
DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

REPORT

Investigation into Judicial Criticism of
Immigration Judge (b)(6) (b)(7)(C)

September 28, 2009

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INTRODUCTION AND SUMMARY

The United States Court of Appeals for the (b)(6) (b)(7)(C) Circuit criticized Immigration Judge (IJ) (b)(6) (b)(7)(C) conduct during an asylum proceeding, (b)(6) (b)(7)(C) Although the court dismissed (b)(6) (b)(7)(C) appeal, it found that IJ (b)(6) (b)(7)(C) (b)(6) (b)(7)(C)

While reviewing the materials submitted by the complainant in (b)(6) (b)(7)(C) we learned of another (b)(6) (b)(7)(C) Circuit case in which the court criticized IJ (b)(6) (b)(7)(C) for (b)(6) (b)(7) conduct during an asylum hearing, (b)(6) (b)(7)(C) In remanding the case, the court found that IJ (b)(6) (b)(7)(C) erred in basing much of (b)(6) (b)(7) adverse credibility determination on (b)(6) (b)(7) personal knowledge of (b)(6) (b)(7)(C) IJ (b)(6) (b)(7)(C) also described (b)(6) (b)(7)(C) testimony as akin to being " (b)(6) (b)(7)(C) " The court did not find, however, that IJ (b)(6) (b)(7) demonstrated prejudice or bias against the respondent.

We initiated an investigation. During the course of our investigation, we

(b)(5) (b)(6) (b)(7)(C)

Based on the results of our investigation, we concluded that IJ (b)(6) (b)(7) engaged in professional misconduct by acting in reckless disregard of (b)(6) (b)(7) obligation to appear fair and impartial in the administration of justice during the hearings in (b)(6) (b)(7)(C) and (b)(6) (b)(7)

1 (b)(6) (b)(7)(C)
(b)(6) (b)(7)(C)

2 (b)(6) (b)(7)(C)
3
4
5

6 (b)(6) (b)(7)(C)
(b)(6) (b)(7)(C)

I. STATEMENT OF FACTS

A. IJ (b)(6) (b)(7)

IJ (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

B. (b)(6) (b)(7)(C)

1. Background

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) eventually filed for asylum and for withholding of removal under the Convention Against Torture (CAT), contending that (b)(6) (b)(7)(C) life would be in danger if (b)(6) (b)(7)(C) returned to the (b)(6) (b)(7)(C)

2. First Merits Hearing Before IJ (b)(6) (b)(7)

On (b)(6) (b)(7)(C) appeared for a merits hearing with counsel before IJ (b)(6) (b)(7)(C) testified that (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

Throughout the hearing, IJ (b)(6) (b)(7)(C) pressed (b)(6) (b)(7)(C) for details regarding (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

Near the end of the hearing, IJ (b)(6) (b)(7)(C) expressed frustration with (b)(6) (b)(7)(C) vague testimony as well as (b)(6) (b)(7)(C) credibility. As (b)(6) (b)(7)(C) was about to render (b)(6) (b)(7)(C) oral decision, IJ (b)(6) (b)(7)(C) stopped and delivered a lengthy address during which (b)(6) (b)(7)(C) complained about the case:

(b)(6) (b)(7)(C)

IJ (b)(6) (b)(7)(C) told (b)(6) (b)(7)(C) that (b)(6) (b)(7)(C) would continue the matter to give

7 (b)(6) (b)(7)(C)

8 (b)(6) (b)(7)(C)

(b)(6)
(b)(7)
(C) an opportunity to present specific evidence to corroborate (b)(6)
(b)(7)
(C) client's claim:

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

⁹ (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

Thereafter, IJ (b)(6) (b)(7)(C) closed the hearing with a lengthy recitation of the evidence (b)(6) (b)(7)(C) needed to obtain to support (b)(6) (b)(7)(C) claim.¹² (b)(6) (b)(7)(C) also told

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

3. Second Merits Hearing Before IJ (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

4. IJ (b)(6) (b)(7)(C) Oral Decision

In a (b)(6) (b)(7)(C) oral decision, IJ (b)(6) (b)(7)(C) denied (b)(6) (b)(7)(C) applications for relief and granted (b)(6) (b)(7)(C) voluntary departure. IJ (b)(6) (b)(7)(C) found (b)(6) (b)(7)(C) testimony incredible and vague. (b)(6) (b)(7)(C) further found that (b)(6) (b)(7)(C) testimony directly contradicted (b)(6) (b)(7)(C) claim that (b)(6) (b)(7)(C) the (b)(6) (b)(7)(C) and (b)(6) (b)(7)(C) thereafter filed an appeal with the Board of Immigration Appeals (BIA).

15 (b)(6) (b)(7)(C)

16 (b)(6) (b)(7)(C)

5. BIA Decision

In an (b)(6) (b)(7)(C) order, the BIA affirmed IJ (b)(6) (b)(7)(C) decision. The BIA found, however, that (b)(6) (b)(7)(C)¹⁷ The BIA noted that IJ (b)(6) (b)(7) did not limit (b)(6) (b)(7) inappropriate commentary towards the respondent and that (b)(6) (b)(7) had also “(b)(6) (b)(7)(C) (b)(6) (b)(7)(C).”¹⁸ Notwithstanding its criticism, the BIA found that IJ (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) did not render the hearing unfair, although it did “(b)(6) (b)(7)(C) (b)(6) (b)(7)(C).”¹⁹ Lastly, the BIA added that IJ (b)(6) (b)(7) was “(b)(6) (b)(7)(C) (b)(6) (b)(7)(C) filed a motion for reconsideration, which the BIA denied on

Thereafter, (b)(6) (b)(7)(C) filed a motion to reopen, contending in part that (b)(6) (b)(7)(C) had obtained previously unavailable evidence. In (b)(6) (b)(7) motion to reopen, (b)(6) (b)(7)(C) sought to introduce a (b)(6) (b)(7)(C) supporting affidavits from (b)(6) (b)(7)(C) (b)(6) (b)(7)(C)

On (b)(6) (b)(7)(C), the BIA denied the motion to reopen, finding that the evidence did not meet the requirements governing motions to reopen.²¹ Specifically, the BIA found that the evidence could have been presented at the earlier hearing; that it was duplicative; and that it did not establish *prima facie* eligibility for any form of relief sought. Thereafter, (b)(6) (b)(7)(C) filed an appeal with the United States Court of Appeals for the (b)(6) (b)(7)(C) Circuit.

6. (b)(6) (b)(7)(C) Circuit Appeal

In a (b)(6) (b)(7)(C) opinion, the (b)(6) (b)(7)(C) Circuit affirmed the BIA's order. The court found that substantial evidence supported the

¹⁷ (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

¹⁸ *Id.* (citation omitted).

¹⁹ *Id.*

²⁰ *Id.* (citation omitted).

²¹ Pursuant to 8 C.F.R. §1003.2 (c)(1), the BIA may grant a motion to reopen only if the evidence sought to be presented is material and was not available and could not have been discovered or presented at the former hearing.

credibility determinations of IJ [redacted] and the BIA.

The court also addressed IJ [redacted] conduct and found that [redacted] did not violate [redacted] right to a full and fair hearing. The court observed that many of IJ [redacted] interruptions were aimed at soliciting necessary information. Nevertheless, the court did find that IJ [redacted] engaged in "[redacted]" both toward [redacted] and the [redacted].²² Among other things, the court found that IJ [redacted]

[redacted]

7. OPR Investigation

[redacted]

²² [redacted]

