U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] **A** [redacted]

Date of this notice: 12/16/2016

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:
Pauley, Roger
Wendtland, Linda S.
O'Herron, Margaret M

EllisM
Userteam: Docket

File: [redacted] – Aurora, CO

Date: DEC 16 2016

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Munmeeth Kaur Soni, Esquire

ON BEHALF OF DHS: Julie Laughlin
Associate Legal Advisor

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (conceded)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

In a decision dated May 19, 2015, an Immigration Judge denied the respondent's application for asylum under section 208(b) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b), withholding of removal pursuant to section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A), and protection under the Convention Against Torture ("CAT"), 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18. The respondent has appealed from that decision. The respondent has also submitted additional evidence on appeal, which we construe as a motion to remand.[1] The appeal will be sustained and the motion will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

In 2005, the respondent, who is a native and citizen of Bangladesh, became a member of the Bangladesh Nationalist Party ("BNP")—the main opposition political party in Bangladesh (I.J. at 4; Exhs. 3-4; Exh. 8 at 15, 22; Tr. at 29-31). As a member of the BNP, the respondent attended party meetings and marches, and, starting in 2014, helped to recruit new BNP members (I.J. at 4; Tr. at 29-31). The respondent claims that he was attacked by members of Bangladesh's ruling party, the Awami League ("AL"), on three occasions (I.J. at 6-9; Exh. 3 at 5; Tr. at 10, 22-40). Believing that he would suffer further harm at the hands of AL members, the respondent fled Bangladesh in September 2014 (I.J. at 6-9; Exhs. 3-4; Tr. at 10, 22-40).

On November 13, 2014, the respondent applied for admission at the port of entry in Hidalgo, Texas, and was not then in possession of a valid entry document (I.J. at 1; Exh. 1; Tr. at 10). The Department of Homeland Security ("DHS") commenced removal proceedings, charging the

[1] The respondent's fee waiver request is granted. *See* 8 C.F.R. § 1003.8(a)(3).

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respondent with being removable from the United States pursuant to section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant who lacked a valid immigrant visa or other entry document (I.J. at 1; Exh. 1; Tr. at 10). The respondent conceded his removability and requested asylum, withholding of removal, and protection under the CAT (I.J. at 1, 6-9; Exh. 1; Exh. 3 at 5; Tr. at 10, 22-40).

The Immigration Judge found the respondent to be credible but concluded that he was ineligible for asylum and withholding of removal due to his inadmissibility under section 212(a)(3)(B)(i)(VI) of the Act, 8 U.S.C. § 1182(a)(3)(B)(i)(VI), as a member of the BNP—which the Immigration Judge deemed to be an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act (I.J. at 3-6).[2] But for the respondent's inadmissibility under section 212(a)(3)(B) of the Act, the Immigration Judge would have granted the respondent's application for asylum under section 208(b) of the Act based on showings of past persecution and a well-founded fear of future persecution in Bangladesh on account of his political opinion (I.J. at 6-9; Exh. 3 at 5; Tr. at 10, 22-40).

The respondent appealed. While his appeal was pending, the respondent submitted additional evidence and requested that we take administrative notice of this evidence and remand the record to the Immigration Judge. The DHS filed its opposition to the appeal. The DHS additionally opposes the respondent's motion and argues that the additional evidence submitted on appeal does not warrant remand.[3]

II. ISSUES

To resolve whether the respondent's membership in the BNP renders him inadmissible under section 212(a)(3)(B)(i)(VI) and thus ineligible for relief we must first articulate a legal framework for determining when a political party, such as the BNP, "engages in . . . [terrorist] activities" within the meaning of section 212(a)(3)(B)(vi)(III) of the Act. Second, we must determine whether the BNP's alleged affiliations with recognized terrorist organizations under section 212(a)(3)(B)(vi) of the Act sufficiently establish that the BNP is itself a terrorist organization under this provision. Finally, we must decide whether the record in this case supports the Immigration Judge's conclusion that the respondent has not met his burden of proving that the terrorism bar is inapplicable.[4]

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[2] The Immigration Judge additionally concluded that the respondent did not meet his burden of establishing that he is eligible for deferral of removal under the CAT (I.J. at 9-10). *See* 8 C.F.R. §§ 1208.17, 1208.18.

[3] The Board requested supplemental briefing from the parties in this matter. We acknowledge and appreciate the helpful briefs submitted by the parties and amicus curia, Attorney Trina Realmuto.

[4] The DHS does not challenge on appeal the Immigration Judge's alternative ruling that he would grant the respondent's application for asylum but for the respondent's inadmissibility under section 212(a)(3)(B) of the Act (DHS Brief at 1-5), and we consider any issues in that regard to be waived. *See Matter of L-G-H-*, 26 I&N Dec. 365, 366 n.1 (BIA 2014).

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III. STANDARD OF REVIEW

Ultimately, whether a group, such as the BNP, falls within the definition of an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act is a legal issue we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii). We nevertheless review the Immigration Judge's findings of fact underlying this determination for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015) (holding that the Board "will accept the underlying factual findings of the Immigration Judge unless they are clearly erroneous, and . . . will review de novo whether the underlying facts found by the Immigration Judge . . . resolve any other legal issues that are raised").

IV. ANALYSIS

A. Undesignated Terrorist Organization

Generally under the Act, a group is designated as a "terrorist organization" either by the Secretary of State pursuant to section 219 of the Act, 8 U.S.C. § 1189, or by publishing the designation in the Federal Register after the Secretary determines, in consultation with the Attorney General or Secretary of Homeland Security, that the group engages in "terrorist activity."[5] *See* sections 212(a)(3)(B)(vi)(I), (II) of the Act. However, even if not so designated, a group may qualify as an undesignated "terrorist organization" if it is composed of "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in [terrorist] activities." Section 212(a)(3)(B)(vi)(III) of the Act. Nevertheless, even if an alien is a member of an undesignated terrorist organization he or she remains eligible to seek asylum and withholding of removal, if he or she can "demonstrate by clear and convincing evidence that [he or she] did not know, and should not reasonably have known, that the organization was a terrorist organization." Section 212(a)(3)(B)(i)(VI) of the Act.

Unlike with designated terrorist organizations under sections 212(a)(3)(B)(vi)(I) and (II), a determination regarding a group's status as an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act must be made on a case-by-case basis, in connection with an individual application for immigration benefits. *See* U.S. Citizenship and Immigration Servs., Dep't of Homeland Security, *Terrorism-Related Inadmissibility Grounds (TRIG)*, uscis.gov (follow "Laws" hyperlink; and then follow "Terrorism-Related Inadmissibility Grounds" hyperlink); *see also* Melanie Nezer, *The Material Support Problem: Where U.S. Anti-Terrorism*

(...continued)

[5] The term "terrorist activity" encompasses, among other things, "[a]n assassination," "[t]he use of any . . . explosive, firearm, or other weapon or dangerous weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property," and "a threat, attempt, or conspiracy to do any of the foregoing." Sections 212(a)(3)(B)(iii)(IV)-(VI) of the Act.

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Laws, Refugee Protection, and Foreign Policy Collide, 13 Brown J. World Aff. 177, 179 (2006). For this reason, any determination regarding the BNP's status as an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act is case-specific and must be based on the facts presented in each individual case.

Central to the Immigration Judge's decision to deny the respondent's application for asylum and withholding of removal were his determinations that: the respondent was a member of the BNP; the respondent was unable to show by a preponderance of the evidence that the BNP is not an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act; and he was unable to demonstrate by clear and convincing evidence that he did not know and should not reasonably have known about the BNP's terrorist nature (I.J. at 3-6). *See* sections 208(b)(2)(A)(v), 212(a)(3)(B)(i)(VI), 241(b)(3)(B) of the Act; 8 U.S.C. § 1208.16(d)(2), 1240.8(d).[6] The respondent's membership in the BNP at all relevant times is not in dispute. Moreover, it is also well-settled that the respondent's, or the BNP's, intentions to achieve a legitimate political objective are irrelevant to whether section 212(a)(3)(B) of the Act applies. *See, e.g.*, *Matter of S-K-* ("*Matter of S-K- I*"), 23 I&N Dec. 936, 940-41 (BIA 2006).[7] Nevertheless, we are unaware of any published decision from the Board or the Federal courts of appeals which has concluded that the BNP—a widely recognized and longstanding political party in a democratic political system—qualifies as an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act.

To determine whether the BNP is an undesignated terrorist organization, we must first ascertain whether the statutory language which sets forth the definition of an undesignated terrorist organization in section 212(a)(3)(B)(vi)(III) of the Act has a plain and unambiguous meaning. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). We make such a determination by referring "to the [statutory] language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997).

