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

Order on Motion to [redacted] Proceedings
RECONSIDER

In the Matter of:

[redacted]

RESPONDENT/APPLICANT

Case No.: A [redacted]

Docket: [redacted]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondents's/~~written~~

☑ Motion to Reconsider an Immigration Judge's decision

☐ Motion to Reopen proceedings

filed in the above entitled matter, it is **HEREBY ORDERED** that the motion

☐ be granted.

☑ be denied for the reasons indicated in the attached ~~decision~~ addendum.

Immigration Judge

Date: October 4, 2012

Addendum, Request for Motion to Reconsider filed by (b) (6)
Respondent in Removal Proceedings

With a cover sheet dated July 31, 2012, the New York Immigration Court mailed out a decision denying the Respondent's application for deferral of removal pursuant to the Convention Against Torture and ordering the Respondent removed from the United States to the Dominican Republic.

On September 6, 2012, the Respondent filed a pro se motion captioned Request for Motion to Reconsider. On September 13, 2012, the Department of Homeland Security (DHS) filed the United States Department of Homeland Security's Response in Opposition to Respondent's Motion to Reconsider.

The Department of Homeland Security argues that Respondent's Motion to Reconsider is untimely, and the Court concurs. 8 C.F.R. Section 1003.23(b)(1) requires that motions to reconsider be filed within 30 days of the entry of a final administrative order of removal, deportation or exclusion. Since the decision in the Respondent's case was mailed on July 31, 2012, his Motion to Reconsider had to be filed on or before August 31, 2012. The September 6, 2012 filing date was untimely. In addition, as set forth in 8 C.F.R. Section 1003.23(b)(2), a motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the Immigration Judge's prior decision. Respondent's motion does not specify errors of fact or law in the Court's decision; rather it alleges deficits in the performance of the Respondent's attorney. Both because it is untimely and because no errors of fact or law in the decision have been established, the Motion to Reconsider must be denied.

A close reading of this pro se motion establishes that it could also be considered as a motion to reopen based on ineffective assistance of counsel. Since the Respondent is pro se, the Court will also consider the motion as a motion to reopen. As a motion to reopen, Respondent's motion would be timely, as motions to reopen must be filed within 90 days the date of entry of a final administrative order of removal, deportation or exclusion.

A motion to reopen alleging ineffective assistance of counsel must include: (1) an affidavit by the respondent detailing the agreement entered into with former counsel[1]; (2) evidence that former counsel has been informed of the allegations leveled against him or her and that he or she has been afforded the opportunity to respond[2]; and (3) information about whether a complaint has been filed with the appropriate disciplinary authorities. See Matter of Lozada, 19 I&N Dec. 637, 639 (BIA 1988); see also Matter of Assaad, 23 I&N Dec. 553 (BIA 2003) (reaffirming requirements for motions to reopen alleging ineffective assistance of counsel, as set

[1] See Piranej v. Mukasey, 516 F.3d 137, 144-45 (2d Cir. 2008) (remanding to the BIA to determine whether "the existence of a general retainer agreement can give rise to ineffective assistance of counsel claims in the immigration/removal context," where the BIA determined that the affidavit submitted by petitioner did not provide sufficient detail about the exact parameters of the relationship between the petitioner and his attorney).

[2] The purpose of the second requirement is to provide attorneys an opportunity to respond to allegations which might call into question the reputation of the attorney as competent counsel. Lozada, 19 I&N Dec. at 639.

forth in Lozada). Additionally, the petitioner must demonstrate that he or she was prejudiced by the performance of their counsel. Esposito v. INS, 987 F.2d 108, 111 (2d Cir. 1993); Rashid, 533 F.3d at 132 ("[T]he alien must allege facts sufficient to show (a) that competent counsel would have acted otherwise, and (b) that he was prejudiced by his counsel's performance.") (internal citations omitted); Vartelas v. Holder, 620 F.3d 108, 115 (2d Cir. 2010) (finding that a respondent must show that he or she was prejudiced but declining to set a standard for the prejudice prong of an ineffective assistance of counsel claim). The (b) (6) requires only "substantial compliance" as opposed to "slavish adherence" to the Lozada requirements. Yi Long Yang v. Gonzales, 478 F.3d 133, 142-43 (2d Cir. 2007); see also Debeatham v. Holder, 602 F.3d 481 (2d Cir. 2010) (affirming IJ's denial of an ineffective assistance claim where petitioner failed to offer evidence of his agreement with former attorney regarding the handling of the issue in question, failed to notify him of his alleged ineffectiveness, failed to notify the appropriate disciplinary board, and failed to demonstrate that his former attorney's alleged ineffective assistance actually resulted in prejudice).

The Respondent's statement does not sufficiently establish the agreement entered into with former counsel. There is no evidence that counsel was informed of the allegations leveled against him and was afforded an opportunity to respond other than Respondent's assertion, which the Court deems insufficient. No information has been provided as to whether a complaint has been filed with the appropriate disciplinary authorities. Moreover, as pointed out by DHS in its response to the motion, the Respondent has not submitted the additional evidence he claims his attorney failed to submit. He has not established that competent counsel would have acted "otherwise" and that he was prejudiced by counsel's performance. For these reasons, a motion to reopen for ineffective assistance of counsel must fail.

