File: (b) (6) Date: MAY - 5 2009

In re: (b) (6)

IN ASYLUM ONLY PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Joshua E. Bardavid, Esquire

The applicant filed a motion to reopen on October 6, 2008. The Department of Homeland Security (the "DHS") has not responded to the motion, which will be denied.

The Board dismissed the applicant's appeal on February 22, 2005, affirming an Immigration Judge's decision denying the applicant's applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Board determined that the Immigration Judge correctly found that the applicant had failed to meet his burden of proof due to his failure to submit sufficient corroborating evidence, most notably with respect to the applicant's membership in the Democratic League of Kosovo. The Board denied a motion to reopen on August 17, 2005, finding that the applicant attempted to present documents that were available at the time of the original hearing, that could have been obtained by the applicant, and no explanation was provided for failing to earlier present the documents. The Board also found that the materials presented did not establish that country conditions had changed in Kosovo.

The applicant then filed a document which the Board construed as a motion to reissue its August 17, 2005, decision. The Board denied this "motion" on October 17, 2005, finding that the August 17, 2005, decision was mailed to the address provided by counsel, and the decision was not returned as undeliverable. The Board declined to reconsider this decision on May 1, 2006. On remand from the United States Court of Appeals for the (b) (6) (b) (6) (b) (6) the Board on July 28, 2008, again declined to reissue the August 17, 2005, decision.

The applicant's current motion seeks reopening for "humanitarian asylum" ...and for *sua sponte* reopening." The motion states that the applicant was shot in the back in 1999 and consequently is a paraplegic bound to a wheelchair. Where there is little likelihood of future persecution, a favorable exercise of discretion may be warranted for humanitarian reasons where an individual has suffered atrocious forms of past persecution. 8 C.F.R. §§ 1208.13(b)(1)(iii)(A), (B); *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989); *Matter of D-I-M-*, 24 I&N 448, 450 (BIA 2008).

However, the Immigration Judge, and Board, have already considered the applicant's claims, including his assertion that he was shot, and the Board found that the applicant, in failing to provide corroborating evidence, "... is unable to establish a nexus between the harm he claims to have suffered and his political opinion." (Board's Feb. 22, 2005, dec., at 2). The Board therefore found that the applicant had not carried his burden of proof with respect to demonstrating past persecution. There was thus no reason for the Immigration Judge, or Board, to consider granting humanitarian asylum, where the applicant failed to meet his burden of proof of showing past persecution. *See* I.J. at 11-12 (recognizing that a grant of humanitarian asylum may be appropriate under certain circumstances).

The motion argues that the applicant is unable to return to Kosovo due to his need for medical care and support here. It is possible that discretion would be exercised to allow the applicant to remain in the country, due to his health condition, but such a decision would be entirely within the power of the DHS. *See Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982)(deferred action status, giving person permission to remain indefinitely, is matter of prosecutorial grace).

The Board declines to reopen proceedings under its discretionary *sua sponte* authority at 8 C.F.R.§ 1003.2(a). The motion to reopen will, therefore, be denied.

ORDER: The pending motion is denied.

Frederick D. Hess

FOR THE BOARD

File: (b) (6)

Date: JUL 28 2008

In re: (b) (6)

IN ASYLUM PROCEEDINGS PURSUANT TO 8 C.F.R. § 1208.2(c)

MOTION

ON BEHALF OF APPLICANT: Joshua E. Bardavid, Esquire

This case is before the Board on remand from the United States Court of Appeals for the (b) (6) (b) (6) In its (b) (6) published decision, the court remanded the case to the Board. (b) (6) [1] Upon further consideration of the applicant's request that the Board reissue its August 17, 2005, decision denying reopening, the request will again be denied.

The Board dismissed the applicant's appeal on February 22, 2005, affirming an Immigration Judge's decision denying the applicant's applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Board determined that the Immigration Judge correctly found that the applicant had failed to meet his burden of proof due to his failure to submit sufficient corroborating evidence, most notably with respect to the applicant's membership in the Democratic League of Kosovo. The Board denied a motion to reopen on August 17, 2005, finding that the applicant attempted to present documents that were available at the time of the original hearing, that could have been obtained by the applicant, and no explanation was provided for failing to earlier present the documents. The Board also found that the materials presented did not establish that country conditions had changed in Kosovo.

The applicant then filed a document which the Board construed as a motion to reissue its August 17, 2005, decision. The Board denied this "motion" on October 17, 2005, finding that the August 17, 2005, decision was mailed to the address provided by counsel, and the decision was not returned as undeliverable. The Board declined to reconsider this decision on May 1, 2006.

In its decision, the (b) (6) ordered the Board to "determine what weight to accord to the claims of non-receipt of its opinion[] by [the applicant] in determining whether the opinion[] [was] properly served, and to explain the reasoning and analysis it employs in reaching its decision." (b) (6) *supra*, at (b) (6)

[1] The court's remand order also concerned (b) (6) The Board will issue a separate decision in that case.

(b) (6)

First, as the Board stated in its October 17, 2005, decision, the Board's August 17, 2005, decision denying reopening was mailed on that same date to the address provided by Iskender (Alex) Cemaletin, the applicant's attorney, on a Notice of Entry of Appearance before the Board (Form EOIR-27), under the Standard Operating Procedures of the Board's Office of the Clerk. There was no indication that the decision was returned as undeliverable by the United States Postal Service.

The burden to establish that reissuance is warranted is with the applicant. The applicant's claim of non-receipt of the Board's August 17, 2005, decision came in the form of two letters from Cemaletin. First, on September 22, 2005, Cemaletin sent a letter to the Board in which he claimed that he did not receive the August 17, 2005, decision. In seeking reconsideration of the Board's October 17, 2005, decision, Cemaletin sent another letter to the Board again contending that he had not received the August 17, 2005, decision.

In its decision, the (b) (6) stated that "[a]n alien claiming non-receipt of a BIA decision, and who presents the BIA with an affidavit to that effect, may well have provided enough evidence to rebut the presumption of mailing which attaches to the presence of a transmittal cover letter in the administrative record." (b) (6) , *supra*, at (b) (6) The applicant's claim of non-receipt was not, however, accompanied by an affidavit, either from the applicant, or from his counsel. In the absence of such an affidavit, the Board declines to credit the claims of non-receipt in this case. *See also Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007)(in case approvingly cited by the court in *Jahjaga*, case remanded to Board to determine weight and consequences of sworn affidavits by alien and his counsel that they never received notice of Board's decision); *compare Gaberov v. Mukasey*, 516 F.3d 590, 595 (7th Cir 2008) (court found that affidavit of non-receipt not required, where respondent presented evidence that counsel received decision relating to a different individual).

ORDER: As set out in the (b) (6) decision in (b) (6) *supra*, the Board has given further consideration to the applicant's request that the Board reissue its August 17, 2005, decision denying reopening, and the request is again denied.

FOR THE BOARD