UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
FAUZIYA KASINGA,	)	A73 476 695
Applicant	)	

RESPONDENT'S REPLY TO GOVERNMENT'S RESPONSE OF MARCH 27, 1996

Prof. Karen Musalo
International Human Rights Clinic
Washington College of Law
American University
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016-8184

Attorney for Applicant

INTRODUCTION

Counsel for the Immigration and Naturalization Service (INS) submitted to the Board of Immigration Appeals a page and a half Response (hereinafter "Second Response") to the Applicant's Reply Brief. The INS' Response was dated March 27, 1996. In its Second Response the INS asserts "that the Board cannot consider new evidence on appeal." (emphasis in original). This legal memorandum is submitted to address the narrow issue of whether the Board can accept and consider new evidence on appeal.

LEGAL MEMORANDUM

Although the INS asserts that the Board "cannot" accept new evidence on appeal, it cites no authority whatsoever for this proposition. Instead, the INS cites authority for the principle that the record the Board reviews on appeal is the record before the immigration judge. The INS cites to *Matter of Haim*, 19 I & N 641 (1988) and *Matter of C-*, Interim Dec. 3180 (1992) for this proposition.

Although the general rule articulated in *Matter of Haim* and *Matter of C-* is not in dispute, neither is it dispositive on the issue of the Board's *authority* to accept and consider new evidence on appeal. A rule which reiterates the obvious, i.e., that the Board reviews the record before the immigration judge, is not necessarily inconsistent with the principle that the Board maintains authority to *accept and consider* new evidence under the appropriate circumstances.

There is legal authority which clearly and unequivocally supports the proposition that the Board has such authority. Applicant's opening Brief cited to one such case, *Hazzard v. INS*, 951

F.2d 435 (1st Cir. 1991)[1]. In *Hazzard*, the First Circuit ruled that the Board has full power to determine factual issues and "may consider new evidence not presented to the immigration judge." *Id.* at 40. In support of this principle, the court in *Hazzard* cited to Gordon & Mailman, IMMIGRATION LAW & PROCEDURE, section 3.05[5][b], as well as to a number of Board decisions. The proposition that the Board has the authority to accept and consider new evidence is so unremarkable that courts mention it in passing as an accepted norm. *See, e.g., Cortes-Castillo v. INS,* 997 F.2d 1199, 1200 (7th cir. 1993) (referring to the fact that in a 212(c) case the applicant submitted additional evidence with his appeal to the Board, including an affidavit from his employer regarding the applicant's moral character); *Goncalves v. INS,* 6 F.3d 830, 831 (1st Cir. 1993) (referring to the fact that the Board may "take evidence and decide issues de novo.")

The Board has accepted and considered evidence not submitted to the immigration judge in *Matter of Chang*, Int. Dec. 3107 (1989), *Matter of Reyes*, 16 I & N Dec. 475 (1978) and *Matter of S.S. Captain Demosthenes*, 13 I & N Dec. 345 (1969). In *Matter of Chang*, the respondent submitted a letter from the Library of Congress to the Board with his appeal. The Board accepted and considered this new evidence which addressed the issue of population control in the People's Republic of China. In *Matter of Reyes*, the Board accepted and considered new evidence from the petitioner, who was trying to establish that the beneficiary of his petition was his "child" within the meaning of the INA. The intended beneficiary had been born in the Dominican Republic. The evidence which the Board accepted included excerpts from the Dominican Republic's Civil Code, and an affidavit from a Dominican lawyer regarding the legal

[1] In her Brief to the Board, Counsel for the Applicant mistakenly cited *Hazzard v. INS* as having been decided in 1981, when in actuality it was decided in 1991.

interpretation of the code. The Board also accepted and considered new evidence in *Matter of S.S. Captain Demosthenes*. In that case the information accepted by the Board established that one of the crewmen who had made his way to shore was no longer in the United States, but had been apprehended and deported to Greece. In explaining its decision not to remand, the Board referred to the interest in avoiding administrative delay, and the fact that the authenticity of the information proferred had not been questioned. *Id.* at 348.

Although preferred practice at the Board is for the party seeking to present new evidence to make a motion to remand, or reopen, the Board has accepted and considered new evidence when there are legitimate reasons for doing so. The factors present in Applicant's case argue for the exercise of the Board's authority to accept new evidence rather than to remand. As detailed in the Applicant's Response Brief, Ms. Kasinga has been detained for more than a year and a half, under conditions which have been deleterious to her mental and physical health. Thus, there is a legitimate interest in avoiding delay.

Furthermore, the INS has failed to clearly articulate why the immigration judge, rather than the Board, is the more appropriate body to consider the new evidence at issue. The new evidence consists of the affidavit of expert witness Professor Emeritus Merrick Posnansky, and the affidavit of the Applicant. The INS has not challenged Professor Posnansky's credibility. Given that the Professor's credentials clearly establish his expertise, and that he explained the basis for his opinions in detail, it is not clear what purpose would be served by a remand. Under these circumstances the Board is just as competent as the immigration judge to determine what weight should be given to Professor Posnansky's opinions.

There is equally scant reason to remand the case to consider the affidavit of the Applicant. Ms. Kasinga's affidavit is consistent with her I-589 and her hearing testimony, and although it fleshes out the facts of her case, it does not add any new elements whatsoever. The affidavit was submitted for the sole purpose of making up for the poor quality of the transcript. It is significant that the immigration judge did not question Ms. Kasinga's credibility on the basis of her demeanor, or on the basis of internal inconsistencies in her testimony. He denied her credibility on the basis of his unschooled opinion that the story she told didn't make sense. Professor Posnansky's affidavit has explained that her story does make sense. Under these circumstances, it is difficult to see what legitimate purpose would be served by remanding the case to the immigration judge.

CONCLUSION

Legal authority clearly refutes the INS' bald assertion that the Board "cannot" accept and consider new evidence. The Board has the plenary power to do so, and has done so in limited circumstances. The nature of the evidence at issue, and the fact of the Applicant's lengthy and harsh detention make such an exercise of the Board's authority to be clearly in the interests of justice.

Dated: 4/23/96

Respectfully submitted,

Professor Karen Musalo
International Human Rights Clinic
American University
Washington College of Law

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 1996, I caused to be served the enclosed Respondent's Reply to Government's Response of March 27, 1996, by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid and causing the same to be mailed by certified first class mail to the persons at the addresses set forth below:

David M. Dixon
Chief Appellate Counsel
Immmigration & Natualization Service
5113 Leesburg Pike, Suite 309
Falls Church, VA 22041

David Martin
INS General Counsel
425 I Street, N.W.
Washington, D.C. 20536

I declare under penalty of perjury that the foregoing is true and correct.

Karen Musalo