

EOIR FOIA Processing (EOIR)

From: Burr, Sarah (EOIR)
Sent: Tuesday, April 27, 2010 9:28 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: (b) (6)

I need the A#, as (b) (6) in the (b) (6) Circuit can cover a multitude of cases.

From: Keller, Mary Beth (EOIR)
Sent: Tuesday, April 27, 2010 9:24 AM
To: Burr, Sarah (EOIR)
Subject: RE: (b) (6)

No, I don't think we have to wait.
I think you can review this record for yourself, and then we can figure out what to do from there.
We have had this situation before, where we get a trip report from an OA and upon our independent review of the record we think something not so good transpired.
We needn't wait to counsel a judge to stop ongoing inappropriate behavior if we think it's inappropriate.
Then, if the circuit comes down with criticism, we have already taken care of it at least to some extent.
I just advised OPR yesterday in a case in which they had concluded that the judge exercised poor judgement that we had counseled the judge following oa but before the circuit criticism, again when the circuit decision came out, and then did a written counseling following the OPR report.
I think that showed pretty well that we were on top of things.
mtk

From: Burr, Sarah (EOIR)
Sent: Tuesday, April 27, 2010 9:13 AM
To: Keller, Mary Beth (EOIR)
Subject: RE: (b) (6)

Well, this doesn't sound good, but I think at this point that we have to wait for the (b) (6) Circuit to rule. Don't you agree?

From: Keller, Mary Beth (EOIR)
Sent: Friday, April 23, 2010 9:19 AM
To: Burr, Sarah (EOIR)
Subject: FW: (b) (6)

Sarah,
This in from OIL on a recently briefed case of (b) (6) in (b) (6). Looks like you'll need to look at this one.
mtk

From: McConnell, David (CIV)
Sent: Friday, April 23, 2010 9:06 AM
To: Keller, Mary Beth (EOIR)
Subject: FW: (b) (6)

Hey MB – not sure this is really a misconduct issue, but I thought you should see it anyway.

Thanks for the getting me the info I was looking for this week. Dave

1186



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

Date: June 14, 2010

MEMORANDUM

To: Thomas W. Hussey, Director

From: Lisa M. Damiano, Trial Attorney

Cc: Terri Scadron, Assistant Director

Re: Trip Report, EOIR (b)(6) Cir.), AEOIR (b)(6)

On June 9, 2010, I appeared before the EOIR (b)(6) Circuit EOIR (b)(6) in the above-referenced case involving an alien from China who applied for asylum/withholding/CAT based upon persecution from the Chinese government on account of her "other resistance to population control policies" for refusing to take a pregnancy test and for assisting her cousin in evading family planning authorities. The IJ denied the applications based on an adverse credibility finding, as well as the alternative finding that the alleged events do not rise to the level of persecution. The Board affirmed the IJ's decision without addressing credibility, and held that the events do not rise to the level of persecution. The alien did not petition for review of that decision, but instead, filed a motion to reconsider the Board's merits decision arguing that the Board failed to properly address relevant facts in her case, or discuss whether her three-day detention combined with the fine paid by her family amounted to persecution. The Board denied alien's motion to reconsider, and the alien then petitioned for review of that decision.

At oral argument, all three judges asked questions of Petitioner's counsel, while only Judge EOIR (b)(6) and Judge EOIR (b)(6) questioned Respondent's counsel. The majority of the questions directed at Respondent's counsel came from Judge EOIR (b)(6).

Petitioner's counsel began argument by stating that he represented the alien before the Board but not before the IJ. Judge (b)(6) immediately questioned Petitioner's counsel as to whether his brief even addressed the reasons the Board was required to reconsider the prior decision, and advised Petitioner's counsel that his opening brief reiterated his prior merits arguments only. Judge (b)(6) asked Petitioner's counsel what the Board "did wrong" and counsel replied that the Board's February 2009 decision did not "mention" "or consider" the three-day detention or fine, which he believes amounts to persecution in the aggregate. Judge (b)(6) asked Petitioner's counsel how he can make that argument when the September 2009 Board decision states that it "considered and addressed" all Petitioner's claims. In response, Petitioner's counsel stated that the February 2009 decision didn't list those facts, implying that the Board can't show they considered a fact if it's not mentioned in the prior decision. Judge (b)(6) questioned Petitioner's counsel about whether he ever argued to the Board that the

fine constituted persecution, and the Petitioner's counsel answered yes (although he did not ever specifically argue same). Judge (b) (6) asked Petitioner's counsel to show him in the record where he argued that point and counsel could not cite to the record but began listing his various arguments in his brief to the Board. Before he could finish, Judge (b) (6) postured that the February 2009 decision could have been "better," but questioned Petitioner's counsel as to whether that was enough to say the Board abused its discretion. Counsel answered affirmatively without providing reasons why that was the case, and then launched into an argument not contained in his brief. Namely, counsel argued that (b) (6)

(b) (6) and (b) (6) - cases Respondent cited to show that Petitioner's harm does not rise to the level of persecution - supported his position that the alien was persecuted. It seemed that Petitioner's counsel believed that his client's case was more severe than these two cases involving three-day detentions. Petitioner's counsel then argued that this is "the perfect case" demonstrating "other resistance" to China's population control policies, and claimed that Petitioner had three incidents of other resistance. Judge (b) (6) noted that there were two incidents and questioned counsel as to what the third incident was. Petitioner's counsel then claimed (1) that the alien's **mother's** purported forced sterilization and fine from years ago should be considered a third incident of "other resistance" imputed to alien; (2) that the Board hasn't properly explained what constitutes "other resistance" and should be required to do so; and, (3) that alien's pants were pulled down in front of "several officers" when she refused the pregnancy test and that she was "humiliated" as a result. Judge (b) (6) pointed out that the Board seems to find that alien's harm falls short of "other resistance." Petitioner's counsel was allowed to sum up, and he stated that the Board abused its discretion because it failed to consider the cumulative effect of the three-day detention, fine and other harms.

CIV (b) (5)