1. Group which Engages in Terrorist Activities

The Immigration Judge first found that the BNP is "a group . . . which engages in . . . [terrorist] activities" within the meaning of section 212(a)(3)(B)(vi)(III) of the Act because the record indicates that BNP members have committed violent acts which qualify as "terrorist activity" under section 212(a)(3)(B)(iii) of the Act (I.J. at 4-6). There is no clear error in the

[6] The Immigration Judge's decision did not explicitly rely on the material support bar under section 212(a)(3)(B)(iv)(VI)(dd) of the Act.

[7] This case was later remanded to the Board for further proceedings by the Attorney General in *Matter of S-K-* ("*Matter of S-K- II*"), 24 I&N Dec. 289 (A.G. 2007). Subsequent to remand, we held that *Matter of S-K- II* did not affect the precedential nature of the Board's conclusions in *Matter of S-K- I* regarding the applicability and interpretation of the material support provisions in section 212(a)(3)(B)(iv)(VI) of the Act. *Matter of S-K-* ("*Matter of S-K- III*"), 24 I&N Dec. 475 (BIA 2008).

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Immigration Judge's finding that BNP members have participated in violent conduct in Bangladesh (I.J. at 4-5; Exhs. 6-8). Nevertheless, even assuming that these acts qualify as "terrorist activity" within the meaning of section 212(a)(3)(B)(iii), that does not necessarily establish that the BNP is "a group . . . which engages in" such activity within the meaning of section 212(a)(3)(B)(vi)(III) of the Act.

The United States Court of Appeals for the Seventh Circuit has concluded that the phrase "a group . . . which engages in" terrorist activity under section 212(a)(3)(B)(vi)(III) of the Act is ambiguous because it remains unclear whether a group which contains some members who resort to terrorist acts, without the group's sanction, has "engage[d] in" terrorist activity. *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008). After reviewing cases relating to the constitutional right of free association and agency law, the court concluded that the phrase "engages in" terrorist activity under section 212(a)(3)(B)(vi)(III) of the Act necessarily requires an undesignated terrorist organization to authorize, ratify, or otherwise approve or condone terrorist activity committed by its individual members. *See id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930-32 (1982)).

We concur with the Seventh Circuit's reasoning and hold that the phrase "a group . . . which engages in" terrorist activity under section 212(a)(3)(B)(vi)(III) of the Act requires some evidence that a group authorizes, ratifies, or otherwise approves or condones terrorist activity committed by its members. *Id.* Absent such evidence, a political party such as the BNP cannot be deemed an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act. *Khan v. Holder*, 766 F.3d 689, 699 (7th Cir. 2014) ("An entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization.") (citing *Hussain v. Mukasey*, *supra*, at 538 (holding that "[a]n organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization")).

Evidence of authorization may be direct or circumstantial, and authorization may be reasonably inferred from, among other things, the fact that most of an organization's members commit terrorist activity or from the failure of a group's leadership to condemn or curtail its members' terrorist acts. *See Viegas v. Holder*, 699 F.3d 798, 802 (4th Cir. 2012) (stating that the DHS had met its initial burden of establishing that the terrorism bar may apply based on evidence that "most, if not all," of the factions in the Front for the Liberation of the Enclave of Cabinda, of which the alien was a member, "include military wings [that] engaged in violence"); *see also Hussain v. Mukasey*, *supra*, at 539 (finding that, where members of an organization to which an alien belonged "committed a number of acts of armed violence" against a rival group, and the group's leadership "did not criticize, or make efforts to curb, that violence[,] an inference that it was authorized is inescapable"). An Immigration Judge's finding that a group authorizes terrorist activity is subject to a clearly erroneous standard of review. *See, e.g.*, *Matter of G-K-*, 26 I&N Dec. 88, 97 (BIA 2013) (holding that determinations regarding an actor's motives, and the link between his or her motives and actions, are findings of fact which the Board reviews for clear error). Whether the Immigration Judge clearly erred in rendering his finding of such authorization in this particular case is addressed below.

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2. Affiliations with Terrorist Organizations

The Immigration Judge's determination that the BNP qualifies as an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act also rests on his determination that the BNP has affiliated with recognized terrorist organizations (I.J. at 4). While there is no clear error in the Immigration Judge's finding that the BNP has politically affiliated with such groups, we disagree with his legal determination that the BNP is itself a terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act as a consequence of these affiliations (I.J. at 4; Exh. 6 at 24-26, 35, 48-68).

The plain language of section 212(a)(3)(B)(vi)(III) of the Act does not provide that a group becomes an undesignated terrorist organization as a consequence of its "affiliation" with a terrorist organization, whether designated or undesignated. Further, the respondent contends that interpreting this provision to include groups who are merely affiliated with recognized terrorist organizations would run afoul of the presumption that Congress acts deliberately when it "includes particular language in one section of a statute but omits it in another section of the same Act." *E.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983). In support of this argument, the respondent asserts that section 212(a)(3)(B)(i) of the Act does not render an alien inadmissible as a consequence of his or her affiliation with a terrorist organization—at the very least, it requires an alien to be a "member" or a "representative" of such a group. *See* sections 212(a)(3)(B)(i)(IV), (V), (VI), (B)(v) of the Act.[8]

We observe that Congress outlined two separate grounds of inadmissibility under section 212(a)(3), not applicable here, which render an alien inadmissible if he or she is "affiliated" or "associated" with certain groups. *See* sections 212(a)(3)(D)(i), (F) of the Act (rendering inadmissible an alien "affiliated with the Communist or any other totalitarian party," or who is "associated with a terrorist organization" *and* who intends to engage in activity which could endanger the welfare, safety, or security of the United States, respectively). These provisions reflect that Congress knew how to render inadmissible certain aliens, or groups, affiliated with or associated with terrorist organizations, but it chose to exclude such a provision from section 212(a)(3)(B) of the Act.

Accordingly, the plain language of section 212(a)(3)(B) suggests that a group's mere affiliation with a terrorist organization, without more, will not bring it within the ambit of section 212(a)(3)(B)(vi)(III) of the Act. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (holding "that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"). Holding otherwise would lead to absurd results—namely, an alien who directly affiliates or associates with, but is not a member or representative of, a terrorist organization would not be inadmissible under section 212(a)(3)(B) of the Act, while an alien who indirectly associates with a terrorist organization, by

[8] Section 212(a)(3)(B)(v) of the Act defines a representative of a terrorist organization as "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity."

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way of his or her membership in a political party which, in turn, affiliates or associates with a terrorist organization, would be inadmissible. *See Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015) (holding that the Board may only deviate from the plain meaning of the statutory text when it is necessary "to avoid absurd results").

This point is significant because, while the language of section 212(a)(3)(B)(vi)(III) of the Act does not reach political parties that merely "affiliate" or "associate" with a terrorist organization, a party would clearly fall within the definition of an undesignated terrorist organization set forth under this provision if any "subgroup" of the party "engages in" terrorist activity. The Act does not define "subgroup," and case law does not illuminate the meaning of this term. We therefore consider legislative history to help discern its meaning. *See, e.g.*, *Matter of L-A-C-*, 26 I&N Dec. 516, 518 (BIA 2015) ("Where the statutory language is unclear, we consider legislative history to help discern congressional intent.").

Section 212(a)(3)(B)(vi)(III) was added to the Act in October 2001 by section 411(a)(1)(G) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 348 (effective Oct. 26, 2001). A report issued by the House Judiciary Committee regarding this provision indicates that it was intended to encompass "any group which has a *significant* subgroup that carries out [terrorist] activities." H.R. Rep. No. 107-236, pt. 1, at 63 (2001) (emphasis added). The Foreign Affairs Manual likewise provides that a subgroup relationship exists under section 212(a)(3)(B)(vi)(III) of the Act only "where there are reasonable grounds to believe that [a subgroup] is subordinate to, or affiliated with, [the larger group] *and* the [subgroup] is dependent on, or otherwise relies upon [the larger group] in whole or in part to support or maintain its operations." Vol. 9 Foreign Affairs Manual § 302.6-2(B)(3)(h) (CT:VISA-67 03-01-2016) (emphasis added).

