IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on APR - 8 2010.
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.

[X] The respondent was ordered removed from the United States to Mexico 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[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.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[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn.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[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn.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[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn.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.

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of removal (X) deferral of removal under Article III of the Convention Against Torture was (X) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.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

Date: Apr 8, 2010

WILLIAM J. NICKERSON, JR.
Immigration Judge

Appeal: Waived/[redacted] Appeal Due By:

File: (b) (6) Date: MAR 18 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jodi Goodwin, Esquire

ON BEHALF OF DHS: Daniel J. Pomschloegl
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Convention Against Torture

The respondent is a native and citizen of Mexico. This matter is before the Board pursuant to a remand of the United States Court of Appeals for the (b) (6) *v. Holder*, (b) (6) The court has vacated our July 9, 2008, decision sustaining the Department of Homeland Security's ("DHS") appeal of the Immigration Judge's October 11, 2007, grant of the respondent's application for deferral of removal under the Convention Against Torture. The complex facts and procedural history of this case are summarized in the (b) (6) Circuit's decision. *See id.* at 895-99. In short, the respondent claims that he more likely than not would be tortured, by or with the acquiescence of a public official of the Mexican government, due to his work as a drug informant for the United States government. Upon consideration of the points raised in the (b) (6) Circuit's decision, the DHS's appeal will be dismissed.

In our previous decision, we found no clear error in the Immigration Judge's positive credibility finding or his other factual findings. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) (holding that where there are two permissible views of the evidence, the fact-finder's choice between them cannot be deemed clearly erroneous); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We concluded that the record supports the determination that the respondent's work as an informant has placed him at serious risk of harm at the hands of the (b) (6) drug cartel. We saw no reason to disturb the finding that this cartel possesses the means to locate him throughout Mexico. Additionally, we affirmed the Immigration Judge's finding of pervasive corruption in Mexican law enforcement agencies, despite

remedial efforts at the highest government levels.[1] Nevertheless, we agreed with the DHS's argument that the respondent failed to establish a likelihood of torture within the meaning of the applicable regulations, as he did not show that he faces a likelihood of torture by or with the acquiescence of a "public official or other person *acting in an official capacity*." 8 C.F.R.§ 1208.18(a)(1) (emphasis added); *see also* 8 C.F.R.§ 1003.1(d)(3)(ii) (the Board reviews questions of law *de novo*); 8 C.F.R. § 1208.17(a); *Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005); *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008).

The (b) (6) deferred to our interpretation of the "in an official capacity" language as the equivalent to the "under color of law" standard employed in civil rights cases. (b) (6) *supra*, at (b) (6) On the other hand, the court held that we improperly applied this standard in determining that Mexican law enforcement officers would not harm the respondent in their official capacities. *Id.* at 901. In this regard, the court determined that we neglected relevant fact-findings supported by substantial evidence. The court referred to the Immigration Judge's finding that "people within the Mexican law enforcement community" would harm the respondent directly or by turning him over to the cartel, whose members (perhaps including the same police officers) would then harm or kill him. *Id.* at (b) (6) The court further called attention to the finding that the respondent's participation in the deportation process would provide Mexican officials with information about his whereabouts, which they would then make known to the cartel. *Id.* In addition, the court noted the finding that the Mexican police force is rife with corruption at all but the highest levels of government, and that attempts to reign in such corruption have failed. *Id.* at (b) (6) Therefore, the court found it necessary to remand the case for the Board to apply these fact-findings in connection with the "under color of law" standard summarized in its decision. *Id.* at (b) (6)

The (b) (6) Circuit also found impermissibly narrow the Board's stance that even if Mexican law enforcement officers would consent or acquiesce to torture at the hands of the cartel, they "would not be acting under the pretense of law [but] following a purely personal pursuit." *Id.* at (b) (6) The court reasoned that officers engaging in harmful actions of this nature would simultaneously breach their responsibility for stopping such crimes, and acquiescence "in an official capacity" would thereby occur. *Id.* at (b) (6) Moreover, the widespread level of police participation in harmful actions on behalf of the cartel distinguished this case from others in which a government was unable to control third-party torturers despite concerted attempts. *Id.* at (b) (6) The court thus remanded the case for further analysis.

