File: (b) (6) Date: JUN 29 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Robert Adinolfi, Esquire

APPLICATION: Reopening

ORDER:

The proceedings are reopened under the provisions of 8 C.F.R. § 1003.2(a), and the respondent's unopposed motion to terminate these removal proceedings based on his acquisition of asylee status under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, is granted. The proceedings are terminated without prejudice and the record is returned to the Immigration Court without further action.

FOR THE BOARD

File: (b) (6) Date: JAN - 5 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Carlos E. Maury
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before the Board on April 9, 2007, when we remanded the record to the Immigration Court pursuant to an order of the United States Court of Appeals for the (b) (6) ("the Court") "regarding the timeliness of the [respondent's] motion [to reopen]." (b) (6) (b) (6) The Court noted that the motion to reopen was untimely but we had not addressed "either the timeliness of the motion or the possible applicability of the exception in 8 C.F.R. § 1003.23(b)(4)(i)." *Id.* Accordingly, the Court remanded 'to determine whether the evidence the [respondent] presented in support of his untimely motion constitutes evidence of changed country conditions, and if so, whether this evidence was 'material and was not available and could not have been discovered or presented at the previous proceeding.'" *Id.* We, in turn, remanded the case to the Immigration Judge for further proceedings.

The respondent, a native and citizen of China, has appealed from a February 11, 2008, Immigration Judge decision denying his motion to reopen.[2] The Department of Homeland Security ("DHS") has filed an opposition to the respondent's appeal. The appeal will be dismissed.

We review findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues,

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[1] In a November 17, 2009, decision, the Board suspended the respondent's former counsel from practicing law before the Board, the Immigration Courts, and the DHS pursuant to 8 C.F.R. § 1003.103(a). Given that we received the respondent's appellate brief prior to his former counsel's suspension, we will proceed with the appeal, and the respondent will represent himself, *pro se.* A courtesy copy of this decision will be sent to the suspended attorney.

[2] The respondent did not appeal the Immigration Court's original 1997 determination that his asylum application was frivolous. As such, we note the Immigration Court's frivolous finding is a separate basis to deny the respondent's motion to reopen.

including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). Since the respondent submitted his application for asylum before May 11, 2005, it is not governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge correctly determined that the respondent's motion to reopen was untimely filed in April 2004, over 6 years after the order of removal (I.J. at 5). *He v. Gonzales*, 501 F.3d 1128, 1133 (9th Cir. 2007). The untimeliness of a motion may be overcome where the respondent produces evidence of changed circumstances arising in the country of nationality if such evidence was not available and could not have been discovered or presented at the respondent's prior hearing. 8 C.FR. § 1003.23(b)(4)(i). The respondent claims that he will be subject to forced sterilization pursuant to China's Coercive Population Control policy based on changed country conditions arising in China, because his wife gave birth to two United States citizen children. The birth of a child, however, is a change in personal circumstances rather than a change in circumstances in the country of nationality. *He v. Gonzales*, *supra*, at 1133. Therefore, without more evidence, the birth of the respondent's children is not sufficient to establish changed circumstances in the country of origin within the regulatory exception to late-filed motions to reopen.

The respondent's March 15, 2004, affidavit does not meet the "heavy burden" of demonstrating "changed circumstances arising in the country of nationality" in the instant respondent's motion. *INS v. Abudu*, 485 U.S. 94, 110 (1988). Furthermore, the respondent has not submitted evidence showing changed circumstances in China. In sum, the evidence submitted by the respondent with his untimely motion to reopen does not meet his heavy burden of demonstrating changed circumstances in China sufficient to support a reopening of his proceedings.

Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[redacted]

File No.: [redacted]

In the Matter of

[redacted]

Respondent.

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(C((i) of the Immigration and Nationality Act ("Act") - *Alien, who by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States.*

APPLICATION: Motion to Reopen.

ON BEHALF OF APPLICANT:
Karen Jaffe, Esquire
[redacted]

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
Department of Homeland Security
[redacted]

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

On July 24, 1997, the Government personally served Respondent with a Notice to Appear ("NTA"). See Exhibit 1. The NTA was filed with the Court on August 15, 1997, thereby vesting jurisdiction over Respondent's proceedings with this Court pursuant to 8 C.F.R. § 1003.14(a). In the NTA, the Government alleged that Respondent, a native and citizen of China, arrived at or near Anchorage, Alaska on July 14, 1997. Furthermore, the Government alleged that Respondent was ineligible for admission to the United States because he applied for admission to the United States using a fraudulent passport. Accordingly, the Government charged Respondent as being removable pursuant to section 212(a)(6)(C)(i) of the Act.

