UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MUSTAFA TANIN, Petitioner, v. JEFFERSON SESSIONS, JR., United States Attorney General, Respondent.	**PETITION FOR REVIEW** DHS File No.: A206-317-913—Las Vegas, Nevada **DETAINED**

Mustafa Tanin, through his attorneys, hereby petitions the Court for review of the Final Order of Removal entered against him by the Immigration Judge on June 9, 2017.

A copy of the BIA Order is attached. Mr. Tanin is detained. Mr. Tanin has not moved the BIA to reopen and has not applied for adjustment of status. *See* Circuit Rule 15-4. No court has reviewed the sufficiency of this Order.

DATED: June 26, 2017.

STOEL RIVES LLP

Brenda K. Baumgart

BRENDA K. BAUMGART, OSB No. 992160
brenda.baumgart@stoel.com
JEREMY D. SACKS, OSB No. 994262
jeremy.sacks@stoel.com
Telephone: 503.224.3380

Attorneys for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing **PETITION FOR REVIEW** on June 26, 2017 by mailing the original thereof by first-class mail via the U.S. Postal Service to:

Jefferson Sessions, Jr.
U.S. Attorney General
United States Department of Justice
950 Pennsylvania Avenue Room B-103
Washington, D.C. 20530-0001

Office of Immigration Litigation
US Department of Justice
PO BOX 878, Ben Franklin Station
Washington DC 20044

Elizabeth Godfrey
Field Office Director
Immigration & Customs Enforcement
4310 SW Macadam Avenue
Portland OR 97239

DATED: June 26, 2017.

STOEL RIVES LLP

Brenda K. Baumgart

BRENDA K. BAUMGART (SB #992160)
JEREMY D. SACKS (SB #994262)
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, Oregon 97205
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Appellant

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A206 317 913 – Las Vegas, NV

Date: JUN - 9 2017

In re: MUSTAFA TANIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Nicole Wells
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case was last before us on October 27, 2016, when we affirmed the Immigration Judge's determination that the respondent did not establish that he suffered past persecution on account of a protected ground enumerated in the Act, but remanded the record for further proceedings to determine whether the respondent could establish that he had a well-founded fear of persecution on account of a protected ground enumerated in the Act. In a March 2, 2017, decision, the Immigration Judge denied the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").[1] *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c), 1208.18. The respondent has appealed that decision.[2] The Department of Homeland Security submitted a motion for summary affirmance. The appeal will be dismissed.

We review findings of fact determined by the Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

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[1] All references to the Immigration Judge's decision shall relate to the March 2, 2017, decision unless otherwise indicated. References to "Tr.1" shall relate to the transcript from the March 21, 2016, hearing. References to "Tr.2" shall related to the transcript from the February 7, 2017, hearing.

[2] The respondent has submitted new evidence on appeal, including country conditions evidence, a 2015 letter from the Hazara People International Network, photographs, and information regarding the Military Penal Code of Afghanistan. However, as an appellate body, it is the Board's role to review the record as it existed before the Immigration Judge and not to consider new evidence in the first instance. Insofar as we construe the submission of evidence as a motion to remand, the respondent has not explained how this evidence was previously unavailable. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); 8 C.F.R. § 1003.23(b)(3). Thus, we decline to consider the evidence submitted by the respondent on appeal.

The respondent, a native and citizen of Afghanistan, claims that he will be persecuted on account of his Shia Muslim religion, Hazara ethnicity, membership in the National Unity Party ("NUP"), role with the Afghan military, and his status as a deserter from the Afghan military (I.J. at 2-4; Tr.1 at 39-64, Tr.2 at 17-40; Exh. 4 (Form I-589) at 5). We agree with the Immigration Judge that the respondent has not established eligibility for relief or protection from removal (I.J. at 6-14).

On appeal, the respondent argues that the Immigration Judge erred in finding him not credible (Resp. Brief at 12-15, 18-20). However, the respondent has not shown that the Immigration Judge's adverse credibility finding was clearly erroneous, and therefore we will uphold it on appeal (I.J. at 6-8). *See* 8 C.F.R. § 1003.1(d)(3)(i). The Immigration Judge identified a significant omission from the respondent's asylum application and testimony at his March 21, 2016, hearing as compared to his testimony at his February 7, 2017, hearing (I.J. at 6-8). Specifically, the respondent testified at his February 7, 2017, hearing about being knocked unconscious and burned on his back with a hot iron after leaving the NUP offices in 2009 (I.J. at 7; Tr.2 at 24-29, 34). However, this attack was not included in the respondent's asylum application or mentioned during his March 21, 2016, hearing (I.J. at 7; Tr.1 at 39-52).