The DHS has filed a Motion to Remand, seeking further fact-finding tailored to the (b) (6) Circuit's decision. We agree with the respondent that the decision forecloses such a remand, as it instructs the Board to apply the appropriate standard to the highlighted fact-findings. *Id.* at (b) (6) In light of the (b) (6) Circuit's affirmance of the Immigration Judge's fact-findings, we discern no error in the grant of torture protection. The respondent has shown that he more likely than not would be tortured upon return to Mexico, either directly by government agents or indirectly

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[1] We did, however, emphasize that we did not affirmatively find that corruption is pervasive in Mexico to the extent alleged by the respondent; rather, we were unable to find clear error in the Immigration Judge's finding to that effect.

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by government agents turning him over to the cartel. While the record demonstrates that the government of Mexico opposes drug violence and corruption at its highest levels, it also shows that Mexican law enforcement remains rife with corruption. Thus, the instant scenario is distinguishable from one in which "rogue government agents" would engage in torture. Furthermore, the (b) (6) Circuit's discussion of the "under color of law" standard makes clear that a government agent would not merely be following a personal pursuit by consenting or acquiescing to the respondent's torture at the hands of the cartel, but also breaching his or her responsibility to intervene. In the absence of a showing that the Mexican government has succeeded in its efforts to curtail corruption in law enforcement, the respondent has proven that he more likely than not would be tortured upon removal by or with the acquiescence of a public official of the Mexican government. However, as the Immigration Judge stated, deferral of removal is a temporary form of protection, and should the Mexican government make significant inroads in its battle against drug cartels and corruption, the respondent would at that point be subject to removal.

Accordingly, the following orders are entered.

ORDER: The appeal is dismissed.

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 DHS 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

File: (b) (6) Date: JUL 09 2008

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jodi Goodwin, Esquire

ON BEHALF OF DHS: Matthew M. Downer
Appellate Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Convention Against Torture

I. FACTS AND BACKGROUND

The respondent is a native and citizen of Mexico. On August 11, 2005, the Immigration Judge granted his application for protection under the Convention Against Torture, finding that his activities as an informant against a drug cartel made it more likely than not that he would be tortured, by or with the acquiescence of a public official. After we sustained the Department of Homeland Security's ("DHS") appeal of this decision on January 31, 2006, the United States Court of Appeals for the (b) (6) Circuit vacated our decision on (b) (6), finding that we employed an improper standard of review. This matter was last before us on July 12, 2007, when we remanded the case for the entry of a new decision including factfinding addressing the possibility of internal relocation, and the acquiescence of Mexican government officials to torture by drug traffickers. The DHS now appeals the Immigration Judge's October 11, 2007, decision again granting protection under the Convention Against Torture. The appeal is sustained.

The respondent, who was formerly a distributor of illegal drugs, began working for the former U.S. Customs Service (currently, Immigration and Customs Enforcement ("ICE")) in 2000, to infiltrate the (b) (6) drug cartel, also known as the (b) (6) drug cartel (I.J. 8/11/05 at 4-6, 8). The respondent was paid in excess of $200,000 for his work and claims he is owed an additional $400,000 (I.J. 8/11/05 at 6). In addition, his family was paroled into this country when it was determined that his work as an informant placed them in danger in Mexico (I.J. 8/11/05 at 4-5). On one occasion in 2001, drug dealers in (b) (6) realized that a trap was set and they turned on the respondent (I.J. 8/11/05 at 6). Additionally, in August of 2004, an individual was shot to death when going to pick up some money owed to the respondent (I.J. 8/11/05 at 7). At this point, he was placed in a prison for his own protection and segregated from those who could pose a threat to his safety

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(I.J. 8/11/05 at 4, 6). Subsequently, the respondent helped ICE apprehend (b) (6) (b) (6) a high ranking operative in the (b) (6) cartel, and was a material witness in his criminal prosecution (I.J. 8/11/05 at 5). The respondent testified that he has witnessed drug cartels and the Mexican authorities working hand-in-hand in Mexico, and both entities would seek to murder him because of his work as an informant (I.J. 8/11/05 at 7-8). He further claims that he saw persons murdered by the police on behalf of drug cartels and also heard that a Mexican federal investigative agency provided information to cartels, which was then used to kill informants (I.J. 8/11/05 at 8). However, he has never been physically harmed in Mexico (I.J. 8/11/05 at 9). He has provided a statement to the Mexican authorities regarding his work as an informant in the United States and was promised immunity in Mexico regarding this statement (I.J. 8/11/05 at 9).

