IMMIGRATION COURT

(b) (6)

Respondent: (b) (6)

Case Number: A(b) (6) IN REMOVAL PROCEEDINGS

## ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 11/21/11. 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 _____.
[ ] 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 alternative order of removal to_____.
[X] Respondent's application for asylum was ( ) granted ( ) denied (X) withdrawn ( ) other.
[X] Respondent's application for withholding of removal was ( ) granted ( ) denied (X) withdrawn ( ) other.
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[X] Respondent's application for adjustment of status under section 245(a) of the INA was (X) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] *Respondent's status was rescinded under section 246 of the INA.*
[ ] 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.
[X] Relief under the Convention Against Torture was withdrawn.
[ ] Other: _____

Appeal Waived (Reserved) A (I) B Appeal due by: 12-21-11

Polly A. Webber
Immigration Judge

Date: 11/21/11

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [ ] PERSONAL SERVICE [X]
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN'S ATTY/REP [X] DHS JMP for VBG
DATE: 11/21/11 BY: COURT STAFF

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ]

0009F

File: (b) (6) Date: JAN 27 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert G. Ryan, Esquire

ON BEHALF OF DHS: James B. Gildea
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum; withholding of removal

This case was last before us on February 16, 2005, when we affirmed an Immigration Judge's July 17, 2003, decision denying the respondent's application for asylum, withholding of removal, and for protection under the Convention Against Torture. We found no error in the Immigration Judge's determination that the respondent's asylum application was untimely filed, and we also affirmed the Immigration Judge's determination that the respondent had failed to establish that it is more likely than not he will be persecuted or tortured if returned to Indonesia based on his ethnicity (his father is Indonesian and his mother is Chinese) or religion (his is Christian). In our decision, we noted that new case law established that ethnic Chinese from Indonesia are members of a "disfavored group" which would require a lower showing of individualized risk depending on the extent of the evidence indicating that members of his group are persecuted. *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). However, because *Sael v. Ashcroft* only applied to asylum applicants, we found it unnecessary to apply the lower standard of proof to the respondent's withholding of removal request.

On (b) (6), the United States Court of Appeals issued a decision affirming and vacating the Board's and the Immigration Judge's decisions. (b) (6) *v. Holder*, (b) (6) (b) (6) The court did not find error in the determination that the respondent failed to meet his burden of establishing past persecution or that a pattern or practice of persecution exists; it also did not find error in the determination that the respondent failed to meet his burden of establishing that it is more likely than not he will be tortured by a government official or person acting in an official capacity, or that this person or persons would aid or acquiesce in his torture. *Id.* at (b) (6) However, it did remand for two reasons.

First, the court found that we had applied the wrong legal standard in finding the respondent's asylum application untimely filed. *Id.* at 1053. Noting case law and the regulatory history of 8 C.F.R. § 208.4(a)(5), the court found error in the Immigration Judge's decision that the respondent's excuse for filing his asylum application a little over 6 months after his religious visa expired was "'[in]capable' of justifying a reasonable delay." *Id.* at (b) (6) (quoting the Immigration Judge's July 17, 2003, decision at 3). The regulation requires that the Immigration Judge engage in a "fact-based inquiry of the particular circumstances . . ." for the delay which may or may not include his explanation of trying to obtain additional evidence before filing his application for relief. *Id.* at 1059. Since the court found that the Immigration Judge did not engage in such an inquiry, it remanded. Accordingly, we will remand the respondent's case to the Immigration Judge for such a determination and, assuming the delay was reasonable, to assess the respondent's claim of asylum.

The (b) (6) also remanded for reconsideration of the respondent's evidence of current country conditions which could support a finding of persecution because the respondent is considered a member of a disfavored group. *Id.* at (b) (6) Therefore, the court made clear that the standard it set out in *Sael v. Ashcroft* does apply to withholding of removal. *Id.* at (b) (6) The court made clear though that an applicant for withholding of removal "will need to adduce a considerably larger quantum of individualized-risk evidence to prevail than would an asylum applicant like Sael, *id.* at 1066-67, and it has found such evidence lacking in at least one recent case, *see Halim v. Holder*, __ F.3d __, 2009 WL 5158237 (9th Cir. Dec. 30, 2009). Nevertheless, it indicated that there was evidence here which needed to be reassessed by the Immigration Judge. (b) (6) *v. Holder*, *supra*, at (b) (6) The court stated that the only way the Immigration Judge could have found the incidents when the respondent was attacked to be random would be if he had ignored all evidence of motive shown and the ongoing hostility and harm which Chinese Christians experience in Indonesia. *Id.* at (b) (6) It also noted that the respondent's position as a pastor and "religious leader" within the Chinese Christian community might put him at greater risk of persecution, an aspect of his claim which also needs to be factored in. *Id.* Accordingly, in light of this change in law, as well as to allow the parties to update the record with regard to current country conditions, we will also remand for the Immigration Judge to reassess the respondent's claim for withholding of removal.

ORDER: The record of proceedings is remanded for further proceedings consistent with this order.

FOR THE BOARD