For the reasons set forth above, Respondent's motion is denied.

Helen Sichel
U.S. Immigration Judge
October 4, 2012

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File No.: (b) (6) (b) (6)

In the Matter of:

(b) (6)

Respondent

IN REMOVAL PROCEEDINGS

CHARGES:	INA § 237(a)(2)(A)(iii) INA § 237(a)(2)(B)(i)	Aggravated felony Controlled substance violation
APPLICATION:	8 C.F.R. § 1208.16(c)	Convention Against Torture

ON BEHALF OF THE RESPONDENT
Scott Messinger, Esq.
Gladstein & Messinger
(b) (6)

ON BEHALF OF DHS
Angela Marra
Assistant Chief Counsel
(b) (6)

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

This case comes before the Court on remand from the Board of Immigration Appeals ("BIA"). The Court assumes the parties' familiarity with the long procedural history in this case. The relevant events for this proceeding are as follows:

(b) (6) ("the Respondent") is a native and citizen of the Dominican Republic. In a written decision dated June 22, 2006, the Court granted the Respondent's application for deferral of removal to the Dominican Republic under Article 3 of the Convention Against Torture ("CAT"), 8 C.F.R. § 1208.17(a). The Respondent claimed that, as a defendant in a large-scale 2001 federal drug prosecution who cooperated with United States ("U.S.") law enforcement, he was in danger of being tortured or killed by the drug traffickers on whom he had informed, specifically, (b) (6) and his associates, if he were removed to the Dominican Republic. On May 22, 2008, the BIA reversed the Court's decision and remanded the record for entry of a removal order, which this Court entered on October 8, 2008. The Respondent

appealed again to the BIA, submitting newly-obtained documentation from the Dominican Republic that purported to be from various law enforcement agencies. [Exh. A.] The BIA dismissed the appeal on June 22, 2009.

On (b) (6), the United States Court of Appeals for the (b) (6) remanded the case to the BIA in a precedent decision, (b) (6) *v. Holder*, (b) (6) (b) (6). The (b) (6) held that the BIA employed an incorrect standard of review and improperly engaged in fact-finding by considering the Respondent's new evidence on appeal, and also asked the BIA to "issue a precedential opinion on whether, as a matter of law, a government may acquiesce to a person's torture where (1) some officials attempt to prevent that torture (2) while other officials are complicit, and (3) the government is admittedly unable to actually prevent the torture from taking place. *Id.* at 110-11.

On August 22, 2011, the BIA issued a new decision, finding that the Court's credibility determination and factual findings were not clearly erroneous, but that the facts did not establish that the Respondent was eligible for deferral of removal under CAT. The BIA held that the Respondent's "sparse, uncorroborated testimony" that Mr. (b) (6) brother was a Dominican government official who could recognize the Respondent did not meet his burden of proof, as that there was no evidence (b) (6) brother had the means or will to torture the Respondent. The BIA therefore held that the future chain of events was thus too speculative to conclude that it was more likely than not, that the Respondent would be tortured, citing *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). The BIA declined to reach the (b) (6) question as to whether acquiescence is established when some officials attempt to prevent torture while others are complicit. *See* (b) (6) The BIA then remanded the case to this Court to "consider the evidence presented by the respondent on appeal and any other evidence the parties wish to present."

On remand, the Respondent and DHS submitted supplemental documents to the Court, and the Respondent and one witness testified on February 16, 2012 and June 4, 2012. For the reasons that follow, the Court will deny the application for deferral of removal under CAT.

II. EXHIBITS

The Court marked Exhibits 1-15 into the record during the Respondent's original proceeding. After the BIA's August 22, 2011 remand, the Court marked the following additional exhibits into evidence:

Exh. A: Law enforcement documents from the Dominican Republic, with certified translations;[1]

Exh. B: Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *2010 Human Rights Report: Dominican Republic* (Apr. 8, 2011);

Exh. C: Letter to the Court from (b) (6) (Sept. 11, 2011);

[1] Given the BIA's specific order on remand to consider the new evidence presented by the Respondent, the Court found the most prudent course of action to admit the documents and then decide how much weight to give them, as discussed further in Part IV.A.1 of this opinion.

Exh. D: Statement of (b) (6)
Exh. E: Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Country Reports on Human Rights Practices for 2011: Dominican Republic* (2012).

III. TESTIMONY

The transcript of the original proceeding is incorporated by reference into this decision. See Transcript of Removal Proceedings ("Tr."). Additional testimony in this case is summarized as follows:

A. The Respondent

The Respondent testified that the Dominican Republic is less safe now than it was before. People who cooperate with U.S. authorities and return to the Dominican Republic can be killed "right there at the airport" by people who have family connections to the government. He stated that (b) (6), who was deported to the Dominican Republic in connection with the Respondent's cooperation in his drug case, has a brother in the government. The Respondent believes returning to the Dominican Republic would be "like a death sentence" because the government cannot protect him. When asked why (b) (6) has not tried to harm him in the U.S., he stated that all of (b) (6) friends were deported back to the Dominican Republic. The Respondent stated that the police are corrupt, "have their own cartels," and work closely with people involved with illegal drugs.