After remand, the respondent further testified that the (b) (6) cartel has operations in all of the Mexican states and contacts with other Mexican drug organizations (10/11/07 I.J. at 5). The Mexican government is well aware of his dealings with ICE because he gave testimony to Mexican government officials at a Mexican Consulate in Texas (I.J. 10/11/07 at 6). He stated that he has received an offer of immunity from an Assistant U.S. Attorney, as well as an anti-drug trafficking authority in Mexico (10/11/07 I.J. at 6). On the other hand, while ICE and the U.S. Attorney's Office have given him offers of protection, he has not received a similar offer from the Mexican authorities (I.J. 10/11/07 at 6). He does not believe that there is an effective witness protection program in Mexico, as the police and the military cooperate with the drug cartels (10/11/07 I.J. at 6-7). However, the DHS introduced evidence of a SIEDO program in Mexico, in which hundreds of witnesses are being protected (10/11/07 I.J. at 7, 9-10; Exh. G). The respondent also does not believe that a recent wave of arrests of Mexican police officers for corruption will make a difference, because the problem is so deeply rooted (I.J. 10/11/07 at 7; Exh. E, p. 100). The respondent further admitted that his parents and siblings have not been harmed in Mexico, but noted that they have not served as drug informants (10/11/07 I.J. at 7). He also noted that another informant in Mexico being handled by the same drug agent was murdered and several newspapers reported this as a message to him (10/11/07 I.J. at 7-8).

In evaluating the DHS's evidence, the Immigration Judge determined that despite the recent efforts of President Felipe Calderon, drug-related violence and police complicity with cartels remain widespread in Mexico (10/11/07 I.J. at 8-14, 18; Exh. E). The Immigration Judge noted that while some see the program of the Calderon government to root out corruption as a serious effort, others view it as a publicity stunt that has achieved little (I.J. 10/11/07 at 9; Exh. E, p. 2). Despite the deployment of military troops, violent acts by drug cartels have escalated, ranging from torture and beheadings to targeting of crime reporters and military troops (I.J. 10/11/07 at 9; Exh. E, p. 3). Also, despite the existence of a witness protection program, several people involved in the program have been harmed (I.J. 10/11/07 at 9-10; Exh. E, pp. 6-27). As a result of anti-corruption measures taken during the Calderon and Vicente Fox administrations, no senior Mexican government officials encourage or facilitate the distribution of narcotic drugs (I.J. 10/11/07 at 10-11; Exh. E, p. 46). However, despite the recent deployment of the army, no true institutional change has taken place in the Mexican police force and corruption remains pervasive (I.J. 10/11/07 at 11-13, 18; Exh. E, pp. 99, 102-104, 121, 167-168, and 171). The Immigration Judge found that evidence submitted by the respondent corroborates the existence of corruption in the Mexican military and police forces during the ongoing struggle with drug cartels (I.J. 10/11/07 at 13-14; Exh. H).

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The Immigration Judge further found that the respondent has clearly been targeted for elimination by the (b) (6) cartel, as evidenced by two attempts on his life, the United States government's efforts to protect him, and his witnessing of murders undertaken by the cartel and police (10/11/07 I.J. at 15-16). The Immigration Judge also determined that the respondent would be unable to avoid torture by relocating within Mexico because the (b) (6) Cartel is active in 21 of the 31 Mexican states and media coverage of the respondent's involvement in the "House of Death" murders has made him especially well known (10/11/07 I.J. at 16; Exh. E, p. 157). The Immigration Judge also deemed it significant that the respondent would be submitted to normal deportation processes, as he is claiming a fear of criminally corrupt government agents who would expose his presence to drug cartels (I.J. 10/11/07 at 16-17). Thus, the Immigration Judge held that internal relocation was not an option for the respondent (I.J. 10/11/07 at 17).