We find this explication of the term "subgroup" to be persuasive. We therefore conclude that an alleged affiliation between a political party, such as the BNP, and a recognized terrorist organization is insufficient to establish that the party is itself an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act, unless it is shown that the party *significantly* affiliates with the terrorist organization such that the terrorist organization may be considered a "subgroup" of the party or vice versa. *See* H.R. Rep. No. 107-236, pt. 1, at 63. Evidence of significant affiliation, or a "subgroup" relationship, includes proof that a terrorist organization or party is subordinate to or is dependent on, or otherwise relies in whole or in part, on the terrorist organization or party to support or maintain its operations. *See* Vol. 9 Foreign Affairs Manual § 302.6-2(B)(3)(h). For example, under this definition a student or military wing of a political party may qualify as a "subgroup" within the meaning of section 212(a)(3)(B)(vi)(III) of the Act. *See Viegas v. Holder*, *supra* (finding that a group qualified as a terrorist organization because most members of its "military wings" engaged in terrorism).

B. Burden of Proof

Under this framework, factual determinations concerning authorization and significant affiliation will necessarily underlie any legal conclusion regarding the BNP's status as an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act. With respect

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to such factual determinations, the respondent bears the ultimate burden of proof, inasmuch as the "evidence indicates" that the terrorism bar to asylum under sections 208(b)(2)(A)(v), 212(a)(3)(B), and 241(b)(3)(B)(iv) of the Act "may apply." 8 C.F.R. § 1240.8(d); *see also Matter of S-K- I, supra*, at 939. Where there is sufficient evidence[9] to trigger the respondent's burden of proof under 8 C.F.R. § 1240.8(d), the respondent must rebut the bar's potential applicability by a "preponderance of the evidence."

However, to trigger the respondent's burden of proof under 8 C.F.R. § 1240.8(d), the relevant regulatory history reflects that the evidence presented must amount to "more than an allegation" that a mandatory bar to relief is applicable. Comments to Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11,300-01, 11,302 (proposed Apr. 6, 1988).[10] According to this history, the evidence presented must "*reasonably* indicate[] the presence of a basis for a mandatory denial" in order to prompt an alien to present rebuttal evidence under 8 C.F.R. § 1240.8(d). *Id.* (emphasis added) (rejecting the contention that "even a scintilla of evidence" is sufficient to trigger an alien's burden).

We therefore hold that the evidence as a whole must "reasonably indicate" that the bar to relief under section 212(a)(3)(B) of the Act may apply to trigger the respondent's burden under 8 C.F.R. § 1240.8(d) of rebutting the bar's potential applicability by a "preponderance of the evidence." If the respondent's burden is so triggered, then under the preponderance of the evidence standard, the respondent must demonstrate that it is "probably true" that the BNP is not an undesignated terrorist organization, where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989) (holding that in evaluating the evidence, "[t]ruth is to be determined not by the quantity of evidence alone but by its quality"). In the event he is unable to demonstrate by a preponderance of the evidence that the BNP is not "terrorist" in nature, the respondent must "demonstrate by clear and convincing evidence that [he] did not know, and should not reasonably have known, that the [BNP] was a terrorist organization." Section 212(a)(3)(B)(i)(VI) of the Act.

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[9] As with all evidence in immigration proceedings, it must be "probative and its admission [must be] fundamentally fair." *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011). Moreover, to be entitled to full evidentiary weight, such evidence must be reliable. *See Matter of L-A-C-*, *supra*, at 526.

[10] This proposed rule was codified at former 8 C.F.R. § 208.14(b) (1991). This provision was later replaced by 8 C.F.R. § 240.8(d), which was, in turn, transferred and redesignated as 8 C.F.R. § 1240.8(d). *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,322 (Mar. 6, 1997); *see also* Burdens of proof in removal proceedings Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9,824-01, 9,838 (Feb. 28, 2003).

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V. APPLICATION

Taken as a whole, we conclude upon de novo review that the evidence submitted by the parties attributing bombings and other violent acts to BNP members, along with evidence indicating that the BNP has been allied with Islamist terrorist organizations, reasonably indicates that the BNP may qualify as an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act (I.J. at 4-5; Exh. 6 at Tabs A, C-D, I-K; Exh. 7 at Tab B, N; Exh. 8). *See* 8 C.F.R. § 1240.8(d).[11] Thus, it fell to the respondent to establish by a preponderance of the evidence presented in this particular case that it is "probably true" that the BNP does not fit within the definition of an undesignated terrorist organization under this provision. *See id.*; *see also Matter of E-M-*, *supra.*

The Immigration Judge found that the respondent was unable to meet his burden of proof in this regard (I.J. at 4-5). Pursuant to the legal framework outlined above, we cannot affirm this conclusion.