The Respondent met (b) (6) brother in New York in 1999, before the criminal case happened. He did not know the brother's name or exactly what position he held in the government, but stated that at the time he was wearing "a uniform that is part of the Santo Domingo government." The Respondent stated that he knew (b) (6) brother was still in the government because the mother of his children, (b) (6), still speaks to his former co-defendant (b) (6) and others in the Dominican Republic. The Respondent did not have written evidence relating to (b) (6) brother. When asked why this man would abuse his authority to help target the Respondent, he stated that "they all do over there," and stated that he saw a documentary in 2011 showing how police go into the homes of deportees. He believes (b) (6) brother would help harm him because the Respondent contributed to (b) (6) deportation, and because the brother saw the Respondent "face to face."

The Respondent stated that since his first removal hearing, there have been deaths in the Dominican Republic related to his criminal case. In May 2004, a brother of (b) (6) (b) (6) was killed along with two other people. (b) (6) was deported to the Dominican Republic in association with the criminal case, in which he also cooperated with U.S. authorities. The Respondent knew the shooting occurred around May 2004 because "during that time (b) (6) spoke to [him]" and told him what happened. (b) (6) told the Respondent that (b) (6) associates, including a man named (b) (6), killed (b) (6) and two others because they thought (b) (6) was in the car with them. The Respondent testified that (b) (6) was arrested in connection with the crime, although he did not know if he went to jail or was released. (b) (6) group has tried to kill (b) (6) "two or three times," and (b) (6) has had to leave his family and "flee" elsewhere

in the Dominican Republic. (b) (6) has told the Respondent not to come to the Dominican Republic because he is in danger.

The Respondent also testified that sometime around July 2008, his cousin, whose last name is (b) (6) was killed in a "shoot-out" in the Dominican Republic, also by people associated with (b) (6) The Respondent does not believe there were any arrests in connection with that killing. The Respondent stated that the threats from (b) (6) are real and "not something [he] created," and noted that when he was in jail during his criminal case, his visits were suspended for his safety.

The Respondent testified that he received threats from (b) (6) and his associates as recently as October 2011, while he was in immigration detention in Alabama. He spoke on the phone to the godfather of one of his children. The godfather told him that (b) (6) had told him that (b) (6) and his associates knew the Respondent was in immigration detention, and were waiting for the Respondent in Santo Domingo. When asked if he had a statement from his child's godfather about these threats, the Respondent stated that he did not, but that the calls were recorded by DHS. When asked exactly who gave this message to (b) (6) the Respondent stated that he did not know, but Santo Domingo was "a small place, and they all send each other messages back and forth." The Respondent stated that people who his family did not know have gone to the family's house in the Dominican Republic, asking for him. Only his mother and father still live in the Dominican Republic. The Respondent did not have statements from his family in the Dominican Republic about threats they received, other than what is mentioned in the documents submitted.

When asked about the new documents he had submitted on appeal, [Exh. A], the Respondent stated that Ms. (b) (6) asked for records from the Dominican court system. He did not know who actually obtained them, or how they were obtained, although he stated that Ms. (b) (6) did not obtain them herself. He was "100% sure" the documents were authentic, because if the events described had not occurred, they would not be documented in the papers. He again stated that the Dominican police will not protect him or his family. His family has filed complaints about threats from (b) (6) and his associates, but nothing has been done about the complaints.

B. (b) (6)

Ms. (b) (6) is the Respondent's ex-wife and a U.S. citizen. She testified that she and Respondent were married in 1985 and have three sons together, who are twenty-four, twenty, and fourteen years old. She is "very close" with the Respondent's family and regularly talks to his parents, who live in the Dominican Republic. She stated that his parents are old and in poor health, and are the only family the Respondent has left in that country. Ms. (b) (6) last visited the Dominican Republic in 2011, for about one week. Her prior visit was in 2009, and she usually visits every one to two years for about one week at a time. She stated that she has never had problems when she visits the Dominican Republic, but that this is because she does not let anyone know that she is traveling there, and has told her sister, who lives there, to keep her visits a secret.

Ms. (b) (6) testified that Respondent and his family have received many threats related to his cooperation in his drug case. In 2002, people called her at work "all the time," and told her at one point that they had "seven bullets" for the Respondent. She stated that the men who were deported after the case have harassed the Respondent's parents by sending them letters and driving around the house. She also stated that these people tried to obtain her email address and pictures of her children. About a month before the hearing, the Respondent's parents filed a complaint at "the prison" about people following them and asking for the Respondent. The Respondent's parents are very scared that he will be killed in the Dominican Republic. Ms. (b) (6) (b) (6) stated that the Respondent's parents have not been physically harmed.

Ms. (b) (6) stated that (b) (6) has "a gang" and has "people in the military." She stated that Brito and the other men deported after the case are together and "all communicate." She knows this from talking to the Respondent's family and his co-defendant (b) (6) who she knows personally and most recently spoke to a month and a half before the hearing. (b) (6) who also testified against (b) (6) in the drug case, was deported to the Dominican Republic in about 2002, and has recently been "moving from one place to another" for his safety. Ms. (b) (6) stated that someone with connections in the military can "track you down." (b) (6) has told Ms. (b) (6) that (b) (6) has a brother or uncle in the government, and that the Respondent should try not to return to the Dominican Republic because of (b) (6) gang. Ms. (b) (6) testified that the Respondent's cousin was killed, as was a former co-defendant of the Respondent's named (b) (6) although she did not know if it was (b) (6) who killed them.

Ms. (b) (6) first stated that (b) (6) and associates have not been able to hurt (b) (6) (b) (6) because he moves from one place to another. She also stated that (b) (6) has a lot of family in the country, while the Respondent only has his parents, who are ill. When asked on cross-examination why, if the military could track down anyone, (b) (6) had not found (b) (6) after ten years in the Dominican Republic, she stated that (b) (6) *had* found him, and that (b) (6) had a "big confrontation" with (b) (6) "with guns and all of that." When asked how (b) (6) escaped this confrontation, she stated that (b) (6) left," and she did not know why he was not killed since she was not there. She could not state when this incident happened.

Ms. (b) (6) testified that the new documents submitted to the court were obtained by a lawyer that (b) (6) and his family hired. She stated that (b) (6) and his family "really wanted to show all the stuff going on out there." She then stated that she told (b) (6) to hire the attorney, and send him "a couple hundred dollars" through her sister, who lives in the Dominican Republic. (b) (6) family contributed the rest of the money. Ms. (b) (6) stated that she never had direct contact with the attorney and did not know his name. She did not think this was a problem because she trusted (b) (6) She knew the attorney obtained documents from government agencies, but did not know which ones. She also did not know how the attorney obtained the letter that purports to be from (b) (6) [Exh. A at 25.] She stated that references to the (b) (6) family in the documents refer to (b) (6) family, and that references to the (b) (6) (b) (6) family refer to distant relatives of the Respondent whom she does not know.

Ms. (b) (6) testified that after the documents were obtained, a female friend in the Dominican Republic brought them to her. She then gave them to the Respondent's former

attorney in 2008 or 2009 for translation. She did not remember them arriving in an envelope from the Dominican attorney. Ms. (b) (6) stated that she tried to get in contact with the Dominican attorney who had obtained the documents, but that he did not want to talk to her or send her anything else because he is a politician now and was involved with the presidential election. She testified that the Respondent's parents have received additional threats, which she thought included written threats. She told his parents to send documentation of the threats to her or the Respondent's lawyer, but she did not know if they ever sent anything.

IV. LEGAL STANDARDS AND ANALYSIS

A. Convention Against Torture

The CAT and its implementing regulations provide that no person may be removed to a country where it is "more likely than not" that such person will be subject to torture. See 8 C.F.R. §§ 1208.16-1208.18. "Torture" is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. § 1208.18(a). The applicant for relief under the CAT bears the burden of proof. 8 C.F.R. § 1208.16(c)(2). Because the Respondent's original application was filed before May 11, 2005, he is not subject to the heightened credibility and corroboration standards of the REAL ID Act of 2005. INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007). As with asylum adjudications, the applicant's testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.16(c)(2); *see also Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998). However, the Respondent should provide reasonably available corroborating evidence. *See Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

To meet his burden of proof, an applicant for relief under the CAT must establish that someone in his particular alleged circumstances is more likely than not to be tortured in the country designated for removal. *Wang v. Ashcroft*, 320 F.3d 130, 144 (2d Cir. 2003); *Matter of J-E-*, 23 I&N Dec. 291, 303-04 (BIA 2002). The definition of torture requires specific intent to inflict severe physical or mental pain or suffering, as well as the instigation, consent, or acquiescence of public officials or persons acting in an official capacity. 8 C.F.R. § 1208.18(a); *J-E-*, 23 I&N Dec. at 297-99. Acquiescence of a public official requires that the official have awareness of or remain "willfully blind" to the activity constituting torture prior to its commission by private actors, and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7); *see also Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004).

1. Credibility and Corroboration

The BIA's 2011 decision held that, on the basis of the Respondent's original testimony and evidence, he did not meet his burden of proof to show that it was more likely than not that he would be tortured in the Dominican Republic with the acquiescence of government officials. As a result, the Court will consider the entire record, but will focus on the evidence and testimony that was new on remand. Additionally, the BIA's 2011 decision held that the Court's finding that the Respondent testified credibly at his first proceeding was not clearly erroneous. Although

DHS's closing brief discusses this testimony at length and continues to argue that it was not credible, the Court finds no reason to re-visit its original credibility finding.