In addition, he held that due to widespread corruption in Mexican law enforcement, the respondent's presence would likely be reported to the cartels, and corrupt Mexican officials would either harm him directly or "acquiesce in placing him into a position where he would be killed by the cartel." (10/11/07 I.J. at 17-20). Although the Immigration Judge noted that the Mexican government opposes drug trafficking and corruption at its highest levels, he found no requirement that the *head* of a government be involved in or acquiesce in torture (I.J. 10/11/07 at 17-18) (*citing* 8 C.F.R. § 1208.18(a)(1)). Moreover, he found that while the steps taken by the Calderon government are positive, there is a long way to go before the pervasive corruption problem within Mexican law enforcement is solved (I.J. 10/11/07 at 18-19). Thus, the Immigration Judge found that if the respondent were removed to Mexico, it would only be a short period of time before his whereabouts were reported to the drug cartels (I.J. 10/11/07 at 19). Also, the Mexican witness protection program is in its relatively early stages and cannot guarantee safety (I.J. 10/11/07 at 19).

On appeal, the DHS argues that the Immigration Judge erred in finding that the respondent would be unable to relocate safely within Mexico, particularly because the (b) (6) cartel is not prevalent in all of the 31 Mexican states (10/11/07 I.J. at 5). The DHS further takes issue with the finding that the respondent is "the most high profile informant against drug cartels in Mexico at this time," and claims that it is speculative to conclude that his segregation while in custody demonstrates that the drug cartel is actively targeting him (10/11/07 I.J. at 19). The DHS also asserts that safe relocation is possible because the Mexican government is actively rooting out corruption and offers an adequate witness protection program. The DHS further argues that the Immigration Judge erred in concluding that the harm faced by the respondent would be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[1] Along these lines, the DHS avers that the Calderon government has stepped up the fight against corruption and, in any event, generalized corruption does not equate to acquiescence in torture under the Convention. Lastly, the DHS asserts that the Immigration Judge failed to consider whether any public officials might personally mistreat the respondent or acquiesce in his mistreatment "under the color of law," as opposed to in a purely private capacity. *See* DHS Brief at 27-36.

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[1] The DHS does not contend that the respondent's death at the hands of the cartel could not be "torture." *See Comollari v. Ashcroft*, 378 F.3d 694 (7th Cir. 2004).

In response, the respondent claims that the Immigration Judge correctly evaluated his testimony and the documentary evidence in finding that Mexican law enforcement authorities would either directly harm him or deliver him for torture (10/11/07 I.J. at 19-20). The respondent further asserts that, as the Immigration Judge found, the effects of President Calderon's recent efforts at redressing police complicity with drug traffickers remain to be seen, and in any event, corruption is rampant in the Mexican military as well as in the police force. Thus, he argues that the Immigration Judge correctly found that a public official or other person acting in an official capacity will more likely than not acquiesce in his torture throughout Mexico.

The Board must defer to the factual findings of an Immigration Judge, including findings as to the credibility of testimony, unless they are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) (holding that where there are two permissible views of the evidence, the fact-finder's choice between them cannot be deemed clearly erroneous); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We find no clear error in the Immigration Judge's positive credibility finding or his other factual findings. The record supports the determination that the respondent's work as an informant has placed him at serious risk of harm at the hands of the (b) (6) drug cartel. Despite the DHS's assertion to the contrary, we further see no reason to disturb the finding that the cartel possesses the means to locate him throughout Mexico. Additionally, the Immigration Judge's finding of pervasive corruption in Mexican law enforcement agencies, despite remedial efforts at the highest government levels, is not clearly erroneous.[2]

II. ISSUE

However, for reasons explained herein, we agree with the DHS's argument that the respondent has not established a likelihood of torture within the meaning of the applicable regulations. The issue we find dispositive in this case, one that neither we nor any other court of which we are aware has addressed in depth, concerns the meaning of the requirement that an alien claiming protection under the Convention Against Torture show that he faces a likelihood of torture by or with the acquiescence of a "public official or other person *acting in an official capacity*." 8 C.F.R.§ 1208.18(a)(1) (emphasis added); *see also* 8 C.F.R.§ 1003.1(d)(3)(ii) (the Board reviews questions of law *de novo*); 8 C.F.R. § 1208.17(a); *Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005); *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008).

