

FOR THE BOARD

IMMIGRATION COURT

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

L. Rudnick

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 9-24-09. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn to Uzbekistan

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: BCR completed.

Date: Sept 24, 2009

WALTER A. DURLING
Immigration Judge

Appeal: Waived/Reserved No appeal Appeal Due By:

File: (b) (6) Date: JUN 18 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence H. Rudnick, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This matter was last before the Board on August 26, 2005, when the Department of Homeland Security (hereinafter "DHS") and the respondent appealed an Immigration Judge's November 19, 2004, decision that determined the DHS had not met its burden to establish that the respondent is a security risk to the United States. *See* section 241(b)(3)(B)(iv) of the Immigration and Nationality Act; 8 U.S.C. § 1231(b)(3)(B)(iv). In the November 2004 decision, the Immigration Judge granted withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(c), 1208.17. The Board sustained the DHS appeal regarding withholding of removal under section 241(b)(3), as we found the DHS established that the respondent is a security risk to the United States, but dismissed the appeal regarding deferral of removal under the Convention, as the respondent established a clear probability that he would be tortured if returned to Uzbekistan.[1]

The United States Court of Appeals for the (b)(6) (hereinafter "(b) (6)") remanded this matter to the Board in March 2008 for the sole issue of determining whether the respondent "is" a danger to the United States.[2] *See* (b) (6) *v. Attorney General of the United States*, (b) (6) (b) (6). The (b) (6) held that the Attorney General's reference to "may pose" a danger was inconsistent with the plain language at section 241(b)(3)(B)(iv) of the Act. *See Matter of A-H-*, 23 I&N 774, 789 (A.G. 2005). The (b) (6) also ruled that the use of "is" indicated that Congress intended the exception to apply to individuals who, under a reasonable belief standard,

[1] The respondent is a native and citizen of Uzbekistan.

[2] The (b) (6) did not vacate our decision of August 2005.

actually (not theoretically) pose a serious danger to the security of the United States, and Congress did not intend this exception to cover aliens who conceivably could be such a danger or have the ability to pose a danger.[3] *See* (b) (6) *supra*, at (b) (6)[4]

In his latest brief before the Board, the respondent argues that the appropriate standard of review only authorizes the Board to disturb the Immigration Judge's decision if we can determine that the Immigration Judge's application of the proper legal standard to the accepted facts was an abuse of discretion. We disagree. As this case concerns an issue of fact and law, we will review the matter *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (providing that the Board may review questions of law, judgment, and discretion in appeals from decisions of Immigration Judges *de novo*); *see also Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008) (ruling that the Board reviews *de novo* mixed questions of law and fact, and questions of judgment).

The respondent also argues that the evidence falls short of the legal standard to establish that he is a danger to the security of the United States. We disagree. There is considerable evidence to support the DHS's claim that there are reasonable grounds to believe that the respondent presents an actual danger to national security.[5] The Government of Uzbekistan has issued a request that the United States extradite the respondent because he is facing criminal charges for his alleged activities in support of an "illegal, religious extremist movement." *See* I.J. at 3, 9-10; Exh. 7. The record also contains a notice from INTERPOL indicating that the respondent is alleged to have "conspired with others to organize public disorder accompanied by violent attacks, arson, damage to property, the use of arms and threats of violence." *See* I.J. at 3, 9-10; Exh. 16. In 2002, the FBI began investigating the respondent and searched the computer he shared with two roommates at his Pennsylvania residence and another one he shared at a Muslim school they attended. *See* I.J. at 2; Tr. at 68. Investigators found downloaded video files of speeches by Muslim extremists Osama Bin Laden, Ayman a-Zawahiri, and Shamil Basayev. *See* I.J. at 3, 6; Exh. 11, 17. Two of these videos exceeded 30 minutes, two were more than 10 minutes long, few appeared to have originated from a legitimate media outlet, and several depicted bombings or other acts of violence. *See* I.J. at 8;

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[3] For a complete discussion of the evidentiary standards to establish a danger to the security of the United States, which was upheld by the (b) (6) see our prior discussion in the August 26, 2005, decision. *See generally Matter of A-H-*, 23 I&N 774 (A.G. 2005).