After the BIA's 2011 remand, the Respondent and his wife testified to the following: (1) individuals related to the Respondent or other U.S. government cooperators have been killed by (b) (6) or his associates in the Dominican Republic; (2) the Respondent's parents have received harassment and threats, up until the present time; and (3) the Respondent received a threat from (b) (6) or his associates while in immigration detention in October 2011. New evidence in the record includes a number of documents purporting to be from Dominican law enforcement, the statement of (b) (6) regarding these documents, and updated country conditions information. [Exhs. A; D; E.]

The Court continues to find the Respondent credible, as he testified consistently and in detail about his fears if removed to the Dominican Republic. However, based on the current evidence in the record, the Respondent did not prove that it is more likely than not that he will be tortured or killed in the Dominican Republic. *See* 8 C.F.R. § 1208.16(c)(2)-(3). Because the Respondent has no first-hand knowledge of recent threats against him or his family, or of recent killings in the Dominican Republic, he must present reasonably available corroborating evidence regarding these events, including their connection to the acquiescence of the government in any future torture. The Court finds that he did not adequately corroborate his claim.

The Court cannot give much, if any, weight to the Respondent's report that he was threatened by (b) (6) or his associates in October 2011. The Respondent received this threat third-hand: according to him, unknown individuals in the Dominican Republic told his co-defendant, (b) (6) that they were waiting for the Respondent; (b) (6) told the Respondent's child's godfather (whose name is not in the record); and this person told the Respondent. There are no statements in the record from the Respondent's child's godfather, and none from (b) (6) regarding neither this threat nor any of the many aspects of testimony that related to him. *See Kyaw Zwar Tun v. INS*, 445 F.3d 554, 568 (2d Cir. 2006) (failure to present corroborating evidence from Respondent's parents, who were available, was fatal to asylum claim). It is not even clear that the original threat was actually a threat of violence, or what its wording was. While hearsay is admissible in immigration court, *see Felzcerek v. INS*, 75 F.3d 112, 115-16 (2d Cir. 1996), this does not mean the Court must give weight to double and triple hearsay evidence, and the Court will not do so here.

In addition, the Court finds that (b) (6) did not testify credibly, as her testimony was inconsistent and implausible. She stated that the family of (b) (6) obtained the documents in Exhibit A from an attorney they hired, because the family "really wanted to show all the stuff going on out there," but also testified that she told (b) (6) to hire the attorney, and sent him a couple of hundred dollars toward the fees. She stated that she did not know the attorney's name or how exactly the documents were obtained, but did not think this was a problem because she trusted (b) (6) Ms. (b) (6) testified that she received the documents when a friend of hers brought them from the Dominican Republic. She did not provide this friend's name and stated she did not remember the documents coming with any identifying information from the attorney. However, she then testified that she later tried to get in contact with the attorney who allegedly obtained them, and stated that he did not want to talk to her or

send her anything else because he was involved in politics. It is hard to understand how Ms. (b) (6) (b) (6) was able to contact or learn this information from the attorney when she previously testified that she did not even know the attorney's name. The record does not contain any statement from the attorney, (b) (6) or the friend who purportedly gave the documents to Ms (b) (6)

Other aspects of her testimony were also vague and inconsistent; for example, when asked on cross-examination why (b) (6) had not located (b) (6) after (b) (6) had been in the country ten years, she responded that (b) (6) had in fact found him, and described a major confrontation "with guns and all that" that neither she nor the Respondent had ever mentioned in testimony or their written statements. She also could not explain when this happened or how (b) (6) escaped injury in this incident, making her report of this incident unreliable. For these reasons, the Court cannot find that the Ms (b) (6) estified credibly.

This brings the Court to consideration of the documents in Exhibit A themselves, which supposedly corroborate the deaths of people in the Dominican Republic at the direction of (b) (6) and his associates, and the harassment of the Respondent's parents. [Exh. A.] The origin of these documents is extremely unclear, and the Respondent had no first-hand knowledge of how the documents were created. Given that Ms. (b) (6) testimony was not credible and her role in the creation of the documents was unclear, the Court is left with an unauthenticated set of documents with virtually no chain of custody and no way to determine if they are authentic.

As a result, the Court cannot find that these documents are reliable proof of what they purport to state. The Court is not finding that the Respondent intended to deceive the Court; the record does not support a finding that the Respondent knew or had reason to know of any fraud. *See Corovic v. Mukasey*, 519 F.3d 90, 97-98 (2d Cir. 2008) (reversing adverse credibility determination where respondent submitted possibly fraudulent documents, but there was no evidence he knew or had reason to know of the fraud). However, if someone along the chain of custody did obtain falsified documents in an effort to strengthen the Respondent's case, there would be no way to know, because the documents have allegedly passed through the hands of three or four people on their way to the Respondent's former attorney: an unnamed Dominican attorney; possibly Mr. (b) (6) an unnamed friend of Ms. (b) (6) and Ms. (b) (6) None of these individuals besides Mrs. (b) (6) submitted any information to the Court. The Court would have been willing to accept the documents as reliable even if they were not authenticated under the regulations for foreign official records in 8 C.F.R. § 287.6, had there been alternate evidence or testimony establishing their reliability, but there is none. *See Shunfu Li v. Mukasey*, 529 F.3d 141, 149 (2d Cir. 2008) (IJ should not reject documents simply for a lack of authentication under 8 C.F.R. § 287.6, but may use "considerable flexibility" in determining authenticity by considering the totality of the evidence).

