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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date:

In re: (b) (6)

JUL 30 2007

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: H. Nelson Meeks, Esquire

ORDER:

PER CURIAM. This case has had a long procedural history before the Board, the United States Court of Appeals for the (b) (6), and the United States Supreme Court. On remand from the Supreme Court and the (b) (6) we found that the respondent, a native and citizen of Guatemala, had not established that any harm he might face at the hands of the G-2 would be persecution on account of a protected ground (BIA Dec. dated 8/28/03 at 2). Our August 28, 2003, decision held: "[g]iven that the respondent did not suffer any actual harm in Guatemala, and that any threat of harm he felt was not on account of a protected ground, we conclude that he does not have a well-founded fear of persecution on account of a protected ground, as required by asylum." BIA Dec. dated 8/28/03 at 3. In (b) (6) the (b) (6) denied the respondent's petition for review with respect to our August 28, 2003, decision (Respondent's Motion to Reopen, p. 3).

This case was last before the Board on June 22, 2005, when we denied the respondent's first motion to reopen. On June 27, 2007, the respondent filed the instant motion to reopen. The motion is untimely and number-barred. 8 C.F.R. § 1003.2(c)(2). However, the time and number limitations do not apply to a motion to reopen based on changed country conditions or circumstances. *See* 8 C.F.R. § 1003.2(c)(3)(ii)(time and number limits do not apply to motions to reopen "[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing").

The respondent's motion will be denied because he fails to show that conditions or circumstances in Guatemala have changed in a manner material to his claim. The respondent asserts that he still has a well-founded fear of future persecution on account of a protected ground. In support of his claim, he has attached his own affidavit, as well as the affidavits of two experts on Latin America, Ms. (b) (6) and Ms. (b) (6) The respondent has also attached summaries or excerpts of declassified information, which he claims support his testimony. The evidence that the respondent has submitted does not show that conditions or circumstances have worsened in Guatemala with respect to his claim. Rather, most of the evidence is an attempt to corroborate his original claim, and indicates that not much has changed since the respondent's original asylum hearing. *See e.g.* Affidavit of Ms. (b) (6) paras. 6-7. Since the respondent has not shown changed country conditions or circumstances material to his claim, the motion is denied.

CL

(b) (6)

Even if the respondent showed changed country conditions or circumstances material to his claim, and that the evidence was previously unavailable, the motion would still be denied because the respondent has not shown that the evidence would change the outcome of his case. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992)(a motion to reopen may not be granted unless the respondent meets a "heavy burden" and presents additional evidence of such a nature that the additional evidence would likely change the result in the case). We previously denied relief because the respondent did not prove that any fear he held was on account of a protected ground (BIA Dec. dated 8/28/03). The respondent still has not shown that any fear he has is on account of a protected ground.

The respondent also contends that his due process rights have been denied because he did not receive a full and fair hearing on the merits. We disagree. The respondent's case has had a long procedural history, including review by the (b) (6) on at least three occasions, as well as the United States Supreme Court. The respondent has had the opportunity to present his case over the course of many years, and has done so. A review of the record does not indicate that his hearing was fundamentally unfair, particularly in light of all the administrative and judicial review he has previously received.

Accordingly, the motion is denied.

FOR THE BOARD

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File: (b) (6) Date:

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

JUN 22 2005

MOTION

ON BEHALF OF RESPONDENT: H. Nelson Meeks, Esquire

ORDER:

PER CURIAM. The motion to reopen has been filed out of time and will be denied. The final order in these proceedings was entered by the Board on August 28, 2003. Pursuant to 8 C.F.R. § 1003.2(c)(2) (with certain exceptions), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, a motion to reopen would have been due on or before November 26, 2003. The record reflects, however, that the Board did not receive the motion until April 11, 2005.[1] The motion to reopen was therefore filed out of time.

Accordingly, the motion to reopen is denied.

FOR THE BOARD

[1]The respondent claims derivative asylee status as his wife has included him in her asylum application. However, we note to date the respondent's wife has not been granted asylum. Should the respondent's wife be granted asylum at some time in the future, the respondent may wish to pursue a claim to derivative status with the Department of Homeland Security (DHS) under 8 C.F.R. § 1208.20.

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6)

Date: AUG 28 2003

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel J. Roemer, Esquire

ON BEHALF OF DHS: Evan R. Franke
Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] -
Entered without inspection

APPLICATION: Asylum; withholding of deportation

This case was last before us on October 5, 2000, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his applications for asylum and withholding of deportation. In dismissing the case, we upheld the Immigration Judge's finding that the respondent had not met his burden of showing past persecution or a well-founded fear of persecution on account of a protected ground. On (b) (6) the United States Court of Appeals for the (b) (6) granted the respondent's petition for review, finding that he had an objectively reasonable fear of persecution in Guatemala on account of imputed political opinion.