On August 25, 1997, Respondent filed an Application for Asylum and for Withholding of Deportation with the Court. See Exhibit 2. On subsequent dates, Respondent submitted additional documentation in support of his applications. See Exhibits 2B and 3. Prior to taking the application into the record and on August 25, 1997, the Respondent was advised of the consequences of filing a frivolous application for asylum. See Exhibit 4.

On October 9, 1997, the Court denied Respondent's application for asylum and for withholding of deportation because it found (1) Respondent was not credible; (2) Respondent had failed to demonstrate that his unwillingness to return to China stemmed from persecution on account of any of the five enumerated grounds; and (3) Respondent had failed to show past persecution or a well-founded fear of future persecution. Furthermore, the Court made a special finding that Respondent was deemed to have filed a frivolous asylum application since Respondent provided contradictory and false testimony and false documentary evidence to support his asylum claim.

On March 26, 2001, Respondent filed another Application for Asylum and for Withholding of Removal.

On April 12, 2004, Respondent, through counsel, filed a Motion to Reopen due to changed circumstances. Respondent submitted an affidavit, stating that after he returned to China, he was interrogated, beaten, and detained by police officers. Furthermore, Respondent stated that he met his current wife in China, who was forced to have an abortion. As a result, Respondent left China again. He also stated that his eldest daughter was born in the United States in 2000.

On April 13, 2004, the Government submitted an Opposition to Respondent's Motion to Reopen. The Government argued that Respondent's prior asylum application was denied and that thereafter, Respondent was deported back to China. However, Respondent illegally re-entered the United States, such that Respondent was subject to reinstatement of his prior removal order. Finally, the Government argued that the Court lacked jurisdiction to reopen the case since Respondent was subject to reinstatement.

On April 26, 2004, the Court agreed with the Government that the Court had no jurisdiction to reopen the case. Specifically, the Court stated that the Respondent entered the United States illegally after having been removed under an order of removal. The Respondent admitted in his affidavit that he was previously removed pursuant to an order of removal and reentered illegally after removal.

On May 17, 2004, Respondent, through counsel, filed a Notice of Appeal with the Board of Immigration Appeals ("Board"). On July 8, 2004, the Board affirmed the Court's April 26, 2004 decision that the Court had no jurisdiction to reopen Respondent's case, as Respondent admitted reentering the U.S. illegally in 1999 following his removal order in 1997. Moreover, the Board stated that the Court found in its October 9, 1997 that Respondent filed a frivolous application for asylum and was therefore permanently ineligible for any benefits under the Act. See Section 208(d)(6) of the Act. Thereafter, Respondent appealed the Board's decision to the (b) (6) Court of Appeals. On (b) (6) the (b) (6) held that Respondent's original removal proceeding was completed when he was removed to China, and therefore, Respondent was not barred from filing a motion to reopen. See 8 C.F.R. § 1003.23(b)(1). Furthermore, the (b) (6) held that Respondent's original removal order was not automatically reinstated by operation of law upon his reentry. Finally, the (b) (6) remanded the case back to the Board with instructions to remand to the Court for further proceedings because there were no findings regarding the timeliness of Respondent's motion to reopen and that even if untimely, whether there was evidence of changed country conditions. On

April 9, 2007, the Board remanded to the Court for further proceedings consistent with the (b) (6) (b) (6) (b) (6) decision.

The Court will address Respondent's grounds for reopening as it has not been previously addressed at subsequent hearings.

II. Law and Analysis

A. Frivolous Asylum Application

Generally, a party may file one motion to reopen within 90 days from the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. 8 C.F.R. § 1003.23(b)(1) (2007). The time and numerical limitations of 8 C.F.R. § 1003.23(b)(1) do not apply if the purpose of the motion is to apply or reapply for asylum, withholding of removal, or relief pursuant to the Convention Against Torture, and is based on changed country conditions arising in the country of nationality, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing. 8 C.F.R. § 1003.23(b)(4)(i). See also Malty v. Ashcroft, 381 F.3d 942, 945 (9th Cir. 2004); Azanor v. Ashcroft, 364 F.3d 1013, 1021-1022 (9th Cir. 2004). However, if the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal. 8 C.F.R. § 1003.23(b)(4)(i) (2007).

Section 208(d)(4)(A) of the Act states that at the time of filing an application for asylum, the Attorney General shall advise the alien of the privilege of being represented by counsel and of the consequences, under section 208(d)(6), of knowingly filing a frivolous application for asylum. Under section 208(d)(6)of the Act, if the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under the Act, effective as of the date of a final determination on such application. See also 8 C.F.R. § 208.3(c)(5). 8 C.F.R. § 208.20 provides:

> For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

The Ninth Circuit emphasized the importance of providing the alien with the opportunity to explain any discrepancies before a court makes a finding of frivolousness. Farah v. Ashcroft, 348 F.3d 1153, 1157 (9th Cir. 2003).

Recently, in Matter of Y-L-, 24 I. & N. Dec. 151 (BIA 2007), the Board addressed the standards for a finding by the Court that an asylum application is frivolous. The Board held that in order for an application to be found frivolous: (1) the applicant must have received notice of the consequences of filing a frivolous application; (2) the Immigration Judge must make a specific finding that the alien deliberately fabricated a material element of his asylum claim; (3) there must be sufficient evidence in the record to support the finding that a material element of the application was deliberately fabricated; and (4) the alien must be afforded a sufficient opportunity to account for any discrepancies or implausible aspects of her claim. Id. at 155. Regarding the sufficiency of evidence, the Board stated that the preponderance of the evidence must support an Immigration Judge's findings of frivolousness. Id. at 157. Any plausible explanation offered by the respondent must be considered in determining whether the preponderance of the evidence supports a frivolousness finding. Id.

Upon a careful review of the record, the Court found that by a preponderance of the evidence, the Respondent deliberately fabricated a material element of his asylum claim. First, at Respondent's merits hearing held on October 9, 1997, the Court acknowledged that Respondent twice received the notice of filing a frivolous asylum application. See October 9, 1997 Decision; see also Exhibit 4. Second, Respondent testified that his first wife was hiding in northeast China; however, during his asylum interview, he stated that his wife was in Fujian, Fuzhou. The Court found that this was a material contradiction. Third, Respondent testified that he never registered his marriage until he was arrested and detained. However, shortly thereafter, Respondent testified that he was detained because of an argument with the Village Chief about the government not making just compensation for destructing his parent's house to build a road. Respondent also provided documentary evidence that the house was demolished as a warning to others because Respondent had an early marriage and childbirth, which was illegal in the village. See Exhibit 2B. The Court found that the documentation was not genuine, since it contradicted the entirety of Respondent's testimony that the house was demolished to build a road. Fourth, Respondent provided a written document indicating an arrest warrant on May 28, 1997. See Exhibit 2B. However, Respondent testified that he went to argue with the Chief Villager in February 1997 and was arrested in March 1997. As such, Respondent's own testimony conflicted with his supporting documentation. Fifth, during testimony, Respondent did not know when his previous wife was expected to give birth. Finally, Respondent testified that he would be sterilized if he returned to China; however, he never mentioned his fear during his asylum interview, nor did he mention his wife's abortion.

When given an opportunity to explain all the discrepancies, Respondent failed to provide any plausible explanation. The Court found that the Respondent deliberately fabricated the account of his first wife's pregnancy and his fear of sterilization as Respondent failed to mention any of these significant factors during his asylum interview. As to materiality, the Court found that Respondent had provided two completely different aspects of his reasons for leaving China. Therefore, the Court found that a preponderance of evidence supported the Court's finding that the Respondent had knowingly filed a frivolous application for asylum on August 25, 1997.

B. Changed Country Conditions

The Respondent requested that his case be reopened due to changed circumstances. However, the Court on October 9, 1997, denied his original asylum application based upon a finding that it was frivolous, such that he is ineligible to file a motion to reopen. See 8 C.F.R. § 1003.23(b)(4)(i) (2007). Nevertheless, the Court will consider Respondent's grounds for reopening pursuant to the (b) (6) Court of Appeal's remand order.