A. BNP Authorization

As noted, the record reflects that some BNP members—as well as members of other opposition groups, with which the BNP has been politically aligned—have engaged in bombings and other violent acts in Bangladesh (I.J. at 4-5; Exhs. 6-8). However, as discussed above, evidence showing that individual members of the BNP and its affiliates have committed terrorist acts is insufficient, in and of itself, to establish that the BNP is an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act. *See Khan v. Holder*, *supra*; *Hussain v. Mukasey*, *supra*, at 538.

Recognizing this distinction, the Immigration Judge ultimately concluded that the leadership of the BNP has instigated or authorized the violent acts committed by BNP members (I.J. at 4-6). On the present record, the Immigration Judge's conclusion is clearly erroneous (I.J. at 4-6; Exh. 5 at 5; Exh. 6 at 79, 84-85; Exh. 8 at 11, 22). *See Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

The Immigration Judge's conclusion in this regard is based on: statements from AL-government officials, accusing the BNP's leadership of instigating violence; evidence that the AL-government has begun to prosecute BNP leaders for authorizing such violence; and other

[11] The DHS did not decline to present evidence in this case. Thus, we need not address the DHS's appellate argument that it does not have the initial burden of presenting evidence to trigger the respondent's burden of proof under section 8 C.F.R. § 1240.8(d). *Cf. Budiono v. Lynch*, 837 F.3d 1042, 1049 (9th Cir. 2016) (citing *Matter of S-K- I*, *supra*, and holding that that the DHS has the initial burden to present evidence that raises the inference that each element of the terrorist bar applies).

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sources, attributing bombings and other violence to BNP members (I.J. at 4-6; Exh. 5 at 5; Exh. 6 at 79-90; Exh. 8 at 11, 13-14, 22). The record nevertheless suggests that there is a significant history of antagonism and reprisal between the AL-controlled government, the BNP, and its political partners (I.J. at 4-6; Exh. 5 at 5; Exh. 6 at 79-90; Exh. 8 at 11, 22). The record further suggests that prosecutors and security forces acting on behalf of the AL-controlled government have targeted individual members and leaders of the BNP on account of their political affiliation (I.J. at 4-6; Exh. 5 at 5; Exh. 6 at 79-90; Exh. 8 at 11, 22).

Thus, the fact that the Bangladeshi government has arrested and initiated prosecutions against the BNP's leaders and accused them of authorizing violence is not a reliable basis for concluding that BNP leaders have actually authorized such violence. The Immigration Judge acknowledged that the AL-controlled government's decision to initiate these criminal prosecutions and to make these accusations may have been politically motivated (I.J. at 5; Exh 8 at 22). The record supports this view, indicating that when either the BNP or AL wins an election, both parties entrench their power by staffing the judiciary and security forces with their own supporters, use the justice system to harass and marginalize their political opposition, and initiate criminal prosecutions mostly against opposition leaders and activists (Exh. 8 at 13-14, 22). Independent observers have found strong reason to question official accounts from security forces who have killed and arrested members of the opposition accused of participating in violence (Exh. 8 at 13-14). These observers found little justification for these arrests and killings, many of which were later shown to be politically motivated (Exh. 8 at 13-14).

In light of the history of antagonism and reprisal between the AL-controlled government, the BNP, and its political partners, the Immigration Judge improperly relied on the AL government's representations for the proposition that the BNP's leaders have, in fact, authorized BNP members to engage in violence. *See Zhen Nan Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 269-70 (2d Cir. 2006) (finding unreliable a report that relied, in turn, entirely "on the opinions of Chinese government officials who appear to have powerful incentives to be less than candid on the subject of their government's persecution of political dissidents"). Significantly, the record does not reflect whether any members of the BNP's leadership have been successfully prosecuted for and convicted of authorizing BNP party members to engage in violence.

While reliable sources independent of the AL government, including reports from nongovernmental organizations and international news agencies, show that individual BNP members have committed, and have been accused of committing, violent acts, the Immigration Judge's characterization of this evidence as confirming that the BNP's leadership authorized such violence is clearly erroneous (I.J. at 5; Exhs. 6, 8). For instance, the Immigration Judge did not acknowledge record evidence indicating that after the government charged Zia and other BNP members with perpetrating a bombing, "[t]he BNP denied the attack and condemned the violence" (Exh. 8 at U.K. Home Office Report, 16). *Cf. Hussain v. Mukasey*, *supra*, at 539 (inferring authorization where a group fails to "criticize, or make efforts to curb," its members' violent acts).

