File: (b) (6) Date: MAY - 7 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elizabeth Holmes, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

APPLICATION: Reopening

This case was last before the Board on May 18, 2007, when we denied a motion filed by the respondent seeking reopening of his proceedings. On (b) (6) the United States Court of Appeals for the (b) (6) issued a decision remanding proceedings to the Board. (b) (6) *v. Mukasey*, (b) (6). Therein the court found that aliens did not have a constitutional right to effective counsel in removal proceedings. *Id.* at (b) (6). On remand the Board was directed to address the respondent's contention that, even if there is no constitutional right to effective assistance of counsel, the Board should exercise administrative, discretionary authority to reopen his proceedings based on his claim of ineffective assistance of counsel. The court also noted that, if the Board recognizes an administrative right to effective assistance of counsel, the Department of Homeland Security has conceded that the Board has not yet determined whether the respondent satisfied the requirements for a claim challenging his former counsel's performance, as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), "with respect to counsel's performance in challenging the finding of frivolousness" during the respondent's appeal to the Board. (b) (6) *v. Mukasey, supra*, at (b) (6)

We initially observe that subsequent to the issuance of the (b) (6) decision, the Attorney General in essence concurred with that court's precedent regarding claims of ineffective assistance of counsel, also finding that aliens have no constitutional right to effective assistance from counsel. *See Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009) (hereinafter, "*Matter of Compean*"), overruling *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), in part. The Attorney General did find that "in the extraordinary case

where his lawyer's deficient performance likely changed the outcome" of an alien's case, removal proceedings may be reopened as a matter of administrative grace. *Id.* at 729. That decision directs that for motions filed prior to its issuance on January 7, 2009, the "substantive standards" of *Compean* should be applied, but that the "filing requirements" of *Lozada* should still be applied. *Matter of Compean* supra at 741-42. As the respondent in this case filed his motion prior to January 7, 2007, the *Lozada* filing requirements apply.

In conjunction with his motion to reopen, the respondent submitted copies of a statement from the respondent, a California State Bar complaint form against his former counsel (with no evidence that the same was filed), and a letter that was reportedly mailed and faxed to former counsel, with evidence that it was faxed. The statement is unsigned and unsworn, and alleged that respondent's former counsel, Ms. Jacobson, "failed to address numerous issues raised by the Immigration Judge." The respondent's brief and generalized statement fails to set forth in any manner, much less "in detail" as required, the agreement entered into with former counsel regarding what actions were to be taken on appeal, and what counsel represented to him in this regard. As such, the respondent has not satisfied the administrative filing requirements for a claim of inadequate performance by counsel as set forth in *Matter of Lozada, supra*, at 639, and reopening based on any claim of deficient performance of counsel is not warranted.

While the respondent's case was before the Board on remand, he submitted a motion to supplement and remand the record. The respondent seeks to remand proceedings for consideration of two statements, and review of the Immigration Judge's adverse credibility findings in light of a recent decision by the (b) (6) *Banat v. Holder*, 557 F.3d 886 (8th Cir. 2009) ("*Banat*").

In *Banat,* the (b) (6) found that it is fundamentally unfair to rely on reports or investigations that do not provide sufficient information about how the investigations were conducted as, without that information, it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigation's allegations. The Immigration Judge in that case rendered an adverse credibility finding predicated on a letter from an American embassy that admittedly had no prior experience with the type of letter submitted by the respondent, but which nonetheless reported that its investigation suggested that the letter had been fabricated. There was no evidence of the qualifications or experience of the embassy's investigator or the unidentified contact who provided evidence regarding the author of the letter at issue, nor was there any indication that any effort was made to verify the contact's claims. The Immigration Judge also found that the embassy letter involved "multiple levels of hearsay" which were "highly unreliable." *Banat v. Holder, supra*, at 892.

However, in the case before us, the concerns evident in the letter at issue in *Banat v. Holder, supra*, are not present. Here, the Immigration Judge did not predicate his adverse credibility findings solely on one document, the reliability of which was highly questionable. Further, unlike in *Banat*,

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a forensic document examiner appeared at the respondent's hearing, and was subject to both direct and cross-examination regarding his evaluation of evidence submitted by the respondent (I.J. at 5).[1] As noted, the Immigration Judge determined that the respondent was not credible in light of six separate documents, which were subject to forensic analysis and/or investigation by the Department of State (I.J. at 6). For example, the forensic examiner testified that the respondent's birth certificate did not conform to available genuine birth certificates and reference material on file (I.J. at 6). Here, a listing of the forensic examiner's qualifications was also submitted, and is of record (Exh. 45). This contrasts with the evidence at issue in *Banat*, which consisted of a statement from an embassy that admittedly had no experience with such documents, and that found the same was fraudulent predicated on the claims of an unidentified contact.