[4] *See also Malkandi v. Mukasey*, 544 F.3d 1029, 1036-37 (9th Cir. 2008) (commenting favorably on the (b) (6) analysis in (b) (6) *supra*, and adopting its analysis of section 241(b)(3)(B)(iv) of the Act).

[5] The DHS argued before the Immigration Judge that photographs supposedly in the possession of the respondent, showing rather poor quality views of bridge supports and a location surrounded by a tall security fence, establish that the respondent was a security risk as these photos were intelligence of potential targets for attack. *See* I.J. at 4; Exh. 18. The Immigration Judge determined that the respondent had presented credible testimony from a supporting witness that this film was not the respondent's and that the photographs were of such poor quality it could not be established what was the subject of the photographs. *See* I.J. at 4-5, 7. Regardless, as discussed further in this decision, we find that the DHS has presented other evidence sufficient to meet its burden under section 241(b)(3)(B)(iv) of the Act.

Exh. 11; Tr. at 136-39. In addition, one of the respondent's roommates, also named in the extradition request, received an email referring to his role "in a big jihad," and the computer files contained a map of the (b) (6) State Police offices. *See* I.J. at 2, 6; Exh. 11. All three of these individuals entered the United States on student visas, but none attended school for any length of time. *See* I.J. at 1; Tr. at 80-83. Furthermore, the respondent was convicted in June 2003 under 18 U.S.C. § 1001(a) of falsely representing himself as a United States citizen or national on a federal Employment Verification form in Virginia. *See* Exh. 5; Tr. at 101. We also note that the respondent, upon learning that the federal government was seeking the apprehension of his roommates, attempted to evade detection and initially denied to federal investigators he resided at the same address as his roommates. *See* Tr. at 100-05.

As discussed in our prior August 2005 decision, we find no clear error in the Immigration Judge's credibility determination regarding the respondent's explanations of the reasons for downloading files on his computer, or the potential that the Uzbek extradition request and INTERPOL warrant are politically motivated. However, the mere possibility that the extradition and warrant are, at least in part, politically motivated does not diminish the evidence that the respondent also poses a security risk to the United States. *See* I.J. at 9-10; Tr. at 112. Furthermore, the respondent has not submitted any substantive evidence to support his claims regarding the downloaded video files other than his own testimony. The respondent's claim that the downloaded video files were merely attributed to his curiosity regarding the views of the noted Muslim extremists and events occurring in central Asia does not persuade us that the DHS failed to establish reasonable grounds that the respondent poses a security risk to the United States. *See* I.J. at 3, 6; Tr. at 97-98; *see also Matter of R-S-H-, et al.*, 23 I&N Dec. 629, 631-32, 640-41 (BIA 2003) (finding that the respondent's testimony of peaceful intent or disagreement with violent actions did not refute evidence of an association with violent extremist groups that established reasonable grounds to believe the respondent was a danger to the security of the United States under section 241(b)(3)(B)(iv) of that Act).

The respondent's testimony, even if credible, cannot be considered in isolation. Instead, we must base our decision on the totality of the evidence. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Price*, 558 F.3d 270, 282 (3d Cir. 2009) (ruling that the determination of probable cause is simply a practical commonsense decision whether, given all the circumstances, there is a fair probability that contraband or evidence of a crime will be found). We find that the totality of the evidence, as discussed above, establishes reasonable grounds (i.e., probable cause) that the respondent is a serious danger to the security of the United States, if not by direct action, then by supporting or assisting terrorism inspired by Muslim extremists. *See Illinois v. Wadlow*, 528 U.S. 119, 123 (2000); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (noting that probable cause is a less demanding standard than the preponderance of the evidence). The respondent's associations and actions, especially his past history of obtaining and viewing videos from sites that are pro-extremist, sharing his time, computer, and residence with others who discussed a violent jihad via email, his lying about his United States citizenship/nationality in an attempt to obtain employment, and the respondent's initial denial of his residence with individuals suspected of criminal activity when questioned by federal investigators, shows a fair probability that he supports

and assists terrorist activity.[6] *Cf. Malkandi, supra,* at 1037 (holding that a "constellation of undisputed facts" connecting an alien to extremist groups or individuals that advocate terrorism is compelling evidence that an alien presents an actual danger to the security of the United States). Thus, the DHS has met its burden of proof in this regard.