We acknowledge that not all omissions support an adverse credibility finding. However, the omission relied upon by the Immigration Judge is not a minor detail or a tangentially related fact, but one of two incidents of alleged physical harm suffered by the respondent in Afghanistan and the basis for why the respondent fears future persecution on account of his political opinion (I.J. at 7-8). *See Silva-Pereira v. Lynch*, 827 F.3d 1176, 1185 (9th Cir. 2016) ("[A]n adverse credibility determination may be supported by omissions that are not 'details,' but new allegations that tell a 'much different—and more compelling—story of persecution than [the] initial application.'") (internal citation omitted). Based on the evidence in the record, the Immigration Judge reasonably found unpersuasive the respondent's explanation that he did not reveal the alleged attack in his asylum application or at his prior hearing because he did not have an attorney and was under a lot of stress (I.J. at 7-7; Tr.2 at 24-35). *See Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (explaining that an Immigration Judge is not required to accept an alien's account where other plausible views of the evidence are supported by the record).

Moreover, the respondent has not presented any corroborating evidence to support his claim that he was part of the NUP or that he was attacked because of his work with the NUP (I.J. at 8). *Id.* at 1186-87 (upholding adverse credibility finding based in part on lack of corroborating evidence). The Immigration Judge reasonably rejected the respondent's argument that he could not obtain corroborating evidence given that the respondent was in communication with his sister in Canada, he was able to obtain letters from his family regarding his brother's kidnapping in Afghanistan, and he had an extended amount of time to obtain additional documentary evidence (Resp. Brief at 13-14; I.J. decision dated June 16, 2016, at 15-16; Exh. 7). *Id.* Accordingly, we will uphold the Immigration Judge's adverse credibility finding.

Even assuming the respondent credible, we will uphold the Immigration Judge's alternative determination that the respondent did not establish eligibility for relief from removal on the merits of his claim (I.J. at 9-14). With regard to the respondent's fear of persecution on account of his political opinion, we note that the respondent was allegedly last harmed because of his support for

the NUP in 2009 (I.J. at 10; Tr.2 at 34-35). The respondent did not present any evidence or argument that he was harmed or threatened because of his support for the NUP between 2009 and when he left Afghanistan in 2015. *See Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (acknowledging that a "post-threat harmless period" in the country of alleged persecution is "relevant" to whether an applicant's fear is objectively reasonable).

With regard to the respondent's fear of persecution on account of his religion and ethnicity, we acknowledge the country reports indicating that Shia Muslims and the Hazara people are minority groups in Afghanistan subjected to societal abuses and discrimination (I.J. at 11-12; Tr.2 at 18-25, 29-31, 39-40; Exhs. 6-9). However, the respondent has not presented any evidence that his family living in Afghanistan, including his parents and siblings who are also Shia Muslims and of the Hazara ethnicity, have ever been harmed or threatened on account of their religion or ethnicity (I.J. at 4, 13; Tr.2 at 17-18, 29-32). *See Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (explaining that a claim of future persecution is weakened when similarly-situated individuals continue to live in the country without harm).

On appeal, the respondent argues that he will be persecuted by the Taliban because of his ties to the Afghan military (Resp. Brief at 18; Tr.2 at 19-21, 35-36). However, the Immigration Judge correctly determined that persecution resulting from membership in the police or military is insufficient to establish persecution on account of a protected ground enumerated in the Act (I.J. at 9-10). *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000); *see generally Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988). Additionally, we agree with the Immigration Judge that the respondent has not submitted sufficient evidence to demonstrate that his desertion from the Afghan military would qualify him for asylum (I.J. at 9-10). *See Barraza Rivera v. INS*, 913 F.2d 1443, 1450 (9th Cir. 1990) ("Requiring military service and punishing deserters does not, per se, constitute persecution."); *see generally Matter of A-G-*, 19 I&N Dec. 502 (BIA 1987) (describing the "rare cases" where failure to serve in the military may qualify an alien for asylum).