Moreover, the findings by the embassy in the case before us were revealed by an investigation conducted by the manager of the Fraud Prevention unit of the Baku embassy (Exh. 54). The determination that a birth certificate was fraudulent was predicated on review of the genuine seal and signature for birth certificates, while a police letter was determined to be fraudulent in light of various factors, including the language in which it was written, the fact that the criminal case number contained too many digits, and because the named signatory of that document did not then, and never had, worked in the position alleged, among other factors. A report from the Department of State also reports on this investigator's qualifications, and details his findings (Exhs. 27, 55). Thus the qualifications of the investigators involved in the review of the documents in this case are of record, and their determinations as to the validity of the evidence was predicated not on "multiple levels of hearsay," as in *Banat v. Holder, supra*, but on firsthand examination of the documents, and comparison to known exemplars.

We note that with his motion to remand the respondent has submitted a letter reportedly from Ms. (b) (6) who was the Chief of the Registration office contacted by investigators in the course of the review of the respondent's evidence. The respondent apparently submitted the same to rebut the Immigration Judge's adverse credibility findings regarding documents under her purview. This letter, however, does not claim that fraudulent birth certificates were issued by her office, nor does it otherwise explain how the respondent came into possession of fraudulent documents. Her letter also does not claim that she provided false information regarding the language and seals used in the respondent's certificates. Rather, the letter states that Ms (b) (6) wishes to explain her "reply to the request of confirming birth and registration" of the respondent, and why she did not find information regarding his birth in the civil registration archives. Thus, by her own account her statement does not relate to the death certificates she was also questioned about.

Ms. (b) (6) claims that in 1991 representatives of the KGB "demanded submission of registration books" regarding civil registrations, such as birth and death certificates. This claim,

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[1] The embassy letter at issue in *Banat v. Holder, supra*, was submitted by the DHS not, as here, by the alien.

however, fails to address why she reported to investigators that the language and seals used in the certificates introduced by the respondent were not the ones officially used (I.J. at 8; Exh. 27). No mention in her letter is made of the creation of fraudulent documents, nor does her letter otherwise explain why the respondent should have a fraudulent birth certificate. As noted, her letter does not purport to address the death certificates submitted by the respondent, which were also determined to be fraudulent. At best, her letter could be construed to suggest an explanation for why there were no recorded incidents in Ms. (b) (6) office's registration books matching those described on the death certificates. However, this does not explain why corroboration of the incidents, alleging severe traumatic murder, was not found in either contemporary hospital or police records (I.J. at 8; Exh. 27). As such, Ms. (b) (6) letter, even when construed in the light most favorable to the respondent, fails to rebut the findings revealed by the investigations.

Given this record, we find that the facts in this case are distinguishable from those presented in *Banat v. Holder, supra*. Therefore, we do not find that a remand of the proceedings for review of the record in light of *Banat* is warranted. We also observe that the respondent has presented no evidence or argument that a letter from his mother's cousin, (b) (6), could not have been obtained and presented at the time of his hearing. As such, he has not shown that it was previously unavailable, and it does not support reopening. 8 C.F.R. § 1003.2(c)(2); *see Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). In sum, the respondent has failed to present new and material evidence reflecting that he is *prima facie* eligible for any relief from removal. Therefore, neither reconsideration and reopening of our decision nor a remand of the proceedings for consideration of the respondent's recently submitted evidence is warranted. *Id.*

Although we have found that reopening is not otherwise warranted, we find that this case is appropriate for *sua sponte* reopening with regard to the finding that the respondent filed a frivolous application for asylum. *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *see also Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. § 1003.2(a). Subsequent to the Immigration Judge's and this Board's decision, the Board addressed the issue of what findings an Immigration Judge has to make to support a determination that an alien has filed a frivolous application for asylum. *See Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007). Here, the Immigration Judge properly advised the respondent of the consequences of filing a frivolous application (Tr. at 5). However, he did not independently address the question of frivolousness, and discuss the evidence supporting a finding that the respondent deliberately fabricated a material element of the asylum claim. *Id.* at 155-56. In light of the very severe consequences that flow from a finding that an alien filed a frivolous asylum application, we will exercise our *sua sponte* authority, and reopen and vacate that part of the Board's January 12, 2007, decision upholding the Immigration Judge's finding that the respondent had submitted a frivolous application for asylum. Therefore, the following orders shall be entered.

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Accordingly, the following orders will be entered.

ORDER: The Board's January 12, 2007, decision is vacated solely insofar as it upholds the Immigration Judge's finding that the respondent filed a frivolous application for asylum.

FURTHER ORDER: The respondent's motions are otherwise denied.

FOR THE BOARD