Based on this record, we conclude that the Immigration Judge's determination that the BNP leadership authorized its members to engage in violence is clearly erroneous (I.J. at 4-6; Exhs. 5-6, 8). The record in this case indicates that the BNP's leadership has condemned such

violence, and, while the AL-government blames the leadership of the BNP opposition for the violence, such evidence is unreliable. As a consequence, we will reverse the Immigration Judge's conclusion that the respondent has not established by a preponderance of the evidence that the BNP does not authorize—or "engage[] in"—terrorist activity as an organization within the meaning of section 212(a)(3)(B)(vi)(III) of the Act (I.J. at 4-5).

B. BNP Affiliations

The Immigration Judge also erred in finding that the BNP is a terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act as a consequence of its affiliations with recognized terrorist groups (I.J. at 4). While the BNP has affiliated with such groups to form coalition governments and as political allies in opposition to the AL, there is no evidence that the BNP significantly affiliates with these groups, such that these organizations would qualify as "subgroups" of the BNP within the meaning of section 212(a)(3)(B)(vi)(III) of the Act under the criteria discussed above (I.J. at 4; Exh. 6 at 24-26, 35, 48-68).

For instance, although the BNP politically aligned itself with one terrorist group, the Jamaat-ul Mujahideen Bangladesh ("JMB"), in the past, the Immigration Judge did not acknowledge in his decision that the BNP-controlled government of Bangladesh banned the JMB in 2005 and, under public pressure, initiated a crackdown on the JMB that same year, arresting, prosecuting, and convicting hundreds of the group's leaders and members following a series of bombings perpetrated by the JMB (Exh. 6 at 24-26, 35). Similarly, while the record suggests another group, the Jamaat-e-Islami ("JEI"), was a political ally of the BNP in the Bangladeshi parliament, there is no indication that the BNP's leadership sanctions the JEI's violent activities (Exh. 6 at 50-55). Notably, the DHS on appeal does not assert that the BNP was a terrorist organization when it controlled the Bangladeshi government from 2001 to 2006—when the JEI was a member of its coalition government (DHS Brief at 6 n.1).

The record further reflects that the nature of the BNP's political alliances with the JMB, JEI, and other groups are weak, not driven by a shared ideology, and are used to mobilize anti-government support (Exh. 8 at 1-2, 13, 24). There is no indication that the JMB, the JEI, or other similar groups with which the BNP has allied are subordinate to, dependent on, or otherwise rely upon the BNP in whole or in part to support or maintain their operations. Because the record does not establish that the BNP significantly affiliates, or has a subgroup relationship, with these groups, we will reverse the Immigration Judge's determination that the BNP's political affiliations with the JMB, the JEI, or any similar group bring the BNP within the definition of an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act.

VI. CONCLUSION

We will reverse the Immigration Judge's conclusion that the respondent is inadmissible under section 212(a)(3)(B)(i) of the Act (I.J. at 4-6). Based on the foregoing, we conclude that the respondent has shown by a preponderance of the evidence that the bar to relief under section 212(a)(3)(B)(i)(VI) of the Act does not apply. In other words, he has shown it is "probably true"

[redacted]

that the BNP, of which he is a member, does not fall within the definition of an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act.[12] Because we are reversing the Immigration Judge's finding that the respondent is ineligible for asylum as a result of his inadmissibility under section 212(a)(3)(B)(i) of the Act, we will affirm the Immigration Judge's uncontested alternative determination that he is otherwise eligible for and deserving of asylum under section 208(b) of the Act (I.J. at 6-9).

In view of the foregoing disposition, we need not address the respondent's appellate arguments regarding his eligibility for protection under the CAT (Respondent's Brief at 27-33). Furthermore, inasmuch as we have disposed of the appeal based on the record considered by the Immigration Judge, we need not address the additional evidence the respondent has submitted on appeal. We will therefore deny as moot the respondent's motion for us to take administrative notice of such evidence. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The respondent's motion for administrative notice and remand is denied as moot.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations; for further proceedings, if necessary; and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

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[12] For this reason, we do not reach the step of ascertaining whether the respondent did not know, and should not reasonably have known, that the BNP was a terrorist organization (I.J. at 5-6). *See* section 212(a)(3)(B)(i)(VI) of the Act.