On (b) (6) the United States Supreme Court vacated the (b) (6) decision in this case and remanded the matter back to the (b) (6) for further consideration in light of its decision in *INS v. Ventura*, 537 U.S. 12 (2002). In that decision, the Court held that the court of appeals should have remanded the asylum case to the Board for the Board to consider changed circumstances in Guatemala, rather than granting the alien asylum outright. It emphasized that "well-established principles of administrative law" require a court to remand a case to the agency for a decision on an issue that the agency has not addressed. On (b) (6) the (b) (6) remanded the case back to us for further consideration in light of the *Ventura* decision.

In this case, the Board did not specifically address the question whether any persecution the respondent may face in Guatemala would be on account of a protected ground. We also did not previously consider the effect of changed country conditions on the respondent's case.

(b) (6)

The respondent in this case is a 33-year-old native and citizen of Guatemala. He credibly testified that he was forcibly recruited into the Guatemalan military in 1988, and left after serving 2 ½ years, having attained the rank of sergeant. Before leaving the military, his superior officer discussed with him the possibility of his joining the G-2 group, but he told the officer that he did not want to join and wanted to return to civilian life. In his asylum application, and in his testimony, the respondent indicated that he did not agree with the methods used by the G-2, who were known to be the military death squads.

After leaving the military in April of 1990, he returned home and began working in the family restaurant. He was approached at the restaurant on two occasions and asked to join the G-2. The respondent testified that although the two men who approached him did not actually threaten him, he felt threatened and afraid because he knew that the G-2 had a reputation for indiscriminate killing. After the second visit to the restaurant, the respondent, feeling afraid, moved to Antigua. He was never actually approached there, but felt that he was regularly being followed by vans with dark windows, which he said were used by the G-2. The respondent came to the United States in April of 1991.

We find that any harm or persecution the respondent may fear from the G-2, or the Guatemalan military, is not on account of a protected ground. The Supreme Court has held that a Guatemalan guerrilla organization's attempts to recruit a person, absent evidence that the recruitment was motivated by the person's political opinion, was not sufficient to show persecution on account of political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The (b) (6) relying on the Supreme Court's decision, has held that where there is nothing to indicate that the recruiting organization was motivated by anything other than the recruit's refusal to join, such harm does not establish persecution on account of a protected ground. *See Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000).

Here, although the respondent testified that he disagreed with the methods used by the G-2, there is no evidence to show that he ever expressed those views to the persons who came to the restaurant, or to his commanding officer while he was in the army. The respondent testified, and his asylum application states, that he consistently told both his commanding officer and the men who spoke to him in the restaurant that he simply wanted to serve his time in the army, then return to civilian life, not make a career as a soldier. Tr. at 20-21. Under these circumstances, we find that the respondent has not established that any harm he might face at the hands of the G-2 would be persecution on account of a protected ground.

Moreover, we note that the alien in *Tecun-Florian v. INS, supra,* who was found not to have a well-founded fear on account of a protected ground, was in fact kidnaped by the guerrilla organization and then tortured for 10 days before being freed. In this case, by contrast, the respondent never came to any harm. It appears that the respondent had served well in the army and therefore was being sought out for further service in another military group. However, he was never actually forced to join the group, or indeed even threatened with harm for choosing not to join.

(b) (6)

In this regard, we also note that while the (b) (6) has held that in some cases, threats alone can constitute past persecution, it has made clear that threats alone rise to the level of past persecution only in a small category of cases. *See Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000). Here, the respondent admitted that even when the men came to the restaurant, they did not actually threaten him. Nor was he ever actually threatened in Antigua, though he stated that he believed he was being followed there. *Compare Ruano v. Ashcroft, supra.* Nor were the encounters described by the respondent accompanied by any kind of mistreatment. *See Lim v. INS, supra.*

Given that the respondent did not suffer any actual harm in Guatemala, and that any threat of harm he felt was not on account of a protected ground, we conclude that he does not have a well-founded fear of persecution on account of a protected ground, as required for asylum. We also note that Peace Accords were signed in Guatemala in 1996. While random violence remains a problem in that country, the respondent has not shown a well-founded fear that the G-2, the military in general, or any other organization, would now have any interest in him.

Finally, we note that the (b) (6) has recently held that, even in a case where past persecution had been shown, the Board could reasonably conclude that the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) had rebutted the presumption of future persecution based on a Department of State *Country Report* for Guatemala stating that only party leaders or high-profile activists would generally be vulnerable to persecution based on political opinion. *See Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003). The respondent in this case was not a high-ranking official of any kind. As indicated above, he was simply a good soldier that the military, in 1991, would have liked to have remain in their forces. This is not sufficient for a finding that the respondent has met his burden of establishing eligibility for asylum.

For these reasons, the respondent's appeal will again be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

FOR THE BOARD