U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] **A** [redacted]

Date of this notice: 6/11/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

yungc
Userteam: Docket

File: [redacted] – San Francisco, CA Date: JUN 11 2014

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Kenneth Mehr, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (sustained)

Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude (not sustained)

APPLICATION: Deferral of removal under the Convention Against Torture

The respondent, a native and citizen of Mexico, appeals the December 10, 2013, decision of the Immigration Judge denying his application for protection under the Convention Against Torture (CAT), 8 C.F.R. §§ 1208. 16(c), 1208.17. The Department of Homeland Security (DHS) has not responded. The appeal will be sustained.

We review findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). Because the application was filed after May 11, 2005, it is subject to the provisions of the REAL ID Act of 2005. Whether an applicant for relief under the CAT has met his or her burden of establishing that it is more likely than not that he or she would be tortured if removed to the proposed country of removal is a finding of fact subject to clear error review. *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012) (ruling that the Board reviews under the "clearly erroneous" standard the Immigration Judge's determinations regarding likelihood of future events, for purposes of eligibility for relief under the CAT).

To prevail on a claim for protection under the CAT, an alien must show that, more likely than not, he will be tortured upon his removal from the United States. 8 C.F.R. § 1208.17(a). For an act to constitute "torture" it must (1) cause severe physical or mental pain or suffering, (2) be intentionally inflicted, (3) be inflicted for a proscribed purpose, (4) be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim, and (5) cannot arise from lawful sanctions. 8 C.F.R. § 1208.18(a). If the CAT claim relies on a series of suppositions, the petitioner must demonstrate that each hypothetical event in the chain is more likely than not to occur. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 & n.4 (A.G. 2006). It is a respondent's burden to show that he more likely than not will be tortured by or "at the instigation of or with the consent or acquiescence of a

public official or other person acting in an official capacity" upon removal. *See* 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a); *see also Wakkary v. Holder*, 558 F.3d 1049, 1067–68 (9th Cir. 2009); *Arteaga v. Mukasey*, 511 F.3d 940, 948 (9th Cir. 2007); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001); *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002).

The respondent's credibility is not at issue, and the Immigration Judge's decision sets forth the documentary and testimonial evidence (I.J. at 4-6). The respondent fears torture because of an imputed gang affiliation (I.J. at 4; Tr. at 55-56). The respondent denies gang membership and has no gang tattoos, although he was arrested for a fight during custody with an individual wearing a symbol for the Norteños gang (I.J. at 4-5; Tr. at 61-64).[1] Immigration Customs and Enforcement publicly classified the respondent as a member of the Norteño gang, housing him in a segregated area, labeled "Norteños," in detention and seating him with Norteño gang members when transported (I.J. at 5; Tr. at 59, 70-71). The Norteños are segregated from its rival gang, the Sureños (I.J. at 4; Tr. at 68-69). He stated that if he is removed to Mexico he will be harmed or killed by the Sureños or by Mexican law enforcement in collusion with the Sureños (I.J. at 4; Tr. at 57, 60, 74).

In support of his claim, the respondent presented testimony and a written report from Harold Campbell, Ph.D., whom the court recognized as an expert regarding Mexican street gangs (I.J. at 5-6; Tr. at 85-100; Exh. 4 at 4-19, 20-30). He stated that because the respondent has been identified as a member of the Norteños by the United States Government and that many other detainees know that the United States Government considers him a member of this criminal organization, he will be considered a member of the Norteños (Exh. 4 at 24). He testified that the respondent's mere identification as a Norteño renders him a target of the Sureños, who are associated with a notorious drug cartel. Dr. Campbell testified that the Sureños and the drug cartel have purchased or intimidated Mexican law enforcement to cooperate in their criminal endeavors (I.J. at 6; Tr. at 91, 92, 94; Exh. 4 at 25-26).

The Immigration Judge clearly erred in finding that the applicant had not met his burden of demonstrating that it is more likely than not that he will be tortured upon his removal from the United States (I.J. at 7). The Immigration Judge determined that the respondent's fear is in the nature of speculation, based on a series of assumptions, relying on *Matter of J-F-F-, supra.* The Immigration Judge stated that the respondent "assumes he will be identified as a member of the Norteño street gang" (I.J. at 6-7). However, the respondent has presented evidence, undisputed by the DHS, that the Federal Government and at least one local government in the United States have identified him as a member of the Norteño gang and have done so in the presence of rival gang members. The Immigration Judge stated that the respondent's claim also rests on the assumption that the gang members and drug cartels have the cooperation of the Mexico law enforcement agencies (I.J. at 7).