Furthermore, the respondent argues that certain evidence presents a clear inference that he is not a risk to national security. *See* 8 C.F.R. § 1208.16(d)(2) (providing that if the evidence indicates the applicability of a bar to asylum or withholding of removal, the applicant bears the burden of proving by a preponderance of the evidence that such grounds do not apply). The identified evidence includes the respondent's stay in the United States without any evidence of being a risk to national security, a State Department opinion that indicated the extradition request by the Uzbek Government may be politically tainted, the United States Government's decision not to prosecute the respondent for criminal charges associated with terrorism or other national security risks, and a United States district court judge's decision to release the respondent from federal detention.

Regardless of the respondent's stay in the United States since 1998, as discussed above, there is evidence that he poses a security risk to this country. Furthermore, the State Department opinion, which was the basis for the respondent's grant of deferral of removal under the Convention, does not touch on the evidence before the Board regarding the respondent's activities and actions after arriving in the United States. Just because the Uzbek Government is corrupt and oppressive, and may have sought the respondent's extradition on "trumped up" charges, does not necessarily lead to a conclusion that the respondent is not a legitimate security risk to this country. In addition, the Federal Government's decision not to pursue criminal charges under the higher beyond a reasonable

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[6] *See Illinois v. Gates, supra at* 245, n. 13, where the Supreme Court found that lower courts had applied a too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause, and commented:

> ...[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands...In making a determination of probable cause the relevant inquiry is not whether the particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

See also United States v. Price, supra (holding that direct evidence of a crime is not necessary in all cases; rather probable cause can be, and often is, inferred by considering the type of crime, the nature of the items sought, the suspect's opportunity for concealment, and normal inferences about criminality) (*citing United States v. Jones,* 994 F.2d 1051, 1056 (3d Cir.1993); *United States v. Yusuf,* 461 F.3d 374, 390 (3d Cir. 2006) (commenting that probable cause is less than certainty of proof, but more than suspicion or possibility, the test being whether the allegations warrant a prudent and cautious man in believing that the alleged offense has been committed) (*citing United States ex. rel Campbell v. Rundle,* 327 F.2d 153, 163 (3d Cir.1964).

doubt standard required for a conviction would have little bearing on the validity of the DHS seeking to apply the bar to withholding of removal under the much lower standard of probable cause required by section 241(b)(3)(B)(iv) of the Act. Finally, the evidence before the federal prosecutors and the federal judge on the habeas corpus issue is not contained in the record. As it is not established that the current record was before federal prosecutors and the judge at earlier dates in separate proceedings, their actions have little bearing on our determination. While we will consider this evidence, it does not present a "clear inference" that the respondent is not a security risk to the United States.

Based on the foregoing analysis, the Board finds that the DHS has met its burden, under the reasonable belief standard, to establish that the respondent is an actual and serious danger to the security of the United States. Furthermore, we are not persuaded that the respondent has rebutted the evidence that he is an actual danger to national security. *See* 8 C.F.R. § 1208.16(d)(2).

Accordingly, we will enter the following orders:

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: In regards to the Immigration Judge's grant of deferral of removal under the Convention Against Torture, 8 C.F.R. § 1208.17, the Department of Homeland Security's appeal is dismissed.

FURTHER ORDER: In regards to the Immigration Judge's grant of withholding of removal under section 241(b)(3) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 1208.16(c), the Department of Homeland Security's appeal is sustained and the November 19, 2004, decision is vacated.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

On further reflection, Board Member Filppu finds the favorable credibility assessement below significant, and thus respectfully dissents. The Immigration Judge was not clearly erroneous in crediting the respondent's innocent explanations for what would otherwise be reasonable concerns respecting his danger to the United States. Accepting those explanations as true, in the context of this case, supports the ruling below, and DHS's appeal should be dismissed.