

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

In the Matter of:)
)
FAUZIYA KASINGA,) File: A73-476-695
) Newark District
Applicant,)
)
In Exclusion Proceedings)
-----)

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GOVERNMENT'S RESPONSE TO REPLY BRIEF OF APPLICANT

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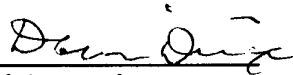
On February 28, 1996, the Immigration and Naturalization Service (Service) filed a response brief to applicant's brief on appeal submitted December 4, 1995. In a reply brief dated March 13, 1996, applicant argues, among other matters, that a remand is not warranted in her case. The Service's response to applicant's reply brief follows.

It is well-settled that the record the Board reviews on appeal is the record before the Immigration Judge (IJ). Matter of C, Interim Decision 3180 at 2 n.2 (BIA 1992); Matter of Haim, 19 I&N Dec. 461, 463 (BIA 1988). The applicant in this case has submitted at least two (2) new pieces of evidence with her brief on appeal.¹ While it is true that the Board has "de novo" review of the record as applicant argues, it is also true that the Board cannot consider new evidence on appeal. Indeed, based upon the applicable law, the applicant's submission of new evidence on appeal should be disregarded by the Board. Matter of C, *supra*, Matter of Haim, *supra*. Applicant has failed to file a motion to reopen based on new evidence. Since applicant submitted new evidence which she claims is crucial to her claim for asylum in the United States, a remand of these proceedings to the IJ is the only procedure for proper consideration of this evidence.

¹ This NEW evidence includes an affidavit by applicant, and a affidavit of an expert witness Professor Merrick Posnansky. See Applicant's Brief dated 12/4/94. The third piece of evidence, a purported marriage certificate, was submitted into evidence at the applicant's asylum hearing before the IJ. See Exhibit 3 (marriage certificate dated 7/10/94).

Moreover, the IJ specifically made an adverse credibility finding based upon the record before him. See Dec. 10-11. The Service, in its response brief, further questioned applicant's credibility based upon the record before the IJ. See INS Response Brief dated 2/28/96 at 7-10, 22. These issues regarding credibility cannot be cured by applicant submitting a new affidavit on appeal. Rather, as the Service has properly maintained -- See INS Response Brief dated 2/28/96 at 22 -- inconsistencies in the record would also be appropriate subjects of inquiry on remand. As the Service suggested in its response brief, should the Board adopt the suggestion concerning a new framework of analysis regarding FGM, a remand would be proper.

Respectfully submitted,


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Dated: Mar 27, 1996

CERTIFICATE OF SERVICE

It is hereby certified that a that copy of the foregoing brief of the Immigration and Naturalization Service was mailed to:

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Dated: 3/27/1996