Unrebutted evidence presented by the respondent's expert witness indicates that Mexican law enforcement agencies have been intimidated and bribed into cooperating with the Sureños and its

[1] The Immigration Judge did not make a finding of fact regarding whether the respondent actually has a gang affiliation. *See, e.g.,* Tr. at 78 referencing the respondent receiving a "gang enhancement" during his sentencing for the fight (Tr. at 78). The result in this case would not change under either scenario.

affiliated drug cartel. An Immigration Judge can reject an expert opinion, or give it less weight, if it is not in accord with other information in the record or if it is in any way questionable. In the present matter, neither the Immigration Judge nor the DHS attorney questioned the credentials of the expert, took issue with his knowledge, or otherwise found reason to doubt the veracity of his testimony. Moreover, the Immigration Judge did not refer to any information in the record that controverted the testimony of the respondent or Dr. Campbell. Thus, we will vacate the Immigration Judge's decision and remand the record so that the required background and security checks may be completed. Moreover, the Immigration Judge clearly erred in finding that the respondent conceded that he could be safe if he relocated to another territory of Mexico (I.J. at 7), as the record does not support such a finding (Tr. at 109-13; Exh. 4 at 25).

The Immigration Judge further found that the respondent assumes that other vigilante or criminal groups would seek to harm him on the basis that he is a Norteño or an Americanized Mexican (I.J. at 7). Although this last scenario may be based on an assumption, it is not part of a "chain of events" as indicated in *Matter of J-F-F-*, *supra*. Under the particular circumstances and evidence in this case, notably that which has not been challenged by the DHS, we find the respondent has met his burden of proof under the Act.

Accordingly, the respondent's appeal will be sustained, and the respondent is eligible for protection under the CAT.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the DHS the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

File: [redacted] San Francisco, CA Date: JUN 11 2014

In re: [redacted]

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent. The respondent has not met his burden of proof for protection under the CAT. Even if the respondent has met his burden of demonstrating that it is more likely than not that he will be tortured upon his removal from the United States, he must still show that his torture will be at the instigation of or with the consent or acquiescence of Mexican Government officials. *See* 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a). The respondent has not presented sufficient evidence to establish that Mexican law enforcement officials will acquiesce in his torture.

The majority relies on the "unrebutted" of respondent's witness, whom the Court recognized as an expert regarding Mexican street gangs, to conclude that Mexican law enforcement officials will acquiesce to the respondent's torture. Specifically, the majority finds that since "neither the Immigration Judge nor the DHS attorney questioned the credentials of the expert, took issue with his knowledge, or otherwise found reason to doubt the veracity of his testimony," the respondent provided sufficient evidence. As the majority notes, an Immigration Judge can reject an expert opinion, or give it less weight, if it is not in accord with other information in the record or if it is in any way questionable. Here, to find that the Mexican Government acquiesces in torture is a very serious allegation that is in many ways "questionable," especially given that Mexico is a signatory to the Convention Against Torture (CAT). *See* https: //treaties.un.org/pages/ViewDetails. aspx?src =TREATY&mtdsg_no=IV-9& chapter=4&lang=en (last accessed June 2, 2014) (indicating that Mexico became a signatory to the CAT on March 18, 1985, and ratified the treaty on January 23, 1986).

The expert's testimony that Mexican government officials cooperate with gangs and drug cartels is not conclusive to show that the respondent will be tortured by or "at the instigation of or with the consent or acquiescence of a Mexican public official or other person acting in an official capacity." If evidence is inconclusive, the respondent has not met his burden of proof for relief under the CAT. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) ("The Government need not prove the opposite: 'The burden of proof is on the applicant.'" (quoting 8 C.F.R. § 1208.16(C)(2)). Therefore, I would affirm the Immigration Judge's decision to deny the respondent's application for CAT relief.

Patricia A. Cole
Board Member