The Court also notes that the documents do not comport with the Respondent's testimony regarding the deaths of certain individuals in the Dominican Republic. The Respondent testified that in 2004, the brother of (b) (6) was shot to death along with two other people. He specifically stated that the shooting happened because (b) (6) associates believed (b) (6) was in the car with the three victims. However, documents purportedly from the Santo Domingo district attorney's office state that (b) (6) and two associates hired men to kill

(b) (6) and (b) (6) who is described in one document as a close friend of the Respondent, and in another as a relative of the Respondent. [Exh. A at 5, 8, 10.] The same statement from the district attorney's office later says that the hired killers were told they would be in charge of killing (b) (6) who "by an unfortunate fate of life that tragic day was accompanied by Mr. (b) (6) and (b) (6) who was wounded[.]" *Id.* at 11.

Additionally, police documents include what are supposedly complaints from (b) (6) and (b) (6), both made on May 4, 2004, thirteen days before their deaths. *Id.* at 5. The complaint from Mr. (b) (6) states that a (b) (6) associate named (b) (6) " and his son (b) (6) threatened to hire two people to kill Mr. (b) (6) because of his association with the Respondent. *Id.* The complaint from Mr. (b) (6) states that on the night of May 3, two armed men came to his residence, told him to "count [his] days because they are numbered," and shot twice at the house. *Id.* at 22. The complaint further states that Mr. (b) (6) identified the armed men a (b) (6) and (b) (6) (b) (6), and stated that this happened "all because I was supposedly [a] friend of (b) (6) who was the person who caused the [d]eportation of (b) (6) *Id.* Together, these documents indicate that Mr. (b) (6) and (b) (6) were specifically targeted for their friendships with *the Respondent*, which totally contradicts the Respondent's testimony that (b) (6) was the intended victim, but his brother and two other men were mistakenly shot instead. In fact, none of the documents even mention (b) (6) as a relative of (b) (6) or as an intended target of violence or threats.[2] This seems particularly odd if, as Ms. (b) (6) claimed, Mr. (b) (6) and his family were involved in obtaining the documents.

Finally, the documents contain what purports to be a copy of a handwritten letter from (b) (6) himself to the Respondent. [Exh. A at 25.] The letter is not dated, and it bears a National Police seal. There is no explanation in the documents or elsewhere as to why it bears this seal, when or how it was obtained, or to whom it was actually sent. *Compare Gomez-Beleno v. Holder*, 644 F.3d 139, 141-43 (2d Cir. 2011) (petitioner included the written death threat he had personally received with his asylum application). Therefore, the Court cannot give it weight as proof of (b) (6) current intentions to torture the Respondent.

Because of the Court's serious concerns about the origin, reliability, and content of the submitted documents, the Court cannot find that they constitute adequate corroboration of the deaths of certain individuals or threats against the Respondent's parents. In fact, the documents' murky origin and conflicting content directly undermine the Respondent's case, as they raise serious questions about whether they were created to bolster the Respondent's case, and their content contradicts the Respondent's previous testimony about incidents in the Dominican Republic. Outside of these documents, the record does not contain a separate statement from the Respondent's parents or from (b) (6) regarding threats or letters they have received. For these reasons, the Court finds that the Respondent has failed to adequately support his claim that he faces a likelihood of torture in the Dominican Republic. *See* 8 C.F.R. § 1208.16(c)(2).

[2] To be clear, the Court does not doubt the existence of (b) (6) The Respondent testified about Mr. (b) (6) in his original proceeding, and the record indicates he was a co-defendant in the Respondent's federal criminal case. *See* [Exh. 11.] The Court simply notes that the documents submitted do not mention Mr. (b) (6) at any point.

2. Instigation, Consent, or Acquiescence of Public Officials

In addition, the Court finds that even if the newly-submitted documents were entirely reliable, they would not establish that any torture the Respondent would face would be with the instigation, consent, or acquiescence of a public official. 8 C.F.R. § 1208.18(a)(1), (7). The documents purport to contain direct statements from the Dominican police that they lack the ability to sufficiently protect the Respondent and his family. [Exh. A at 3, 8.] This does not establish acquiescence to torture: it establishes that the police are aware that the Respondent is in danger and would like to help him, but lack the resources to guarantee his safety, rather than refusing to intervene. *See Khouzam*, 361 F.3d at 171 (both actual knowledge and "willful blindness" to torture, coupled with a refusal to intervene, constitute government acquiescence). Moreover, other documents state that the police are actively searching for (b) (6) [Exh. A at 9, 14.] Violence that occurs as a result of the government's poverty or poor management is not done with the acquiescence of the government, within the meaning of the CAT. *See J-E-*, 23 I&N Dec. at 301 ("inexcusable prison conditions" in Haiti were the result of economic and management problems, and therefore lacked the intent necessary to constitute torture). In addition, the most recent State Department report on the Dominican Republic states that corruption and violence continue to be serious problems in the Dominican police force; however, the report also detailed a number of firings, internal affairs investigations, sanctions, and prosecutions of police officers who killed or beat civilians. [Exh. E at 1-4, 7-8.]

