File: (b) (6)

Date: AUG 0 8 2008

In re: (b) (6)

IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Henry Zhang, Esquire

ON BEHALF OF DHS: Kenneth Padilla
Assistant Chief Counsel

EXCLUDABLE: 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

Sec. 212(a)(7)(B)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(B)(i)(I)] - Nonimmigrant - no valid passport

Sec. 212(a)(7)(B)(i)(II), I&N Act [8 U.S.C. § 1182(a)(7)(B)(i)(II)] - Nonimmigrant - no valid nonimmigrant visa or border crossing card

APPLICATION: Reopening

ORDER:

PER CURIAM. This case is before us on remand from the United States Court of Appeals for the (b) (6) which, on (b) (6) remanded this case for our consideration of "whether a petitioner whose changed personal conditions (which result in his falling into a category of individuals threatened by changed country conditions) can rely on those changed country conditions in an untimely motion to reopen where the underlying change in personal conditions postdated his order to depart." *See* (b) (6) *v. Gonzales*, (b) (6) Put most simply, at issue in this case is whether the respondent, who was first ordered excluded in 1995 by an Immigration Judge based on a finding that he lacked credibility on his asylum claim,[1] can support reopening by submitting documents referred to by the (b) (6) as the "*Shou Yung Guo* documents," and arguing that (1) these documents reflect a change in China's application of its coercive population control policy, and (2) by virtue of the births of his two United States citizen

[1] We affirmed the Immigration Judge's finding that the respondent's testimony in support of his asylum claim lacked credibility in a June 29, 1995, decision that dismissed the respondent's appeal and affirmed the order excluding him from the United States. As our decision in this regard was not the subject of any appeal, it remains the law of the case.

children, he has a reasonable possibility of being targeted for enforcement efforts by birth control officials who would implement the change in policy.

As a threshold matter, we note the application to this case of our recent precedent decision in *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), in which we held that a motion to reopen removal proceedings must be filed with the Board within 90 days of the entry of the final administrative order of removal unless it is justified by changed country conditions arising in the country to which removal has been ordered, in this case, China. *See* section 240(c)(7)(C) of the Immigration and Nationality Act; 8 C.F.R. § 1003.2(c)(2). Given that the respondent's motion was filed some 10 years after our affirmance of the exclusion order against him, he must show changed country conditions in order to prevail in his request to reopen proceedings.[2]

That said, we turn now to addressing one of the questions remanded to us by the (b) (6) in this (and several other cases)–i.e., the effect of the so-called "Guo documents" on this case. As we stated in *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), the evidence in that case (some, but not all, of which is also present in the case at bar) did not prove that all foreign-born children born to Chinese couples would necessarily be counted towards birth limits in China. *Matter of S-Y-G-, supra,* at 255-56. We also noted that even if such children were counted towards a couple's birth limits, the applicant in that case did not show how this is a change in country conditions in China. Further, we found that the evidence did not reflect that the applicant in that case, having given birth to one son in China and one daughter in the United States, would be treated as having violated the birth planning laws of Fujian, her onetime home province or that, even assuming a violation was found, this was a fundamental change in country conditions. *Id.* at 258. Finally, we found that the evidence did not reflect that, if a violation of local birth planning policies occurred, the applicant proved that she would be sanctioned for the violation in a way that rises to the level of persecution.

To the extent that the respondent's motion is premised on some of the same documents present in *Matter of S-Y-G-*,[3] and because he also claims to fear persecution in Fujian, we find that no change in country conditions relevant to the births of his United States children and the effect of the birth control policy has been proven. Furthermore, the affidavits and documents attached to the motion alleging that the respondent's mother was sterilized in 1972 and his mother-in-law was sterilized in 1982 cannot reflect any "change" in country conditions since the respondent's 1995 hearing below. The allegation that the respondent's sister-in-law was forcibly sterilized in 1998 also does not produce evidence of changed country conditions that would be relevant to the respondent's case, in that her children were born in China whereas the respondent's children were born in the United States. The general evidence of China's birth planning law and the (b) (6) affidavit do not reflect additional evidence that would cause us to find a material change in country conditions such

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[2] We note that the respondent's motion specifically premises the motion on the birth of his second United States citizen child, a change in personal circumstances that does not support reopening pursuant to regulations and our precedent. *See* Respondent's December 29, 2005, motion at 1.

[3] Specifically, the (b) (6) noted that "two of the three documents discussed in *Shou Yung Guo* [i.e., *Matter of S-Y-G-, supra*]" were present in the record in the respondent's case. (b) (6) *v. Gonzales, supra* a (b) (6)

that the respondent's two United States citizen children would be viewed as violating the birth control policies in the Fujian region and that he would be punished for the violation in a way rising to the level of persecution.

We turn now to the Second Circuit's discussion of *Wang v. BIA*, 437 F.3d 270 (2d Cir. 2006), and in particular, the effect on the respondent's motion to reopen of the fact his children were born here in the United States many years after he was ordered excluded. We are cognizant of the Second Circuit's previous statements in this regard that it would be "ironic, indeed, if petitioners like Wang, who have remained in the United States illegally following an order of deportation, were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities." *Wang v. BIA, supra* at 184. Evasion of removal is doubtless a negative factor that would come into play in any consideration of an issue that is committed to our discretion, whether or not an alien has produced United States citizen children in the process. But we also are sensitive to the fact that, given the length of time that proceedings may take, aliens may marry and produce children while an appeal is pending before this Board and/or a federal appellate court. With this in mind, we take no absolute position on the discretionary effects of an alien's decision to create family ties in this country even while under an order of removal. Such factors should be considered in a case-by-case analysis of whether to exercise the Board's discretion. In this case, such a discussion is unnecessary in any event, given that the motion is untimely and not justified by changed country conditions. Even if the motion was timely filed, the respondent herein was judged incredible below, and we have stated before that we generally would not be inclined to exercise discretion favorably on a motion to reopen when the alien was found to have offered incredible testimony below. *Matter of S-Y-G-, supra* at 252.

Accordingly, the motion is denied.

FOR THE BOARD