III. DISCUSSION

A. Under the regulations implementing the Convention, it is not enough to establish eligibility that an alien prove a likelihood of torture by or with the acquiescence of a public official; the regulations further provide that such an official's torturous action or acquiescence must occur while "acting in an official capacity." *See Matter of Y-L, A-G & R-S-R*, 23 I&N Dec. 270, 285

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[2] We emphasize that we do not affirmatively find that corruption is pervasive in Mexico to the extent alleged by the respondent; rather, we are unable to find clear error in the Immigration Judge's finding to that effect.

(AG 2002).[3] The Attorney General, moreover, in that decision made clear that "acting in an official capacity" is to be interpreted as acting "under color of law." Addressing the torture claim of alien R-S-R, the Attorney General stated, "The scope of the Convention is confined to torture that is inflicted under color of law. It extends to neither wholly private acts nor acts inflicted by or approved in other than 'an official capacity.'" *Id.* at 285; *see also Matter of Jean*, 23 I&N Dec. 373, 380 n.10 (AG 2002) (same).

While we are bound to accept the interpretation by the Attorney General, unless contravened by applicable authority of the Supreme Court or a United States court of appeals, and we are aware of none, we nonetheless point out that the Attorney General's interpretation is supported by the legislative history of the Convention, as recounted by appellate court authority. *See, e.g., Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001) (noting that the agencies implementing Article 3 concluded that acquiescence "includes only acts that occur in the context of governmental authority," citing the Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8482 (1999)). The *Ali* court went on to observe that this interpretation likewise:

> corresponds to the understanding of the Department of State, which remarked that "the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in United States law, it applies to torture inflicted 'under color of law.'"

Id., *citing* Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 3-4 (1988). This is further echoed in a report of the Senate Committee on Foreign Relations, which states that the "Convention deals only with torture committed in the context of governmental authority; acts of torture committed by private individuals are excluded." S. Exec. Rep. No. 101-30, 101st Cong., 2d Sess., at 14 (1990).

In the absence of any indication, and we find none, that "acting in an official capacity" or "under color of law" was intended to have a specialized meaning for purposes of the Convention, we believe that the "under color of law" aspect of Convention Against Torture protection incorporates the same "under color of law" principles applied by the federal courts in determining whether public officials in this country have so acted to deny others their civil rights. It is this body of law that constitutes "terms ... familiar in United States law," *Ali*, *supra*, at 597, and we know of no other such "familiar" use of the phrase in our law. We turn therefore to an examination of cases explicating the meaning of "under color of law."

One early such major decision is *Screws v. United States*, 325 U.S. 91 (1945), wherein the Supreme Court addressed whether law enforcement officers were acting "under color of law," when they beat to death a man whom they had arrested. The Court stated that "[m]isuse of power, possessed by virtue of state law and made possible only because the

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[3] This decision makes clear that the "acting in an official capacity" phrase of 8 C.F.R.§ 1208.18(a)(1) applies to both the "public official" and "other person" described in the regulation. *See id.* at 285.

wrongdoer is clothed with the authority of state law, is action taken 'under color of law.'" *Id.* at 109 (*quoting United States v. Classic*, 313 U.S. 299 (1941)). As the officers were authorized to make an arrest under Georgia law, the Court concluded that they acted without authority only in the sense that they employed excessive force in making the arrest effective. *Id.* at 107-11. In that respect, the case was distinguishable from one in which an officer not authorized to act nevertheless takes action, or follows a personal pursuit. *Id.* at 111. In other words, the officers' excessive conduct in furtherance of duties prescribed by state law made their actions "under color of law." A few years later, the Court held that a private detective who held a special city police officer's card and obtained confessions from suspects through the use of violence was "acting under color of law." *Williams v. United States*, 341 U.S. 97 (1951). The Court emphasized that the detective was vested with police powers pursuant to Florida law in connection with a theft investigation conducted under the aegis of the State. *Id.* at 99-100. *See also*, endorsing the above decisions' definition and understanding of "under color of law," *Monroe v. Pape*, 365 U.S. 167 (1961), overruled on other grounds, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (same). Likewise, in *Dennis v. Sparks*, 449 U.S. 24 (1980), the Court found, consistent with the above decisions, that a State judge had acted "under color of law" when he issued an injunction in exchange for a bribe.

Th(b) (6) Circuit has likewise applied this doctrine. *See, e.g., Dossett v. First State Bank*, 399 F.3d 940 (8th Cir. 2005); *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997). In *Roe v. Humke*, the court held that an off-duty police officer was not acting "under color of state law" when he sexually assaulted a minor. The court noted that "acting under color of law" means under pretense of law, and acts of officers in the ambit of their personal pursuits are thus excluded. *Id.* at 1216. Furthermore, absent any actual or purported relationship between an officer's conduct and duties as a police officer, he or she cannot be deemed to be "acting under color of state law." *Id.* The court reached its conclusion despite the fact that the officer had placed himself in position to commit the assault through his actions taken as an officer. Specifically, he met the victim in the course of his duties to provide security and conduct other programs at the local school, during which he wore his uniform and rode in his patrol car. *Id.* at 1214. He also enticed the victim to come to his farm while he was at the school in his police car and uniform. *Id.* Nevertheless, when the officer picked up the victim and the assault occurred, he was off-duty, driving his personal vehicle, not wearing his uniform or badge, and not carrying a gun. *Id.* at 1214-15. Thus, as he was not acting or purporting to act in an official capacity when the assault occurred, the court found no nexus between the officer's position and his assault. *Id.* at 1216-18.

B. It is apparent from the above that resolution of the issue whether a public official is acting in an official capacity, *i.e.*, under color of law, is not susceptible to a bright line analysis and, as seen by the above authorities, is extremely fact-dependent. It appears that action under color of law will be found where a public official possesses the authority or something akin to but broader than "apparent authority" to act (*i.e.*, is purporting to act in the performance of official duties)[4]

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[4] In *Dossett v. First State Bank*, *supra*, the (b) (6) Circuit found reversible error in a jury instruction that equated "under color of law" with the notion of "apparent authority," holding that the instruction erroneously excluded from the scope of "color of law" the action of an official who was purporting (continued...)

but exceeds such authority in a given case, even where the excessive nature of the action is so great as to constitute a crime. We must also keep in mind that the purpose of the Convention is to protect persons from probable torture in their home countries and should not be given a meager or crabbed construction that undermines its object. At the same time, it is clear that the Convention does not guard against all torturous conduct, but only such conduct undertaken or acquiesced to by a public official or other persons acting "in an official capacity," *i.e.*, "under color of law."

As discussed above, the Immigration Judge found that the corruption in Mexican law enforcement and the influence of the (b) (6) drug cartel are sufficiently widespread to make it more likely than not that the respondent will be tortured. Since we find no clear error in the findings concerning corruption and the reach of the drug cartel, the respondent has satisfied some aspects of his burden of proof. However, the record further reflects that the Mexican government opposes corruption and collusion with drug cartels at its highest levels. Thus, it is necessary to determine whether the public officials who would harm the respondent or acquiesce in his harm would be acting "under color of law."

Applying this concept, even considered expansively, to the respondent's claim, we cannot conclude that the torture or harm he fears would be the result of a public official or officials in Mexico "acting in an official capacity" or "under color of law." Notably, the evidence does not support the conclusion that it is more likely than not that an official in Mexico would arrest the respondent. Indeed, the respondent has been offered immunity in Mexico. In addition, although the Immigration Judge found it significant that the respondent would be subjected to normal deportation processes, it is purely speculative to assume that this will lead to his torture. *See Matter of J-F-F*, 23 I&N Dec. 912 (AG 2006). Yet, even if officials processing his arrival tortured him directly or leaked his future whereabouts to the (b) (6) cartel, such officials would clearly lack the pretense of authority to do so, and these actions would thus not be undertaken "under color of law." *Cf. Screws*, *supra*, at 107-11. Furthermore, in the scenario in which an official reveals the respondent's imminent whereabouts, the notification itself is not a torturous act as defined in the regulations, which do not encompass persons who aid and abet or cause torture. *See* 8 C.F.R. § 1208.18(a)(1). Moreover, while such a disclosure represents acquiescence, the respondent's torture would take place after his release from custody or control and thus fail to qualify under 8 C.F.R. § 1208.18(a)(6) ("In order to constitute torture an act must be directed against a person in the offender's custody or physical control"). We further observe that the respondent's very notoriety may serve to insulate him to some degree from harm inflicted directly by a public official in Mexico, given the ensuing investigation that would probably occur.

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[4] (...continued)
to act in performance of official duties but was acting "outside what a reasonable person would believe the official was authorized to do." 399 F.3d 940, 949.

(b) (6)

It appears that harm at the hands of the cartel is the more dangerous threat.[5] But as to "acquiescence," while we might well agree that the respondent has shown a likelihood that many corrupt public officials in Mexico would in fact, if previously made aware, consent or acquiesce to his torture at the hands of the cartel, corrupt officers who would consent to or acquiesce in his torture by the (b) (6) cartel, including turning a blind eye to his torture,[6] would not be acting under the pretense of law. *See Roe v. Humke*, *supra*, at 1216. Rather, they would be following a purely personal pursuit, completely unrelated to the law enforcement powers and responsibilities entrusted to them by Mexico. *See id.*[7]

In other words, since there is no actual or purported relationship between an officer's collusion with a drug cartel, as applied to the potential torture of the respondent, and such officer's duties as

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[5] We also observe that the Immigration Judge did not determine in what manner the respondent's "torture" was likely to occur. To the extent the respondent might be recognized and assassinated or harmed by the cartel while, for example, he was walking on the street, we doubt whether such action would constitute "torture" under the regulations. See 8 C.F.R.§ 1208.18(a)(6) ("In order to constitute torture an act must be directed against a person in the offender's custody or physical control").

[6] In *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007), the court held that the "awareness" requirement embodied in the concept of "acquiescence" included "willful blindness," rejecting the Board's previous determination that a showing of "willful acceptance" of torture was required. *See Matter of S-V*, 22 I&N Dec. 1306 (BIA 2000). *Mouawad* is consistent with the holdings in other circuits in this respect. See, *e.g.*, *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

[7] The regulatory definition of "acquiescence" requires that a public official "*prior to* the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent" it. 8 C,.F.R.§ 1208.18(a)(7) (emphasis added). Because we sustain the appeal on other grounds, we need not in this case explore this concept further, for example to determine if it requires a showing that more likely than not a public official would become aware of a private individual's or group's intent to torture the alien seeking Convention Against Torture protection or whether it is sufficient that, *if* made so aware, a public official would acquiesce. If the former, we are unaware of any evidence on this record to support a finding that the cartel would likely notify a public official of Mexico of its imminent plan or activity to torture the respondent. We likewise need not examine in depth here the issues surrounding what the Convention means by the concept of the "breach" by a public official of a legal duty to intervene to prevent torturous activity. *Cf. DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (holding that a State has no duty, and thus does not violate the due process clause by declining, to intervene to prevent privately inflicted harm). We are unaware of cases addressing the source of the legal duty to intervene, *e.g.*, whether it arises from the alien's country's domestic law, the Convention itself, general international law, or all of these. Moreover, to the extent this issue may be deemed implicated as bearing on the question whether a public official in Mexico has been shown to be likely to act "under color of law," in acquiescing in torture by breaching a legal duty to intervene to protect the respondent, we point out that it is the respondent who bears the burden to show the source of the legal responsibility and the public officials to whom it extends. The respondent has not done so.

(b) (6)

a police officer, such conduct cannot be deemed "under color of law." Thus, the respondent cannot show that he would experience torture in Mexico "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *See* 8 C.F.R. § 1208.18(a)(1); *Roe v. Humke*, *supra*, at 1216-18.

IV. CONCLUSION

We recognize that the respondent faces a high risk of severe harm upon return to Mexico. However, violence is an "occupational hazard" of the illicit drug trade, and he has courted this risk through his own actions. *See Matter of Y-L-, A-G- & R-S-R-*, *supra*, at 283. Because of his criminal history, the only protection available to him in these proceedings is deferral of removal under the Convention Against Torture.[8] Yet, to obtain protection, it is not sufficient to show that he will more likely than not be tortured by the (b) (6) drug cartel. Rather, he must show that a public official or other person *acting in an official capacity* would torture him or acquiesce in his torture by the cartel. As the respondent has failed to do so, we find it necessary to vacate the Immigration Judge's grant of deferral of removal.

Accordingly, the following order is entered.

ORDER: The DHS's appeal is sustained, the Immigration Judge's grant of deferral of removal under the Convention Against Torture is vacated, and the respondent is ordered removed to Mexico.

FOR THE BOARD

[8] The respondent may be eligible for an "S" visa, see section 101(a)(15)(S) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(S), but that matter is not one over which an Immigration Judge or the Board has jurisdiction.

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

(b) (6)

(b) (6) Case A (b) (6)

Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10/11/2007.
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.

[X] The respondent was ordered removed from the United States to any country other than Mexico.
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ 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 _____.
[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.
[X] Respondent's application for (withholding) (deferral) of removal under Article III of the Convention Against Torture is (X) granted ( ) denied ( ) withdrawn or ( ) other. (grant to Mexico)
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. 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 or ( ) other.
[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] 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: _____.

Date: 10/11/2007
Appeal: ( ) Applicant (X) DHS ( ) Both ( ) Waived
Appeal Due By: Nov. 13, 2007

Joseph R. Dierkes
Joseph R. Dierkes, Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [X] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [X] DHS
DATE: 10/11/07 BY: COURT STAFF JNO

File: (b) (6) Date: JUL 12 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jodi Goodwin, Esquire

ON BEHALF OF DHS: Michael P. Davis
Deputy Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Convention Against Torture

This case was last before the Board on January 31, 2006, when we sustained an appeal by the Department of Homeland Security (the "DHS") of an Immigration Judge's August 11, 2005, decision granting the respondent's application for deferral of removal pursuant to the Convention Against Torture. The respondent, a native and citizen of Mexico, appealed the Board's decision to the United States Court of Appeals for the (b) (6) Circuit"), which issued a decision on (b) (6) vacating the Board's order and remanding the matter to the Board for further proceedings. The record will be remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

In its decision, the (b) (6) Circuit noted that the Board determined that any threat to the respondent would be restricted to the northern part of Mexico, making it possible for him to relocate elsewhere within Mexico where he was not likely to be tortured. The court indicated that the Immigration Judge had not made a determination as to this issue, and that if the Board concluded that the Immigration Judge had erred in not specifically addressing the possibility of internal relocation, we should have remanded the case to the Immigration Judge for further factfinding, citing to 8 C.F.R. § 1003.1(d)(3)(iv). We agree with the argument made by the DHS on remand from the court that a remand for such factfinding is now required, as the relevant regulation appears to mandate consideration of internal relocation prior to granting protection under Convention Against Torture. *See* 8 C.F.R. § 1208.16(c)(3) ("In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture *shall be considered*, including, but not limited to . . . [e]vidence

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that the applicant could relocate to a part of the country where he or she is not likely to be tortured." (emphasis added). Accordingly, we will remand this matter to the Immigration Judge for an analysis of this issue.

In addition, the court faulted the Board for failing to determine whether there was "clear error in the IJ's express finding that [the respondent] was likely to be tortured by Mexican officials." However, this statement appears to suggest an incorrect standard for our review of the Immigration Judge's decision. While we review an Immigration Judge's factual rulings for clear error, we do not understand a prediction as to the probability of future torture to be a "fact" ruling, since, like a conclusion relating to whether a statutorily prescribed level of hardship exists, it relates to whether the ultimate statutory requirement for relief was met and is therefore a mixed question of fact and law. Accordingly, we reviewed this prediction on a *de novo* basis. *See* 8 C.F.R. § 1003.1(d)(3).

However, we note that our decision, now vacated, turned largely on an evaluation of evidence of record tending to show that the Mexican government did not acquiesce in torture by drug warlords or by rogue public officials, including police officers, acting in conjunction with these drug traffickers, but instead was actively seeking to combat such activity. In light of the (b) (6) Circuit's concerns regarding impermissible Board factfinding, on remand the Immigration Judge should render specific factual findings which address the issue of the acquiescence of the Mexican government to torture by drug traffickers and those public officials who assist or cooperate with them.

Accordingly, the following order will be entered.

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

FOR THE BOARD

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