The Respondent continues to state that (b) (6) has a brother who is in the government and who would harm him; this is the testimony the 2011 BIA decision calls "sparse and uncorroborated." The newly-submitted documents do not mention this brother or any other connections that (b) (6) may have to the government. The Court continues to find credible the Respondent's testimony that he met (b) (6)'s brother in the U.S. in 1999 and that he was employed by the Dominican government at that time. However, there is no new evidence establishing this person's name, his former or current position, his current whereabouts, or his feelings toward the Respondent. With no further evidence that this individual is still in the government or has the will or means to harm the Respondent, the Court remains bound by the BIA's most recent ruling that there is insufficient evidence of government acquiescence to future torture. As a result, the claim that (b) (6) or his associates would torture the Respondent with the consent or acquiescence of the Dominican military or police is too speculative to meet the Respondent's burden under the CAT. *See J-F-F-*, 23 I&N Dec. at 917-18; *see also Savchuck v. Mukasey*, 518 F.3d 119, 123-24 (2d Cir. 2008).

This remains a difficult case for the Court. It is unquestioned that the Respondent provided substantial assistance to U.S. prosecutors in 2001, and received a significant reduction in his sentence for information about (b) (6) and other participants in drug trafficking. *See* (b) (6) *see also* [Exh. 11.] It is also clear that at least during and immediately after the criminal case, the Respondent and his family received serious threats from (b) (6) *See* Tr. at 62-67, 95-100. However, the Court is bound by both the strict requirements for protection under the CAT and the BIA's most recent decision in this case. The new evidence and testimony before the Court does not establish a likelihood of future torture with the acquiescence of the Dominican government. In the case of the new documents, the evidence raises more questions than it answers, and ultimately weakens the Respondent's case. As a

result, the Court cannot find that the Respondent has established eligibility for deferral of removal. 8 C.F.R. §§ 1208.16(c), 1208.17(a).

Accordingly, after a careful review of the record, the following orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that the Respondent be removed from the United States to the Dominican Republic on the charges contained in the NTA.

IT IS FURTHER ORDERED that the Respondent's application for deferral of removal pursuant to the Convention Against Torture be **DENIED.**

Date: July 27, 2012.

Helen Sichel
Immigration Judge

File: (b) (6) Date: AUG 22 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alex Arandia, Esquire

ON BEHALF OF DHS: Angela Marra
Assistant Chief Counsel

APPLICATION: Convention Against Torture

This case is presently before us pursuant to an order of the United States Court of Appeals for the (b) (6) vacating the Board's June 22, 2009, order and remanding the record to the Board for further consideration of the respondent's application for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.17, 1208.18. Both parties have submitted supplemental briefs. The record will be remanded.

In its decision, the (b) (6) concluded that the Board had employed an improper standard of review when it reversed the decision of the Immigration Judge granting the respondent deferral of removal under the Convention Against Torture. (b) (6) *v. Holder*, (b) (6) (b) (6) The (b) (6) further found that the Board had acted inconsistent with 8 C.F.R. § 1003.1(d)(3)(iv) by considering evidence the respondent submitted during the pendency of his appeal. *Id.* Finally, the (b) (6) requested that the Board clarify its understanding of the term "government acquiescence." *Id.*

This case has a lengthy procedural history. In December 2001, the respondent was charged with removability as an alien convicted of an aggravated felony and a controlled substance violation as a result of a 2001 conviction for conspiracy to distribute and possess with intent to distribute cocaine and heroin.[1] He conceded removability on January 30, 2002. He was ordered removed in absentia on March 20, 2002, and proceedings were reopened on October 11, 2002. Following a change of venue on February 4, 2003, testimony was taken on the respondent's application for protection under the Convention Against Torture on August 5, 2003, and November 6, 2003. The respondent was thereafter ordered removed in absentia on June 1, 2004, and proceedings were again reopened on June 21, 2005. The Immigration Judge granted the respondent deferral of removal under the Convention Against Torture on June 22, 2006. On May 22, 2008, the Board vacated the

[1] The respondent, who had been admitted to the United States in 1989 as a lawful permanent resident, was previously in deportation proceedings, charged with deportability for a conviction for criminal possession of a firearm. He re-adjusted his status to that of lawful permanent resident in 1995.

Immigration Judge's decision and remanded the record to the Immigration Judge for the entry of a removal order, which was thereafter entered by the Immigration Judge on October 8, 2008. We dismissed the respondent's appeal on June 22, 2009. The (b) (6) remanded the case to the Board on February 25, 2010.