Generally, a party may file one motion to reopen within 90 days from the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. 8 C.F.R. § 1003.23(b)(1) (2007). In this case, Respondent was ordered removed on October 9, 1997, at which time he had recently arrived in the United States, had no children. Subsequently, Respondent returned to the United States in 1999. Now, over eleven years later from the date of his order of removal, and far beyond the ninety day filing deadline and September 30, 1996, Respondent seeks to reopen his proceedings after his personal circumstances have changed. The time and numerical limitations of 8 C.F.R. § 1003.23(b)(1) do not apply if the purpose of the motion is to apply for asylum, withholding of removal, or relief pursuant to the Convention Against Torture, and is based on changed country conditions arising in the country of nationality, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing. 8 C.F.R. § 1003.23(b)(4)(i). Respondent claims that the birth of his second child will render him subject to forced sterilization pursuant to China's population control policy if he is returned to China. However, Respondent has not even provided a birth certificate to evidence the birth of his first child in the United States.

The issue is whether an alien can establish changed circumstances sufficient to satisfy the exception to the time and number bars applicable to a motion to reopen based on the birth of children in the United States and the resulting threat of forced sterilization if returned to the country of origin. The Ninth Circuit recently addressed this question for the first time in He v. Gonzales, 2007 WL 2472546 (2007). In this case, the Ninth Circuit specifically held that "the birth of children outside the country of origin is a change in personal circumstances that is not sufficient to establish changed circumstances in the country of origin within the regulatory exception to late-filed or successive motions to reopen under 8 C.F.R. § 1003.2(c)(3)(ii). Therefore, the Court finds that Respondent is ineligible to reopen based on changed personal circumstances because the motion was untimely filed.

Furthermore, The Board has explained that when considering whether to reopen proceedings for a Respondent to apply for asylum based on changed country conditions, the Court must consider "whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution." Malty, 381 F.3d at 945. In doing so, the Court has "a duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim," particularly in the context of motions to reopen based on changed country conditions. Shou Yung Guo v. Gonzales, 463 F.3d 109, 115 (2d Cir. 2006) (citing Poradisova v. Gonzales, 420 F.3d 70, 81 (2d Cir. 2005)).

In Malty v. Ashcroft, 381 F.3d 942, 946 (9th Cir. 2004), the Ninth Circuit found that there was a change in country conditions where the respondent submitted evidence of "'mass arrests and torture' of approximately 1,000 Egyptian Coptic Christians, murders of numerous

Coptic Christians on account of religion," and "a declaration detailing six separate incidents of persecution of his family members in Egypt," all of which occurred after the respondent's asylum application had been denied. In Wei Guang Wang, the Second Circuit upheld the Board's finding that the petitioner, who was a Chinese citizen with two U.S. citizen children, had not demonstrated changed country conditions, based on the submission of the Arid affidavit, the 2004 Country Report, and an affidavit from Dr. Wu. 437 F.3d at 274-76. The Second Circuit found that at most, the petitioner would face only economic sanctions. Id. at 276.

In this case, Respondent has submitted his own affidavit. In his affidavit, Respondent states,

> *Under the help of my relatives and friends, we came to [the] U.S. successfully. We registered our marriage in New York. We gave birth to our eldest daughter in 2000. we decided to have our second child, to fulfill our dream of having a big family.*

The Court notes that such statements are taken as true and are some evidence of fear of persecution. However, the Court also points out that Respondent provides no evidence of any increased enforcement of the coercive family planning policy that affects the Respondent's specific claim or that circumstances in China have changed to the extent that the Court's previous finding that Respondent did not have a legitimate claim for asylum, that he now does have a well-founded fear of future persecution.

The Court finds that Respondent has not demonstrated changed country conditions. Respondent has not shown that there in fact has been a change in the family planning policy in China. Thus, the Court finds there is insufficient evidence of a *change* in country conditions. Therefore, the Court denies Respondent's Motion to Reopen since he has not demonstrated changed country conditions.

Finally, the Court found that Respondent had knowingly filed a frivolous application for asylum on August 25, 1997. As a result, Respondent is permanently ineligible for any benefits under the Act, effective as of the date of a final determination on such application, which was October 9, 1997. See 8 C.F.R. § 208.3(c)(5).

Accordingly, the following order shall be entered:

ORDER

IT IS ORDERED that Respondent's Motion to Reopen be **DENIED**.

DATE: Feb 11, 2008

Anna Ho
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6) Date: APR - 9 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Karen Jaffe, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact

APPLICATION: Reopening

ORDER:

PER CURIAM. Pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision.

FOR THE BOARD