In addition, the respondent asserts, for the first time on appeal, that he will be persecuted by the Taliban because he worked as an English translator on behalf of the United States government (Resp. Brief at 18). He explains that he did not mention this fact in his asylum application because he feared the "wrong people" would get ahold of this "sensitive information" (Resp. Brief at 18). We note that the respondent had not just one, but two individual hearings where he could have presented this claim (Tr.1 at 39-64, Tr.2 at 17-40). Moreover, the respondent was represented by counsel during his second individual hearing (Tr.2 at 12). Based on the circumstances of this case, we are unpersuaded by the respondent's explanation for why he did not present this claim before the Immigration Judge, and we decline to remand or address this claim in the first instance on appeal. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (recognizing that it is inappropriate for us to consider an issue raised for the first time on appeal); *Matter of Jimenez-Santillano*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (holding that an issue not raised before the Immigration Judge was not properly before us); *Matter of Edwards*, 20 I&N Dec. 191, 196 n.4 (BIA 1990).

For the foregoing reasons, we will affirm the Immigration Judge's determination that the respondent is not eligible for asylum (I.J. at 6-13). It necessarily follows that he did not meet the

higher burden to demonstrate eligibility for withholding of removal (I.J. at 13). *See Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006).[3]

We will also affirm the Immigration Judge's denial of CAT protection (I.J. at 14). The respondent has not established error in the Immigration Judge's determination that the record fails to demonstrate that it is more likely than not he will be tortured by or at the instigation of or with consent or acquiescence (including "willful blindness") of a public official (I.J. at 14; Resp. Brief at 19-20). *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (explaining that to be eligible for protection under the CAT, the applicant must establish each step in the hypothetical chain of events is more likely than not to happen).

Finally, the respondent asserts on appeal that he is eligible for a change in custody status (Resp. Brief at 12-13, 20). Bond proceedings are separate and apart from removal proceedings, and any issue in this regard would have to be raised in separate bond proceedings. 8 C.F.R. § 1003.19(d); *see also Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977). Thus, we declined to address the respondent's request for a change in custody status.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[3] Neither the Immigration Judge's denial of relief, nor our affirmance of that decision here today, relies on the fact that a protected ground will not be a central enough motivation for the harm feared by the respondent. Thus, we conclude that the respondent does not qualify for withholding of removal under the broader nexus standard discussed in *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017).

No. not yet assigned

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUSTAFA TANIN,

Petitioner,

v.

JEFFERSON SESSIONS, Jr., Unites States Attorney General,

Respondent.

PETITIONER'S MOTION FOR STAY OF REMOVAL

DETAINED

Petitioner, Mustafa Tanin, moves for an order staying his removal while his petition for review, concurrently filed, is pending. The motion for a stay of removal should be granted because the petitioner is likely to succeed on the merits, he will be irreparably injured absent a stay, the Respondent will not be substantially injured, and the public interest favors a stay.

Petitioner, who is detained presently, was transferred on Friday, June 23, 2017, from the Northern Oregon Corrections Facility ("NORCOR") in The Dalles, Oregon, to the Northwest Detention Center ("NCD") in Tacoma, Washington. Petitioner requests 14-days from the date of this filing to supplement this motion. In a supplemental filing he will outline the reasons why the Court should grant his motion along with the supporting evidence. The petitioner seeks 14-days to supplement this motion with additional argument and supporting evidence.

DATED: June 26, 2017

Respectfully submitted,

STOEL RIVES LLP

By: *Brenda K. Baumgart*

BRENDA K. BAUMGART (SB #992160)
JEREMY D. SACKS (SB #994262)
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, Oregon 97205
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing **PETITIONER'S MOTION FOR STAY OF REMOVAL** on June 26, 2017 by mailing the original thereof by first-class mail via the U.S. Postal Service to:

Jefferson Sessions, Jr.
U.S. Attorney General
United States Department of Justice
950 Pennsylvania Avenue,
Room B-103
Washington DC 20530-0001

Office of Immigration Litigation
US Department of Justice
PO BOX 878, Ben Franklin Station
Washington DC 20044

Elizabeth Godfrey
Field Office Director
Immigration & Customs Enforcement
4310 SW Macadam Avenue
Portland OR 97239

DATED: June 26, 2017.

STOEL RIVES LLP

Brenda K. Baumgart

BRENDA K. BAUMGART (SB #992160)
JEREMY D. SACKS (SB #994262)
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, Oregon 97205
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Petitioner