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# DEPARTMENT OF JUSTICE



## OFFICE OF PROFESSIONAL RESPONSIBILITY

### REPORT

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

March 29, 2010

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**INTRODUCTION AND SUMMARY**

This Office learned of a (b)(6) (b)(7)(C) opinion by the United States Court of Appeals for the (b)(6) (b)(7)(C) Circuit (b)(6) (b)(7)(C) in which the court criticized Immigration Judge (IJ) (b)(6) (b)(7)(C) for basing an adverse credibility finding on improper speculation and conjecture concerning the respondent's

(b)(6) (b)(7)(C). The court noted that IJ (b)(6) (b)(7)(C) criticized the respondent's (b)(6) (b)(7)(C) (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C).<sup>1</sup> The court also criticized IJ (b)(6) (b)(7)(C) for imposing a (b)(6) (b)(7)(C) as the basis for

(b)(6) (b)(7)(C) adverse credibility finding.<sup>2</sup> The court concluded that IJ (b)(6) (b)(7)(C) adverse credibility determination was not supported by substantial evidence. The court also noted that the Board of Immigration Appeals (BIA) affirmed (b)(6) (b)(7)(C) decision by concluding that the credibility determination was not clearly erroneous.<sup>3</sup>

We initiated an investigation. During the course of our investigation, we reviewed the Record of Proceeding, the tapes of the hearings, and a written response from IJ (b)(6) (b)(7)(C). We subsequently learned that (b)(6) (b)(7)(C)

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

Based upon the results of our investigation, we concluded that IJ (b)(6) (b)(7)(C) did not engage in professional misconduct or exercise poor judgment when (b)(6) (b)(7)(C) questioned (b)(6) (b)(7)(C) about (b)(6) (b)(7)(C). We further concluded that IJ (b)(6) (b)(7)(C) made a mistake when (b)(6) (b)(7)(C) based (b)(6) (b)(7)(C) adverse credibility determination, in part, on conjecture about the respondent's (b)(6) (b)(7)(C)

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

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

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

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

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

**I. STATEMENT OF FACTS**

**A.** [redacted]

[redacted] was a native and citizen of [redacted]. In 2001, [redacted] entered the United States on a tourist visa. [redacted] later applied for asylum and withholding of removal on the grounds of [redacted]. [redacted] claimed to be a [redacted].

[redacted]

In [redacted] appeared before IJ [redacted] for the first of two merits hearings with counsel [redacted]. At the start of the hearing, IJ [redacted] asked [redacted] counsel why he had not submitted any background information about [redacted]. He said that he was unable to locate anything [redacted]. The DHS trial attorney also told the court that she was unable to find any information. While on the record, IJ [redacted] searched [redacted] immediately retrieved information about [redacted]. IJ [redacted] made the information part of the record.

[redacted] testified that [redacted] in 1999. [redacted] explained that [redacted] but later denied that [redacted].

[redacted]

[redacted]

[redacted]

<sup>5</sup> Transcript at 25.

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

(b)(6) (b)(7)(C) claimed that as a result of (b)(6) (b)(7)(C) activities the (b)(6) (b)(7)(C) police persecuted (b)(6) (b)(7) said that the local police beat and harassed (b)(6) (b)(7) and (b)(6) (b)(7)(C)

IJ (b)(6) (b)(7)(C) continued the hearing for eight weeks to enable (b)(6) (b)(7) to find evidence corroborating the (b)(6) (b)(7)(C) When the hearing reconvened on (b)(6) (b)(7)(C) did not provide any evidence concerning (b)(6) (b)(7)(C), including proof of (b)(6) (b)(7)(C) other than a declaration (b)(6) (b)(7)(C)

On several occasions during the hearing, IJ (b)(6) (b)(7)(C) voiced concerns about (b)(6) (b)(7)(C) testimony. Specifically, (b)(6) (b)(7) told (b)(6) (b)(7)(C) that (b)(6) (b)(7) testimony seemed to reflect a memorization of the declaration (b)(6) (b)(7) filed with (b)(6) (b)(7) asylum application:

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

**B. IJ (b)(6) (b)(7)(C) Decision**

In an oral decision immediately following the hearing, IJ (b)(6) (b)(7)(C) found (b)(6) (b)(7) incredible and denied (b)(6) (b)(7)(C) applications for relief. (b)(6) (b)(7) noted that (b)(6) (b)(7) failed to introduce any independent evidence that (b)(6) (b)(7)(C)

<sup>6</sup> *Id.* (b)(6) (b)(7)(C)

noted further that (b)(6) (b)(7)(C) found numerous references on (b)(6) (b)(7)(C) that the information was (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) (b)(6) (b)(7)(C) noted that when

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

IJ (b)(6) (b)(7)(C) questioned the authenticity of (b)(6) (b)(7)(C) documentary evidence. (b)(6) (b)(7)(C) noted that a (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) lacked a date indicating when the treatment occurred. IJ (b)(6) (b)(7)(C) also found that the declarations (b)(6) (b)(7)(C) submitted conflicted with (b)(6) (b)(7)(C) testimony concerning police brutality.

IJ (b)(6) (b)(7)(C) also observed that (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) "8 IJ (b)(6) (b)(7)(C) described (b)(6) (b)(7)(C) s testifying in a manner " (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) "9 (b)(6) (b)(7)(C) appearance and manner led IJ (b)(6) (b)(7)(C) to conclude:

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

IJ (b)(6) (b)(7)(C) also concluded that (b)(6) (b)(7)(C) description of the (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) #11

7 Oral Decision at 9.

8 Id. (b)(6) (b)(7)(C)

9 Id.

10 Id.

11 Id. (b)(6) (b)(7)(C)

Lastly, IJ (b)(6) (b)(7)(C) recounted (b)(6) (b)(7) inability to answer " (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) "12 (b)(6) (b)(7)(C) also noted (b)(6) (b)(7)(C) inability (b)(6) (b)(7)(C) (b)(6) (b)(7)(C)

**C. Appeal to the BIA**

(b)(6) (b)(7)(C) appealed IJ (b)(6) (b)(7)(C) decision to the BIA. On appeal, (b)(6) (b)(7)(C) contended that (b)(6) (b)(7)(C) provided sufficient documentary evidence regarding (b)(6) (b)(7)(C) and that (b)(6) (b)(7)(C) testified in a consistent manner. (b)(6) (b)(7)(C) also argued that IJ (b)(6) (b)(7)(C) based (b)(6) (b)(7)(C) adverse credibility determination on conjecture and assumption:

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

In an (b)(6) (b)(7)(C) single-member decision (authored by BIA Member (b)(6) (b)(7)(C)), the BIA affirmed IJ (b)(6) (b)(7)(C) denial of relief. The BIA concurred with (b)(6) (b)(7)(C) adverse credibility finding and noted (b)(6) (b)(7)(C) failure to produce any independent evidence corroborating (b)(6) (b)(7)(C) evidence corroborating the details of the alleged attacks by the police. In particular, the BIA noted that (b)(6) (b)(7)(C) had depicted certain fellow (b)(6) (b)(7)(C) of being abused by the police. Yet, none of the individuals named by (b)(6) (b)(7)(C) made any reference in their declarations to having been victims of police brutality. The BIA

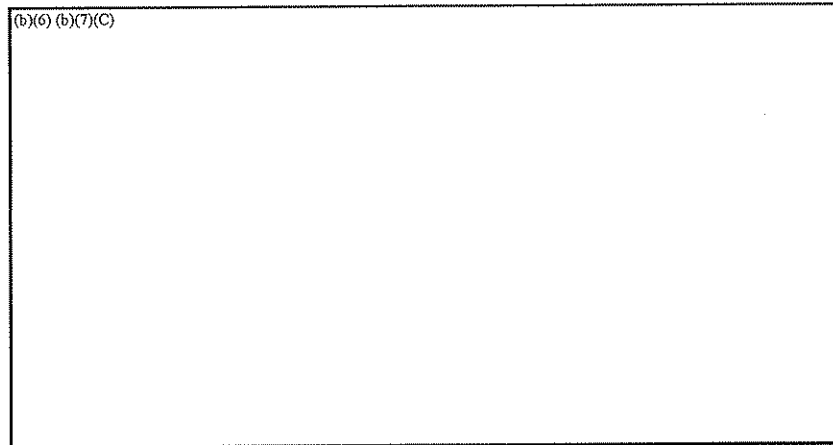
<sup>12</sup> *Id.* (b)(6) (b)(7)(C)