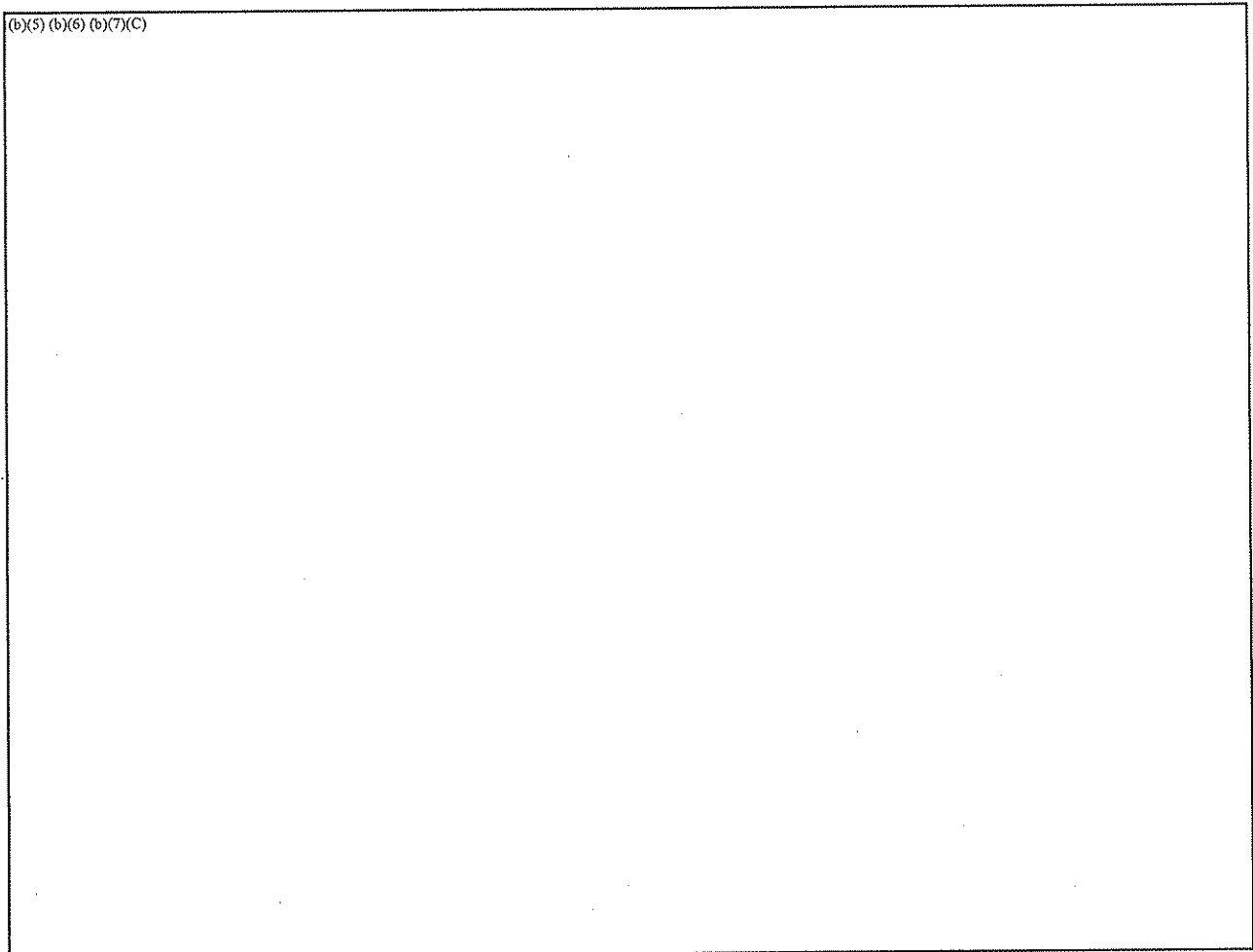
²³ *Id.*

²⁴ *Supra* [redacted]

²⁵ [redacted]

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)



c. (b)(6) (b)(7)(C)

1. Background

(b)(6) (b)(7)(C) is a citizen of (b)(6) (b)(7)(C) entered the United States in (b)(6) (b)(7)(C) applied for asylum claiming that (b)(6) (b)(7)(C) feared persecution because (b)(6) (b)(7)(C)

32 *Id.* (b)(6) (b)(7)

33 (b)(6) (b)(7)(C)
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(b)(6) (b)(7)(C) said that (b)(6) (b)(7)(C) authorities detained (b)(6) (b)(7)(C) for being a (b)(6) (b)(7)(C) also claimed that the police threatened (b)(6) (b)(7)(C) and (b)(6) (b)(7)(C) with death if they were ever again caught (b)(6) (b)(7)(C)

2. Hearing Before IJ (b)(6) (b)(7)(C)

During the initial proceeding, IJ (b)(6) (b)(7)(C) advised (b)(6) (b)(7)(C) counsel to prepare (b)(6) (b)(7)(C) client regarding the topic of (b)(6) (b)(7)(C) IJ (b)(6) (b)(7)(C) p.37
(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

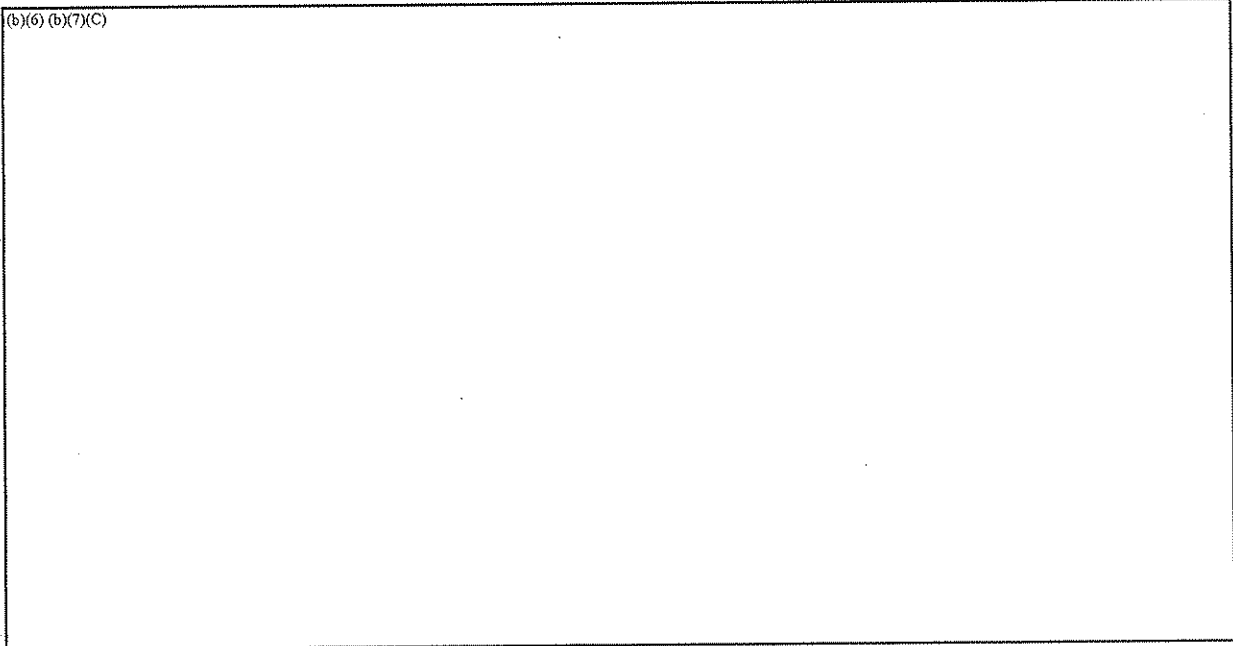
(b)(6) (b)(7)(C)

³⁷ (b)(6) (b)(7)(C)

³⁸ *Id.* at 30.

³⁹ *Id.*

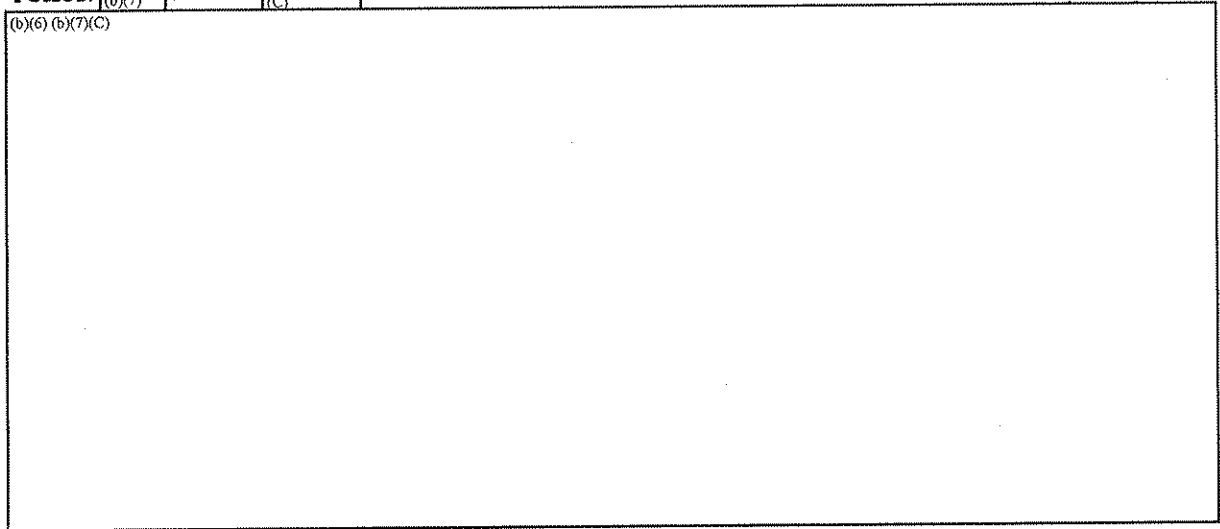
(b)(6) (b)(7)(C)



3. IJ (b)(6) (b)(7)(C) Oral Decision

In a (b)(6) (b)(7)(C) oral decision, IJ (b)(6) (b)(7)(C) denied (b)(6) (b)(7)(C) application for relief. (b)(6) (b)(7) found (b)(6) (b)(7)(C) incredible and did not believe (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)



(b)(6) (b)(7)(C)



(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) appealed IJ (b)(6) (b)(7)(C) order to the BIA, which affirmed without opinion. Thereafter, (b)(6) (b)(7)(C) filed an appeal with the United States Court of Appeals for the (b)(6) (b)(7)(C) Circuit.

4. The (b)(6) (b)(7)(C) Circuit's Decision

In a (b)(6) (b)(7)(C) opinion, the (b)(6) (b)(7)(C) Circuit vacated the BIA's order and remanded the decision. In remanding the decision, the court found that IJ (b)(6) (b)(7)(C) erred in relying on (b)(6) (b)(7)(C) own personal knowledge of (b)(6) (b)(7)(C).

(b)(6) (b)(7)(C) Although the court observed that many of (b)(6) (b)(7)(C) reasons were (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) "47 The court also found that many of the inconsistencies cited by IJ (b)(6) (b)(7)(C) were sufficiently explained in the record. Moreover, even if these inconsistencies had not been adequately explained, each of them was irrelevant to the question of whether (b)(6) (b)(7)(C) had established a pattern or practice of persecution of (b)(6) (b)(7)(C), and that (b)(6) (b)(7)(C) was a (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

The court also commented on IJ (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

5. The BIA's Decision on Remand

In a (b)(6) (b)(7)(C) order, the BIA vacated its earlier decision and granted (b)(6) (b)(7)(C) application for asylum and withholding of removal. The BIA did not comment on IJ (b)(6) (b)(7)(C) original decision.

46 (b)(6) (b)(7)(C)

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(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

II. STANDARDS OF CONDUCT

A. **OPR's Analytical Framework**

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

An attorney intentionally violates an obligation or standard when the attorney (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

54 (b)(6) (b)(7)(C)

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An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

B. Applicable Standards of Conduct

1. Constitutional Standards

Immigration judges have an obligation to be impartial and to maintain the appearance of impartiality. It is well established that aliens, even aliens who are in the United States illegally, are protected by the due process clause of the Constitution in deportation proceedings.⁵⁷ Unlike an Article III judge, an IJ is not merely the fact finder and adjudicator, but he or she also has an obligation to

⁵⁷ See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903)); see also *Calderon-Ontiveros v. I.N.S.*, 809 F.2d 1050 (5th Cir. 1986); *Ka Fung Chan v. INS*, 634 F.2d 248, 258 (5th Cir. 1981).

establish and develop the record.⁵⁸ In developing the record, an IJ must base his factual findings on substantial evidence.⁵⁹ An IJ's findings of fact are judged by a reasonable person standard.⁶⁰ In addition, an IJ's finding regarding the credibility of a witness is generally given significant deference because the IJ is in the best position to observe a witness's demeanor.⁶¹ As a judicial officer, an IJ also has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party.⁶² It is equally clear that due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.⁶³

2. EOIR Ethics Manual and Relevant Federal Regulations

Several professional obligations govern an immigration judge's conduct. In April 2001, EOIR formally adopted an *Ethics Manual for Members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review* ("Ethics Manual"). Although "[t]he Manual does not impose any additional standards or requirements upon EOIR adjudicators[,]," it nevertheless provides "guidance on particular ethical issues."⁶⁴

⁵⁸ See 8 U.S.C. §1229a(b)(1) (authority of IJ to conduct proceedings); see also *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (finding that an administrative law judge "acts as an examiner charged with developing the facts"); *Qun Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002).

⁵⁹ See *Gomez v. Gonzales*, 163 Fed.Appx. 268 (5th Cir. 2006); *Chun v. INS*, 40 F.3d 76, 78 (5th Cir.1994).

⁶⁰ See 8 U.S.C. § 1252(b)(4)(B) (2000) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary...."); see also *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992).

⁶¹ See *Efe v. Ashcroft*, 293 F.3d 899, 905 (5th Cir. 2002); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985); see also *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985); *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980); *Matter of Teng*, 15 I&N Dec. 516 (BIA 1975); *Matter of S-*, 8 I&N Dec. 574 (BIA 1960); *Matter of T-*, 7 I&N Dec. 417 (BIA 1957).

⁶² See *Rivera v. Ashcroft*, 387 F.3d 835 (9th Cir. 2004), as amended by 394 F.3d 1129 (9th Cir. 2005) (IJ must conduct herself as an impartial judge, not as a prosecutor); *Qun Wang v. Attorney General of the United States*, 423 F.3d 260, 261 (3rd Cir.2005).

⁶³ *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3rd Cir. 2003) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)).

⁶⁴ Memorandum from Kevin Rooney to All Board Members, Immigration Judges, and Administrative Law Judges (April 2001) (emphasis added).

The *Ethics Manual* specifically refers immigration judges to the Standards of Ethical Conduct for Employees of the Executive Branch.⁶⁵ In applying these regulations, the *Ethics Manual* refers to several professional obligations applicable in this matter. Part I (B)(8) of the *Ethics Manual* states that immigration judges “shall act impartially.”⁶⁶ The *Ethics Manual* also notes (Part I (B)(14)) that immigration judges must avoid creating an appearance of violating the law or ethical standards:

EOIR Judges shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.⁶⁷

The Code of Federal Regulations further addresses an Executive Branch employee’s responsibilities and conduct, requiring that “[a]n employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or *other conduct prejudicial to the government.*”⁶⁸

Further, although the ABA Code of Judicial Conduct is not binding on IJs, it serves as guidance for their conduct.⁶⁹ Canon 2A provides: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁷⁰ Similarly, Canon 3B states in pertinent part:

⁶⁵ 5 C.F.R. §§ 2635.101 - 2635.107.

⁶⁶ This provision is a restatement as it applies to IJs of the general principle dealing with impartiality in the Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. §2635.101(8), which provides that “[e]mployees shall act impartially.”

⁶⁷ See also 5 C.F.R. § 2635.101(b)(14).

⁶⁸ 5 C.F.R. § 735.203 (emphasis added).

⁶⁹ See *Ethics Manual* at 1 (“The Model Code of Judicial Conduct is not binding on EOIR Judges, but its canons and commentary present aspirational goals.”).

⁷⁰ Also relevant is the Commentary to Canon 2A, which provides: “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny.”

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice⁷¹

Both federal and state court decisions have interpreted and applied the Canons in judicial settings. For example, courts have recognized that judges must be allowed to exercise their powers to control the pace and scope of a hearing and that a judge must be permitted to vigorously question a party.⁷² On the other hand, courts have consistently held that judges must treat parties and counsel with courtesy and respect.⁷³ Further, courts have uniformly recognized that “judges must not only be scrupulously fair in the administration of justice, but also foster an aura of fairness.”⁷⁴

III. DISCUSSION

Based upon the results of our investigation, we concluded that IJ [redacted] engaged in professional misconduct by acting in reckless disregard of [redacted] obligation to appear fair and impartial in the administration of justice during the hearings in [redacted] and [redacted]. Our conclusion is based upon IJ [redacted]

[redacted]

⁷¹ The Commentary to Canon 3(B)(5) cautions that “[a] judge must be alert to avoid behavior that may be perceived as prejudicial.”

⁷² See, e.g., *Kuciamba v. INS*, 92 F.3d 496, 502 (7th Cir. 1996).

⁷³ See, e.g., *United States v. Whitman*, 209 F.3d 619, 625 (6th Cir. 2000).

⁷⁴ *United States v. Brooks*, 145 F.3d 446, 458 (1st Cir. 1998).

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

CONCLUSION

Based upon the results of our investigation, we concluded that IJ [redacted] engaged in professional misconduct when [redacted] acted in reckless disregard of [redacted] obligation to appear fair and impartial in the administration of justice during the hearings in [redacted] and [redacted]