U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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MITCHELL ZWAIK, ESQUIRE
3900 Veterans Memorial Hwy. Suite 120
Bohemia, NY 11716-0000

Office of the District Counsel/NYC
26 Federal Plaza, Room 1130
New York, NY 10278

Name:

Date of this notice: 10/8/2008

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:
Malphrus, Garry D.

File: - New York, NY Date: OCT - 8 2008

In re:

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mitchell Zwaik, Esquire

APPLICATION: Asylum; withholding of removal

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated December 8, 2006, which denied the respondent's application for asylum and withholding of removal as well as his request for protection under the Convention Against Torture. The Department of Homeland Security ("DHS") has not responded to the appeal. The record will be remanded.

On appeal, the respondent argues that the Immigration Judge erred in finding that the standards set forth in the REAL ID Act were applicable to his asylum claim.[1] The Immigration Judge failed to provide any analysis for her determination that the REAL ID Act applies to the respondent's claim. Notably, although the respondent filed an asylum application with the Immigration Judge on October 26, 2006, more than a decade after he entered the United States, the Immigration Judge did not find that the respondent's asylum application was time-barred. *See generally* section 208(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(B). Apparently, the respondent had previously filed an asylum application with the asylum office. However, the record of proceedings does not contain a copy of the respondent's initial asylum application. *See* Tr. at 19-20. We observe that the initial filing date of an asylum application, whether before the asylum office or the Immigration Judge, determines both the timeliness of the application and whether or not the application will be adjudicated under the relevant provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42, 44-45 (BIA 2006). It is unclear why the Immigration Judge implicitly found the respondent's asylum application to have been timely filed, presumably based on the initial filing of an application before the asylum office being within one year of his entry into the United States and many years before the REAL ID Act's effective date, but then adjudicated the respondent's asylum application under the standards articulated by the REAL ID Act. *See* I.J. at 8.

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[1] Relevant provisions of the REAL ID Act apply to asylum applications filed on or after May 11, 2005. *See* section 101(h)(2) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 231, 305 (codified in various sections of 8 U.S.C.).

The Immigration Judge denied the respondent's application for asylum and withholding of removal based on his failure to meet the credibility and corroboration standards of the REAL ID Act. We note that the REAL ID Act's credibility provisions are materially distinguishable from the credibility standards articulated by the United States Court of Appeals for the Second Circuit. *See, e.g., Xiu Xia Lin v. Mukasey*, 534 F.3d 162 (2d Cir. 2008). As the Immigration Judge adjudicated the respondent's application under the REAL ID Act, without adequately addressing how the REAL ID Act applied to the respondent's case, we are unable to meaningfully exercise our responsibility of providing appellate review of the Immigration Judge's adjudication of the respondent's application for asylum and withholding of removal. *See generally Matter of A-P-*, 22 I&N Dec. 468, 477 (BIA 1999) (stating that the Immigration Judge is "responsible for the substantive completeness of the decision"); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (holding that pursuant to regulatory provisions, the Board will not engage in de novo review of findings of fact determined by an Immigration Judge, thereby increasing the need for Immigration Judges to include in their decisions clear and complete findings and analysis that are in compliance with controlling law).

In light of the foregoing, we find it necessary to remand the record to the Immigration Judge for issuance of an appropriate decision, including any necessary findings of fact regarding the date that the respondent initially filed his asylum application. If applicable, the Immigration Judge's new decision should also include a thorough analysis of the respondent's credibility and the sufficiency of his corroborating evidence under pre-REAL ID Act standards. As we are remanding the record to the Immigration Judge, we presently find it unnecessary to address the respondent's remaining appellate arguments. Accordingly, the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD