File: (b) (6) Date: MAR 12 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa J. Palumbo, Esquire

ON BEHALF OF DHS: Lynn K. Hollander
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case is before us pursuant to a decision of the United States Court of Appeals for the (b) (6) dated (b) (6) granting the respondent's petition for review, and remanding the record to this Board. (b) (6) *v. Holder*, (b) (6) Upon further consideration of the respondent's case, we will deny his claims for relief and protection from removal.

In light of the (b) (6) decision, we conclude that the respondent has established past persecution on account of his membership in a particular social group and political opinion. We also conclude that the presumption of a well-founded fear of persecution has not been rebutted. The Department of Homeland Security ("DHS") does not argue that any of these issues need further consideration in its post-remand brief.[1]

Notwithstanding, we conclude that the respondent is statutorily barred from a grant of asylum and withholding of removal by sections 208(b)(2)(A)(v) and 241(b)(3)(B)(iv) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(2)(A)(v) and 1231(b)(3)(B)(iv), for having provided material support to a terrorist organization. *See* sections 212(a)(3)(B)(i)(I) and 237(a)(4)(B) of the Act, 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1227(a)(4)(B).

Both parties submitted post-remand briefs. The DHS moves for a remand to address, inter alia, the application of the material support bars to the respondent's claims. However, the DHS acknowledges in its motion that the record is sufficient to address the material support bar. The respondent opposes the motion on this basis, contending that the facts on this issue are not in dispute, and requesting the Board to issue a decision on the law applicable to the facts. We agree with the respondent, and will address the issue.

[1] We agree with the Immigration Judge that the respondent is not barred from relief based on having been convicted of a particularly serious crime (I.J. at 4-5). *See* 208(b)(2)(A)(2) of the Act.

(b) (6)

The respondent provided support to the FARC, an organization that is defined by the Act as a terrorist organization under § 212(a)(3)(B)(vi)(I) (also known as a Tier I organization). *See* sections 212(a)(3)(B)(i)(I), (iii)(V), (iv)(VI) of the Act; *see also Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).

The record shows that the respondent was forced to provide the use of his trucks to the FARC, and that he saw chemicals being transported in his trucks (Tr. at 124-33). The respondent helped transport armed members of the FARC and their cargo (*Id.*); he admitted that these trucks contained illegal drugs, weapons, chemicals, and money on at least three occasions (Group Exh. 3, Tab 2 "Respondent's Declaration"). Despite his conduct, the respondent contends that he remains eligible for asylum. To the extent this argument is based on the fact that he provided the transportation under duress, we have recognized no such defense for an alien found to have provided material support to a terrorist organization. *See generally INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (the legislative purpose is presumed to be expressed by the ordinary meaning of the words used).

The plain language of the statute is silent, and therefore ambiguous as to whether it provides for a "duress" defense or "involuntariness" exception to the material support bar in the Act. In such cases, it is this Board's obligation to fill the statutory gap by adopting a reasonable interpretation of the language in question. *Negusie v. Holder*, 555 U.S. 511, 515-517, 522-24 (2009);[2] *Matter of Nwozuzu*, 24 I&N Dec. 609, 612 (BIA 2008) (citations omitted). To be reasonable, our interpretation must take into account the language and design of the Act as a whole, since the meaning of an ambiguous term may only become evident when placed in its broader statutory context. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Under the traditional principles of statutory construction, we conclude that the Act made inadmissible all those who commit an act that they know, or reasonably should know, affords material support to a terrorist organization.

Congress could have adopted a "voluntariness" exception if it had elected to do so. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). For example, while section 212(a)(3)(D) of the Act generally applies to aliens who have been members of a totalitarian party, that provision specifically excepts those who can establish their membership was involuntary. *See* section 212(a)(3)(D)(ii) of the Act. Consequently, we would reasonably expect Congress to have used similar language to that contained in section 212(a)(3)(D)(ii) of the Act had it intended to create a duress or involuntariness exception in a case such as this. *See generally Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (discussing the presumption that Congress is aware of existing law when it passes legislation).

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[2] In *Negusie*, the Supreme Court held that its decision in *Fedorenko v. United States*, 449 U.S. 490 (1981) does not control the question whether there is a "duress" or an "involuntariness" exception to the "persecutor bars" in sections 208(b)(2)(A) of the Act. The *Negusie* Court did not render any opinion on the material support bar.

Moreover, the possibility of an implied duress defense in the material support context is undercut by the fact that Congress has provided an alternative statutory mechanism under which deserving aliens may avoid removal or disqualification from relief despite having afforded material support to terrorist organizations. *See* section 212(d)(3)(B)(i) of the Act. Thus, although the respondent clearly acted under duress, his actions still constitute material support to a terrorist organization. *See Matter of S-K-*, *supra*; *see also Annachamy v. Holder*, 686 F.3d 729, 740 (9th Cir. 2012) (agreeing with the Board and "hold[ing] that the material support bar does not include an implied exception for individuals who assist organizations engaged in legitimate political violence or who provide support under duress").

The respondent is, therefore, barred from obtaining asylum. As an alien who has been found to be subject to a mandatory ground of denial, the only relief he may seek is deferral of removal under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(d)(2), 1208.17. As noted in our previous consideration of this claim, although the Immigration Judge did not reach the issue of the respondent's CAT application, we conclude that there is insufficient basis to remand for such consideration. The respondent presents no arguments on appeal, either in his initial brief or post-remand brief, which show that he faces a clear likelihood of torture by or with the consent or acquiescence of a public official. *See Sarhan v. Holder*, 658 F.3d 649, 657-58 (7th Cir. 2011). The respondent's last contact from the FARC was about March 2000 when the respondent learned they burned his trucks. He did not allege any further attempts by the FARC to contact him or his remaining family members in Colombia, or harm his property there (Group Exh. 3, Tab 2 "Declaration"). Therefore, the respondent has not established a claim for protection under the CAT.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is ordered removed from the United States to Colombia.

FOR THE BOARD