<sup>13</sup> Brief in Support of Appeal from Decision of the Office of the Immigration Judge at 10 (internal citations omitted).

also cited to IJ (b)(6) (b)(7)(C) repeated concern that (b)(6) (b)(7)(C) as (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) 14

**D. Appeal to the (b)(6) (b)(7)(C) circuit**

(b)(6) (b)(7)(C) appealed the BIA's decision to the United States Court of Appeals for the (b)(6) (b)(7)(C) Circuit. In a (b)(6) (b)(7)(C) decision remanding the case to the BIA, the (b)(6) (b)(7)(C) Circuit found that IJ (b)(6) (b)(7)(C) based (b)(6) (b)(7)(C) adverse credibility determination on speculation and conjecture and stated that (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) 15 In particular, the court criticized IJ (b)(6) (b)(7)(C) for referencing (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) as somehow contradicting (b)(6) (b)(7)(C) testimony about what attracted (b)(6) (b)(7)(C) to (b)(6) (b)(7)(C)



The court also criticized IJ (b)(6) (b)(7)(C) for belittling (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) when (b)(6) (b)(7)(C) commented " (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) that (b)(6) (b)(7)(C) claimed attracted (b)(6) (b)(7)(C) to (b)(6) (b)(7)(C) 17 The court took issue with IJ (b)(6) (b)(7)(C) faulting (b)(6) (b)(7)(C) for not knowing what (b)(6) (b)(7)(C)

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

15 (b)(6) (b)(7)(C)  
16  
17

(b)(6) (b)(7)(C) <sup>18</sup> The court noted that although “(b)(6) (b)(7)(C)

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

The court also criticized IJ (b)(6) (b)(7)(C) for imposing the unnecessary requirement of corroborating evidence. The court noted that corroborating evidence is appropriate when an IJ “(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) <sup>20</sup> As such, the court concluded that IJ (b)(6) (b)(7)(C) credibility determination “(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) <sup>21</sup>

In remanding the case to the BIA, the court concluded that “[ (b)(6) (b)(7)(C)

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

## II. OPR INVESTIGATION

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

IJ (b)(6) (b)(7)(C) became an immigration judge in (b)(6) (b)(7)(C) Prior to becoming an IJ,

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

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<sup>18</sup> *Id.* (b)(6) (b)(7)(C)

<sup>19</sup> *Id.* (citation omitted).

<sup>20</sup> *Id.* (internal quotations and citation omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (internal quotations omitted).



(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)

### **III. 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.

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,

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

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.<sup>37</sup> Unlike an Article III judge, an IJ is not merely the fact finder and adjudicator, but he or she also has an obligation to establish and develop the record.<sup>38</sup> At the same time, as a judicial officer, an IJ 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.<sup>39</sup> It is equally clear that due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.<sup>40</sup> Accordingly, as quasi-judicial officers presiding over deportation proceedings, IJs must act impartially.<sup>41</sup> An IJ must

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<sup>37</sup> See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903)).

<sup>38</sup> See *Qun Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002).

<sup>39</sup> See *Rivera v. Ashcroft*, 387 F.3d 835 (9<sup>th</sup> Cir. 2004), as amended by 394 F.3d 1129 (9<sup>th</sup> 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 (3d Cir. 2005).

<sup>40</sup> *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)).

<sup>41</sup> See *Reno v. Flores*, 507 U.S. 292, 308 (1993) ("[An] immigration judge is a quasi-judicial officer.") (citing 8 C.F.R. § 3.10); *Felzcerk v. INS*, 75 F.3d 112, 117 (2d Cir. 1996) (a deportation  
(continued...))

also display the patience and dignity befitting a person privileged to exercise judicial authority.<sup>42</sup> Furthermore, behavior by an immigration judge such as intemperate remarks or conduct that exhibits a predisposition to discredit an alien's testimony "cannot be considered objective or impartial."<sup>43</sup>

## 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."<sup>44</sup>

The *Ethics Manual* specifically refers immigration judges to the Standards of Ethical Conduct for Employees of the Executive Branch.<sup>45</sup> 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."<sup>46</sup> 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

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<sup>41</sup>(...continued)  
hearing in immigration court is a quasi-judicial proceeding).

<sup>42</sup> *Giday v. Gonzales*, 434 F.3d 543, 550 (7<sup>th</sup> Cir. 2006).

<sup>43</sup> *Garrovillas v. INS*, 156 F.3d 1010, 1015 (9<sup>th</sup> Cir. 1998); see also *Smolniakova v. Gonzales*, 422 F.3d 1037, 1044 (9<sup>th</sup> Cir. 2005) (IJ's efforts to discredit alien indicated appearance of bias); *Sukwanputra v. Attorney General of the United States*, 434 F.3d 627 (3d Cir. 2006) (intemperate remarks by IJ gave rise to appearance of bias and partiality).

<sup>44</sup> Memorandum from Kevin Rooney to All Board Members, Immigration Judges, and Administrative Law Judges (April 2001) (emphasis added).

<sup>45</sup> 5 C.F.R. §§ 2635.101 - 2635.107.

<sup>46</sup> 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."

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.<sup>47</sup>

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.*"<sup>48</sup>

Further, although the ABA Code of Judicial Conduct is not binding on IJs, it serves as guidance for their conduct.<sup>49</sup> 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."<sup>50</sup> Similarly, Canon 3B states in pertinent part:

(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 prejudice . . . .<sup>51</sup>

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.<sup>52</sup> On the other hand, courts have consistently held that judges must treat parties and counsel

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<sup>47</sup> See also 5 C.F.R. § 2635.101(b)(14).

<sup>48</sup> 5 C.F.R. § 735.203 (emphasis added).

<sup>49</sup> 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.").

<sup>50</sup> 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."

<sup>51</sup> The Commentary to Canon 3(B)(5) cautions that "[a] judge must be alert to avoid behavior that may be perceived as prejudicial."

<sup>52</sup> See, e.g., *Kuciemba v. INS*, 92 F.3d 496, 502 (7<sup>th</sup> Cir. 1996).

with courtesy and respect.<sup>53</sup> 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.”<sup>54</sup>

### 3. The Immigration and Nationality Act

In addition to regulations concerning the general conduct of IJs, the Immigration and Nationality Act (INA) addresses removal hearings. For purposes of the instant case, we found that 8 U.S.C. § 1158(b)(1)(B)(iii), which pertains to credibility determinations, to be relevant:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record[.]

In addition, 8 U.S.C. § 1158(b)(1)(B)(ii) also provides when an applicant is expected to provide corroborating evidence:

The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant’s burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence

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<sup>53</sup> See, e.g., *United States v. Whitman*, 209 F.3d 619, 625 (6<sup>th</sup> Cir. 2000).

<sup>54</sup> *United States v. Brooks*, 145 F.3d 446, 458 (1<sup>st</sup> Cir. 1998).



must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

#### IV. DISCUSSION

Based upon the results of our investigation, we concluded that IJ [redacted] did not engage in professional misconduct or exercise poor judgment when [redacted] questioned [redacted]. We concluded further that IJ [redacted] made a mistake when [redacted] based [redacted] adverse credibility determination, in part, on conjecture about [redacted].

[redacted]

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<sup>55</sup> [redacted]

<sup>56</sup> *See, e.g.*, [redacted]

<sup>57</sup> *Id.* [redacted]

<sup>58</sup> *See* [redacted]

(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 (b)(6) (b)(7)(C) did not engage in professional misconduct or exercise poor judgment when (b)(6) (b)(7)(C) when (b)(6) (b)(7) questioned (b)(6) (b)(7)(C) about (b)(6) (b)(7)(C). We further concluded that IJ (b)(6) (b)(7)(C) made a mistake when (b)(6) (b)(7) based (b)(6) (b)(7)(C) adverse credibility determination, in part, on conjecture about (b)(6) (b)(7)(C). Rather, we concluded that (b)(6) (b)(7)(C) committed a mistake in making those remarks.

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