The Board reviews questions of law, discretion, and judgment under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

We review findings of fact made by the Immigration Judge under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). Pursuant to the regulations, we defer to the Immigration Judge's factual determinations, including credibility determinations, because she is better positioned than the Board to discern credibility and assess the facts with witnesses before her. *See Matter of A-S-B-*, *supra*, at 496. If the Board determines that the Immigration Judge's findings of fact are not clearly erroneous, it may review de novo whether the facts are sufficient to meet an applicable legal standard. *Id.* at 497.

Our decision in *Matter of H-L-H- & Z-Y-Z-*, *supra*, which was issued after the (b) (6) decision in this case, clarifies the relationship between the standards of review employed by the Board. *Matter of H-L-H- & Z-Y-Z-*, *supra*, at 212. It likewise affirms the Board's authority to give different weight to the evidence from that given by the Immigration Judge. *Id.* This authority is critical to permit the Board to determine whether specific facts are sufficient to meet the relevant legal standard. *Id.*

We conclude under our de novo authority that the facts as found by the Immigration Judge do not establish that the respondent is eligible for deferral of removal under the Convention Against Torture.[2] The respondent contends that he will be tortured in the Dominican Republic by or at the behest of individuals, including (b) (6) [3] about whom he provided information to United States law enforcement.[4]

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[2] In his supplemental brief, the respondent contends that he is also eligible for withholding of removal under the Convention Against Torture and section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) (Respondent's Brief at 13). However, the respondent did not present a claim for this relief before the Immigration Judge (Tr. at 21, 25). Nor did he challenge the Immigration Judge's conclusion that his conviction was for a particularly serious crime that rendered him ineligible for withholding of removal, which we affirmed in our May 22, 2008, order (I.J. at 12). We therefore deem the issue waived.

[3] The first name of this individual appears in the record spelled a variety of ways. The respondent identified him in his written application as (b) (6) (Exh. 2).

[4] The respondent testified that other individuals threatened him, but the Immigration Judge made no finding, and the record does not support the conclusion, that these individuals have any connection to the Dominican government (I.J. at 11).

(b) (6)

We acknowledge the Department of Homeland Security's contention that the respondent did not testify credibly but conclude that the Immigration Judge's credibility finding is not clearly erroneous (I.J. at 10). The Immigration Judge's findings that the respondent's credible testimony establishes that (b) (6) brother is a Dominican government official and that he would recognize the respondent are likewise not clearly erroneous (I.J. at 10). However, this sparse, uncorroborated testimony does not suffice to meet the respondent's burden of proof. *See* 8 C.F.R. § 1240.8(d). There is no evidence in the record that (b) (6) brother has the means to torture the respondent and no evidence in the record that (b) (6) brother has the will to torture the respondent. A grant of deferral of removal must rely on a finding that each event in a hypothetical chain of events is more likely than not to occur. *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). In this case, the respondent has not presented evidence with respect to at least two events in a hypothetical chain of events required to establish his claim and thus has not shown that each is more likely than not to occur.

The Immigration Judge properly took administrative notice of the State Department's 2005 *Dominican Republic: Country Reports on Human Rights Practices* to update the 2002 *Country Reports* in the record and found that they reflect widespread corruption among Dominican police as well as government involvement in unlawful killings (I.J. at 11; Exh. 5). *See Burger v. Gonzales*, 498 F.3d 131 (2d Cir. 2007); *Yang v. McElroy*, 277 F.3d 158, 163 n.4 (2d Cir. 2002); *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 341-42 (2d Cir. 2006) (the State Department's reports are usually the best available source of information on country conditions). However this evidence does not establish that it is more likely than not that (b) (6) brother, or any public official or anyone acting in a public capacity, will torture the respondent or will have awareness of the torture the respondent fears and will breach his or her legal responsibility to intervene to prevent it.

We therefore conclude on this record that the respondent has not met his burden of proving that it is more likely than not that he will be tortured if removed to the Dominican Republic. *See* 8 C.F.R. § 1208.18(a)(1) (defining torture). He has not established that Dominican authorities have awareness of the torture he fears and would breach their legal responsibility to intervene to prevent it. *See* 8 C.F.R. § 1208.16(c), 1208.18(a)(7); *see also Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004). He has therefore not established eligibility for deferral of removal under the Convention Against Torture.

In light of the foregoing opinion, we respectfully decline to reach at this time that portion of the (b) (6) decision which requests that we determine whether as a matter of law a government may acquiesce to a person's torture where some officials attempt to prevent that torture, other officials are complicit, and the government is unable to prevent the torture from taking place.

Given the (b) (6) conclusion that the Board acted inconsistent with 8 C.F.R. § 1003.1(d)(3)(iv) by considering evidence the respondent submitted during the pendency of his appeal and given that the most recent testimony in this case dates from 2003, we will remand the record to the Immigration Judge to consider the evidence presented by the respondent on appeal and any other evidence the parties wish to present.

(b) (6)

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD