No. 18-72974

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted] U[redacted],
Petitioner,

v.

WILLIAM P. BARR,
Respondent.

Review of Board of Immigration Appeals Decision
Agency No. [redacted]
(Not Detained)

PETITIONER'S OPENING BRIEF

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STATEMENT PURSUANT TO CIRCUIT RULE 28-2.4

Petitioner is no longer detained in the custody of the Department of Homeland Security. After the Board construed a portion of his appeal as a motion to remand and denied it, Petitioner has not moved to reopen his proceedings again. Petitioner has not applied for adjustment of status.

Dated: July 22, 2019

s/ Bardis Vakili
Bardis Vakili
Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

Two pillars of a full and fair hearing are the right to counsel and the right to present evidence. In removal proceedings, those rights are guaranteed by the Fifth Amendment and enshrined in statute. Little is promised to an immigrant family who journeys to our borders and requests the protection of this country, but at minimum, Congress and the Constitution require that these two fundamental rights must be preserved.

In this case, the Immigration Judge ("IJ") broke that promise when he railroaded Petitioner through a hearing without the pro bono attorney who wanted to take his case and without an opportunity to present the corroborating testimony of his family members, whom the Department of Homeland Security ("DHS") had forcibly separated from him and disappeared into its custody, despite their asylum claims being intertwined with his. This case does not challenge the actions of DHS, but those of an IJ and Board of Immigration Appeals who, rather than protect the pillars of fairness, joined DHS in knocking them down.

Petitioner [redacted] U[redacted] ("Petitioner") fled [redacted] with his 13-year old son T.U., his adult stepson [redacted], whom he raised, and [redacted]'s wife [redacted] They presented themselves together at the San Ysidro port of entry in October 2017 and asked for asylum, based largely on threats stemming from [redacted]'s political activities. Within days, DHS had forcibly split up the family,

scattering the four of them into government custody in three different locations without informing any of them where the others were held. Petitioner spent the next eight months in an Immigration and Customs Enforcement ("ICE") detention center in Otay Mesa, California, not knowing where [redacted] and [redacted] were and only able to speak to T.U. periodically on the phone.

During his confinement, Petitioner diligently attempted to obtain counsel but was unsuccessful. Unrepresented and unable to speak English, he completed his asylum application as best he could, relying on another detainee to prepare it for him. When offered a choice of scheduling his individual hearing either three months or three weeks after filing his application, Petitioner chose the earlier date, wanting to resolve his case and end his separation as quickly as possible.

Unexpectedly, the day before the hearing, Petitioner was informed that a lawyer from a local non-profit organization had just learned of his case and wanted to represent him pro bono, but could not secure a [redacted] interpreter to meet Petitioner and formalize the representation prior to the scheduled hearing. Due to a conflicting hearing for another client, the lawyer could not come to Petitioner's hearing to personally notify the IJ of this. Instead, Petitioner informed the IJ in writing, identifying the attorney and requesting a continuance so the attorney could appear and represent him. He also informed the IJ that the continuance might allow him to locate [redacted] and present his corroborating testimony.

The IJ inexplicably refused. Without obtaining a waiver of his right to counsel, the IJ forced Petitioner to proceed without the lawyer or [redacted]'s testimony. The IJ went on to find Petitioner not credible based on minor perceived discrepancies between his testimony and his written asylum application. These supposed inconsistencies were clearly attributable to poor written translation in the asylum application, as evidenced by the consistency between his testimony and his statements during his Credible Fear Interview ("CFI"), both of which involved an interpreter. Six weeks after Petitioner's case was denied, a different IJ in a different detention center found [redacted] and [redacted] credible and granted them asylum, describing testimony that corroborated Petitioner's claims.

Petitioner provided the Board of Immigration Appeals ("Board" or "BIA") this information and evidence, but the Board affirmed the IJ's decision, violating Petitioner's rights in two fundamental ways.

First, the Board and IJ violated Petitioner's due process and statutory rights to counsel. In forcing him to proceed without a lawyer, the IJ did not obtain a valid waiver of the right to counsel. In justifying the denial of the continuance, the IJ and Board failed to consider the barriers that Petitioner faced in his good faith efforts to secure counsel, instead thwarting his efforts to retain counsel once representation was within grasp. The IJ and Board demonstrated a "myopic insistence upon

expeditiousness" that impermissibly rendered "the right to counsel an empty formality." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007).

Second, the Board and IJ denied Petitioner a meaningful opportunity to present critical evidence in his case, most notably [redacted]'s testimony. For an unrepresented asylum seeker, the right to present evidence is made meaningful by the IJ's affirmative duty to fully develop the record and "ensure that the applicant presents his case as fully as possible and with all available evidence." *Jacinto v. INS*, 208 F.3d 725, 732-33 (9th Cir. 2000). Forsaking this duty, the IJ did not assist Petitioner in obtaining [redacted]'s testimony or order ICE to produce him, despite being aware [redacted]'s location in ICE custody was unknown to Petitioner. The Board compounded this error by refusing to remand based on [redacted]'s corroborating asylum grant. The Board and IJ also ignored Petitioner's consistent CFI testimony and failed to address the fact that his written application was prepared by another ICE detainee, failing to fully develop the record on these issues and necessarily depriving Petitioner of an opportunity to present evidence.

Because the rights to counsel and to present evidence are fundamental and enshrined in statute, Petitioner need not show prejudice for these violations, though the prejudice requirement is easily met because the excluded and ignored evidence would have likely altered the adverse credibility determination, which would have

also altered the outcome of his proceedings because Petitioner was otherwise eligible for relief.

As this Court has noted, immigration judges "do little to impress the world that this country is the last best hope for freedom by displaying the hard hand and closed mind of the forces asylum seekers are fleeing. Better that we hear these claims out fully and fairly and then make an informed judgment on the merits.... [T]he values of our Constitution demand no less." *Colmenar v. INS*, 210 F.3d 967, 973 (9th Cir. 2000). Accordingly, Petitioner requests that this Court grant the petition, instruct the Board to consider the ignored and excluded evidence, and remand for further proceedings on Petitioner's applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT").

STATEMENT OF JURISDICTION

Mr. U[redacted] petitions for review of the Board's decision dismissing his appeal and denying remand. The Board had jurisdiction to review the IJ's decision pursuant to 8 C.F.R. § 1003.1(b). This Court has jurisdiction under 8 U.S.C. § 1252(a)(1) to review final orders of removal. *Abdisalan v. Holder*, 774 F.3d 517, 523 (9th Cir. 2014) (en banc). This Court's jurisdiction over final orders of removal includes denials of motions to reopen or remand. *Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997). Additionally, this Court has jurisdiction to review all "questions of law" arising in petitions for review. *See* 8 U.S.C. § 1252(a)(2)(D);

Husyev v. Mukasey, 528 F.3d 1172, 1178 (9th Cir. 2008). This includes challenges asserting the denial of "a continuance was based on an error of law." *Malilia v. Holder*, 632 F.3d 598, 604 (9th Cir. 2011).

Venue is proper under 8 U.S.C. § 1252(b)(2) because the underlying removal proceedings were completed in Otay Mesa, California, within the jurisdiction of this judicial circuit. This petition was timely filed pursuant to 8 U.S.C. § 1252(b)(1) because it was filed on November 2, 2018, within 30 days of the Board's October 5, 2018 decision.

STATEMENT OF ISSUES PRESENTED

1. Does it violate the due process and statutory right to counsel to deny a continuance for Petitioner, a detained asylum seeker, to secure the representation of a specifically identified attorney who had just learned of the case, was likely to represent Petitioner pro bono, but could not appear at the hearing due to an unavoidable conflict with another hearing?

2. Did the IJ and Board violate the due process and statutory right to present evidence by (a) refusing to assist Petitioner in locating or obtaining the testimony of his corroborating witness who was in ICE custody in a location unknown to Petitioner, (b) failing to order ICE to produce the corroborating witness in its custody, and/or (c) ignoring corroborating evidence and arguments

raised by the Petitioner to explain perceived inconsistencies in his written testimony prepared by another ICE detainee?

3. If Petitioner's statutory right to a meaningful opportunity to present evidence in this case was violated, is prejudice conclusively presumed as it is for violations of the right to counsel, and if not, did he establish prejudice in this case?

FACTUAL AND PROCEDURAL BACKGROUND

I. Petitioner's Arrival, Forced Separation, and Credible Fear Interview

Petitioner is a 56-year-old native of [redacted]. Certified Administrative Record ("CAR") 302. He is a former construction worker who completed high school and technical school. CAR 363. He speaks [redacted] and does not understand English. CAR 307, 356. Petitioner, his 13-year-old son T.U., his adult stepson [redacted] ("[redacted]"),[1] and [redacted]'s wife [redacted] ("[redacted]") fled [redacted] together on October 10, 2017. CAR 303-04, 308-09. They traveled to the United States to seek asylum based largely on [redacted]'s political activities, which led to threats against Petitioner and his family. *Id*.

Petitioner and his family presented together at the San Ysidro port of entry on October 18, 2017.[2] CAR 303, 308, 356, 363. At a border interview the next day,

[1] Because Petitioner raised [redacted] from a young age, he appropriately refers to him as his son. CAR 365.

[2] The IJ decision in [redacted]'s and [redacted]'s asylum case indicates that they arrived on October 10, 2017. CAR 96. This is apparently a clerical mistake, as Petitioner's

Petitioner explained through a [redacted] interpreter that he and his family had received threats from individuals, including "law enforcement authorities," based on [redacted]'s political activities. CAR 303-10. He was detained pending a CFI and given a list of free legal service providers for Pennsylvania, where he originally hoped to go if released. CAR 304, 309. DHS separated [redacted] and [redacted] from him and detained and processed them separately. CAR 92, 96, 223, 269, 325, 356.

On or about October 22, 2017, DHS officials forcibly separated T.U. from Petitioner without explanation as part of its family separation policy.[3] CAR 88, 363. Petitioner would not see T.U. again until after the district court in *Ms. L. v. ICE* issued an injunction on June 26, 2018 requiring reunification of forcibly separated parents. *Ms. L.*, 310 F. Supp. 3d at 1149-50; CAR 86-89. Although Petitioner still did not know where T.U. was when he had his CFI on October 31, he eventually learned T.U. was detained in Chicago for removal proceedings. CAR 89, 325, 363.

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documents in this case confirm that October 10, 2017 is the date the family fled [redacted] and that they presented together at San Ysidro on October 18, 2017. CAR 303, 308, 314, 356, 363. Should the government dispute this or the Court wish to see additional confirmation, Petitioner would be pleased to supplement the record with [redacted]'s immigration documentation confirming the same.

[3] The District Court for the Southern District of California described this policy as "brutal and offensive" and "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Ms. L. v. U.S. Immigration & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133, 1145-46 (S.D. Cal. 2018).

On October 23, 2017, DHS transferred Petitioner to the Otay Detention Facility ("ODF") in Otay Mesa, California. CAR 89. DHS detained [redacted] and [redacted] for removal proceedings at the Adelanto Detention Facility in California, CAR 96, though Petitioner did not know their location, the name of their detention center, or how to get in touch with them, and he did "not have any contact" with them throughout his detention. CAR 92, 222-23, 269, 325, 365. Thus, despite having related asylum claims, the government detained the four family members in three different locations and placed them in three sets of removal proceedings before three different IJs.

On October 31, 2017, Petitioner received a CFI and was found credible. CAR 355-59, 370. Through a [redacted] interpreter, he stated that he feared "mostly law enforcement and also some criminal authorities in [redacted]." CAR 364. Specifically, he stated that in 2002, he and his wife were imprisoned based on a false criminal complaint alleging he and his wife kidnapped a woman to whom his wife had lent money. CAR 364-65. Police beat him with a baton while detained, and he eventually secured their release by paying extortion money. CAR 364.

Petitioner stated that [redacted] eventually became politically active in the [redacted] ("[redacted]") and began "fighting for justice," speaking against corruption within [redacted], and organizing rallies. CAR 365-66. [redacted]'s political activity led to threats, including in summer 2017 when "police"

threatened [redacted] that if he did not stop his activism, they would arrest Petitioner again based on the 2002 charges. *Id*. Petitioner then stated that "criminal authorities" who were previously in jail and were "working together with law enforcement" also told [redacted] that they would harm T.U. if he did not stop his political activities. CAR 366. Petitioner stated that he was targeted mostly because he was helping [redacted] in his political activities. CAR 366-67.

Petitioner also told the asylum officer that he did not know where T.U. was and had had no contact with him. CAR 363. He told the officer he wanted to have T.U.'s asylum claim heard together with his, but the officer concluded it was not possible. CAR 359, 363.

Petitioner passed his CFI and was served with a Notice to Appear on November 13, 2017. CAR 351-352. He was given a list of free legal service providers for ODF listing only three such providers. CAR 353.

II. Petitioner's Efforts from Detention to Find Counsel and File an English Language Asylum Application Pro Se

Petitioner appeared for master calendar hearings on December 20, 2017 and January 12, 2018, but he received continuances to obtain an attorney. CAR 195-97, 199-200. Despite his efforts to obtain counsel, Petitioner had received no responses. CAR 204. When he appeared at his next hearing on February 9, 2018 without counsel, the IJ informed him he would have to proceed without a lawyer

and ordered him to return on March 9, 2019 with an asylum application completed in English. CAR 204, 208. Petitioner was unable to complete his asylum application by March 9 but submitted the application at his next hearing on April 20. CAR 212, 216, 313-25. He submitted it in English, and the application states that an ODF detainee named [redacted] prepared it. CAR 321.

The asylum application describes the 2002 arrest in which he was beaten by police and how those charges were being revived in 2017 in response to his son's political activities. CAR 317-18, 325. It also states that police threatened to kill him and his youngest son in 2017. CAR 317. In his supporting declaration, Petitioner stated that [redacted] and his wife are in a "detention center in the city of Oceanside, California" and that T.U. was in Chicago. CAR 325.

III. Denial of Continuance for Newly Identified Pro Bono Counsel to Appear and to Obtain [redacted]'s Corroborating Testimony

After Petitioner submitted his asylum application at the April 20 hearing, the IJ informed Petitioner he could have his merits hearing 18 days later on May 8, or if that was too soon, then 110 days later on July 30. CAR 217. Petitioner, who at that point had been detained and separated from his children for more than six months, chose the earlier May 8 date. *Id*.

However, on May 7, the day before his hearing, Petitioner learned that his search for an attorney finally took a fortuitous turn. CAR 92. An attorney at a local

non-profit organization had just learned of his case, wanted to represent him pro bono, and was trying to locate a [redacted] interpreter to meet with Petitioner. *Id.* However, the attorney had a conflicting court date on May 8 and could not come to court to inform the IJ himself. *Id.*

With this good news in hand and having just turned down a July 30 merits hearing in favor of the earlier May 8 hearing, Petitioner appeared at the May 8 hearing and submitted a written request for a 45-day continuance for the attorney to appear. CAR 91-92. The motion also informed the IJ that [redacted] was in ICE custody and that their asylum cases were related. CAR 92. Specifically, the motion stated:

- Petitioner had just learned the day before, on May 7, that attorney Luis Gonzalez from Catholic Charities was "very likely" to represent him pro bono but had been unable to secure a "[redacted] interpreter so that we can make his representation official and submit this request" for Petitioner;
- Attorney Gonzalez had a conflict with another hearing on May 8, so he could not appear himself to inform the IJ of this fact;
- [redacted]'s asylum claim involved "many of the same issues" as his, but he was detained somewhere in ICE custody, and Petitioner hoped that having Mr. Gonzalez represent him would make it possible for [redacted] to testify to corroborate his claim;
- His minor son T.U. was in ORR custody in Chicago, and he hoped for any continuance to be brief because he did not want his separation to last any longer than necessary.

Id.

Upon receiving the motion, the IJ asked Petitioner about [redacted], and again Petitioner informed him he believed [redacted] was in a detention center in Oceanside. CAR 223. Petitioner would later testify that he had not had contact with [redacted] since October 20, 2017, and only learned what he could about [redacted]'s location based on long distance phone calls from detention with his wife in [redacted]. CAR 269-70.

The ICE attorney and IJ were aware there is no ICE detention center in Oceanside, CAR 223, but the ICE attorney said he had no information about [redacted]'s detention or case. CAR 223-24. They took no further efforts to learn or inform Petitioner of [redacted]'s true whereabouts.

Then, without further discussion, the IJ denied the continuance, forcing Petitioner to represent himself in the merits hearing without counsel or [redacted]'s corroborating testimony. CAR 224.

IV. Petitioner's Merits Hearing

At his hearing, Petitioner testified consistently with his CFI in all material ways. Specifically, Petitioner testified about his and his wife's 2002 arrest, based on an incident involving a woman who years earlier had borrowed money from Petitioner's wife in a "deceitful" way. CAR 243-50, 262-63. The woman would later be convicted for similar fraudulent schemes, CAR 251, 263, but at the time Petitioner and his wife were arrested and jailed. CAR 250-51, 267. Petitioner

testified that his wife in [redacted] tried to send proof a month earlier that the 2002 case was closed, but he had not yet received it in detention. CAR 264-66.

Petitioner also testified that in 2007, when [redacted] first became politically active and the [redacted] party was in opposition to the party in power, two police officers from the ruling party threatened Petitioner that if [redacted] did not stop his activities, they would lock Petitioner up again. CAR 238-39, 252-53. They had also threatened other members of the [redacted]. CAR 254. [redacted] remained active in the [redacted], which became the ruling party in [redacted] in 2010. CAR 237-39.

Petitioner testified that in 2017, [redacted] opposed the manner in which the party chose its presidential candidate and fought for honest elections, including by conducting actions opposing the party's chosen candidate. CAR 239-41. That year, "criminal people" approached [redacted] and T.U. at a pool and told [redacted] to cease his political activities or "bad things would happen." CAR 254-55. He also testified that the [redacted] had split internally and that one faction told [redacted] to cease his activities and expelled him from the party. CAR 255-56. After that, police officers threatened Petitioner that they would arrest him under his old 2002 charges and arrest [redacted] if [redacted] did not cease his activities. CAR 255-56, 258-60.

The IJ denied the asylum application for lack of credibility based on alleged discrepancies between his testimony and the written asylum application, as well as the supposed omission in the written application of the 2007 threats. CAR 183-89.

The IJ did not credit Petitioner's explanation that any errors in the written application were translation errors. CAR 259-60.

Upon being informed that his case would be denied, Petitioner asked, "If I am deported, will my youngest son be also removed with me?" CAR 275. The IJ responded, "I don't have authority over your son." *Id*. He then asked the ICE attorney, who responded that "the only information" he had about T.U. was that he had an upcoming master calendar hearing in Chicago. *Id*. The IJ added that "your son has his own separate case" and "his case doesn't sound like it's connected to your case in any way." CAR 276. Petitioner then asked, "[B]ut he is a minor. How will his case be heard alone?" to which the IJ responded, "There are a lot of juveniles who come to this country by themselves and they have their own cases." *Id*. When Petitioner informed the IJ that T.U. did not come alone but that they arrived together, the IJ ended the conversation, saying "All I can say, sir is like I said, I don't have his case on my docket. I don't have any authority over his case so I can't tell you one way or another. I just don't know." *Id*.

The IJ denied relief, leaving Petitioner exposed to deportation while his two sons' cases stemming from the same set of events were still active.

V. [redacted]'s Asylum Grant at Adelanto Detention Center

About six weeks later, on June 22, 2018, a different IJ in the Adelanto Detention Facility heard [redacted]'s and [redacted]'s case, found them credible, and

granted them asylum. CAR 96-110. According to the order in that case, [redacted] testified about his political activities for the youth wing of the [redacted], his advocacy for a fair primary process within the party, the split of the party into "two factions," and threats he faced. CAR 101-03, 108.

Relevant to Petitioner's claim, [redacted] testified that in 2017, a party deputy and a "criminal agent" followed him to a public pool where they threatened that he will "have problems" if he did not cease his political activity. CAR 102. He testified that in August 2017 he was expelled from the [redacted] party and that in October 2017 he opposed the [redacted]'s chosen presidential candidate. CAR 102, 108. He also testified that his mother recently received a call from [redacted]'s Ministry of Internal Affairs that Petitioner was wanted on a warrant, CAR 102, presumably regarding the 2002 case that the government was threatening to reopen against Petitioner. [redacted] also testified that he had been detained by security services in 2007, CAR 103, the same year that Petitioner said he had received threats regarding [redacted].

VI. BIA Denial of Petitioner's Appeal

Petitioner appealed the IJ's decision to the Board and submitted the order granting [redacted] and [redacted] asylum with his appeal brief. The government filed no opposition brief. On October 5, 2018, the Board dismissed his appeal. CAR 1-5.

The Board held that the denial of a continuance did not deprive Petitioner of

his right to counsel because Petitioner had allegedly not provided evidence that there was a likelihood he would secure counsel, notwithstanding his statement to that exact effect in his motion. CAR 2-3. Next, the Board erroneously held that the IJ did not deny Petitioner his right to present evidence because he allegedly "did not provide any details about the contents of his stepson's testimony," CAR 3, notwithstanding that he submitted [redacted]'s asylum grant and testified that he had not been in contact with him since they were forcibly separated. CAR 4, 269. The Board construed the inclusion of [redacted]'s asylum grant as a motion to remand and then denied remand based on an erroneous conclusion that it was not "dispositive" and would not "likely change the results" of Petitioner's case. CAR 5.

The Board erroneously affirmed the adverse credibility determination, pointing to alleged discrepancies between his testimony and his written asylum application, specifically (1) whether "criminals" or "police" threatened his family in 2017, (2) whether he and his family were threatened with arrest or death, (3) whether it was Petitioner or his wife who lent money to the woman involved in the 2002 incident, and (4) the failure to mention the 2007 threats in his written asylum application. CAR 3-4.

Based on these holdings, the Board affirmed the denial of asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). CAR 5. Petitioner timely petitioned for review of the BIA's order.

SUMMARY OF ARGUMENT

The Fifth Amendment guarantees due process in removal proceedings, including "a full and fair hearing of his claims." *Colmenar*, 210 F.3d at 971. A full and fair hearing in removal proceedings requires, at minimum, the right to retain counsel and a reasonable opportunity to present evidence. *Id.*; *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005). Congress has codified these due process protections in the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1229a(b)(4)(A), 1362. The BIA and IJ denied Petitioner both of those rights.

First, the IJ violated Petitioner's right to counsel by refusing to continue the May 8 merits hearing to allow attorney Gonzalez to appear, particularly when the IJ had originally offered a potential merits hearing date of July 30. Although an IJ generally retains discretion whether to grant a continuance, when the denial is tantamount to a denial of counsel, it is unlawful and constitutes an abuse of discretion per se. *Biwot*, 403 F.3d at 1100. To force Petitioner to proceed without counsel, the IJ was required to obtain a waiver of the right to counsel, which he did not do. *Id.*

To determine whether a continuance is warranted to find counsel in the absence of a waiver, the Court considers several factors, including the "realistic time necessary to obtain counsel; the time frame of the requests for counsel; the number of continuances; any barriers that frustrated a petitioner's efforts to obtain

counsel, such as being incarcerated or an inability to speak English; and whether the petitioner appears to be delaying in bad faith." *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1080 (9th Cir. 2007) (quoting *Biwot*, 403 F.3d at 1099). Although these factors favored a continuance here, the Board ignored them and offered only a conclusory statement that Petitioner had multiple continuances and a realistic time to retain counsel, evidencing a "myopic insistence upon expeditiousness" that "render[ed] the right to counsel an empty formality," thereby violating Petitioner's right to counsel. *Hernandez-Gil*, 476 F.3d at 807 (citation and quotations omitted).

Because prejudice is conclusively established for violations of the right to counsel, Petitioner need not establish prejudice here. *Montes-Lopez v. Holder*, 694 F.3d 1085, 1092 (9th Cir. 2012).

Second, the Board and IJ violated Petitioner's right to present evidence. Because Petitioner was a pro se asylum seeker, the IJ had an "affirmative duty" to fully develop the record "for the benefit of the applicant," *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc), and "to ensure that the applicant presents his case as fully as possible and with all available evidence." *Jacinto*, 208 F.3d at 732–33 (citation and quotations omitted). This duty requires that when an IJ has credibility concerns and is aware of potentially material, corroborating evidence in ICE custody and unavailable to Petitioner, it must order ICE to produce that

evidence or, at minimum, inform the detainee of his legal options to obtain it. The IJ and BIA failed Petitioner in this duty, impermissibly placing the onus on Petitioner to produce corroborating evidence to which he had no access, namely [redacted]'s testimony. The Board then compounded that error when it refused to remand the case based on [redacted]'s asylum grant, which clearly demonstrated [redacted]'s testimony would corroborate Petitioner's claims.

The Board and IJ also failed in their duty to fully develop the record by ignoring Petitioner's consistent statements through an interpreter in his CFI and by failing to address his arguments that the preparation of the written asylum application by a detainee provided good reason to believe it had translation errors. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010) ("The failure of the IJ and BIA to consider evidence" is "reversible error."); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) ("IJs and the BIA are not free to ignore arguments raised by a [party].").

For the same reasons that this Court recognizes an exception to the prejudice requirement for violations of the right to counsel, a similar exception for violations of the right to present evidence applies here. Like violations of the right to counsel, the right to present evidence is protected in a statute conferred for the benefit of individuals like Petitioner and is meant to protect a constitutional right that is fundamental to a fair hearing. *See Montes-Lopez*, 694 F.3d at 1092. Like the right

to counsel, it can be impractical to determine prejudice when evidence is excluded and not made part of the record. *See id.*

Even if prejudice is required, Petitioner demonstrates clear prejudice here. The evidence that the Board ignored and failed to develop would have likely changed the outcome of the adverse credibility finding and, as a result, Petitioner's case. *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002).

STANDARD OF REVIEW

When the BIA conducts its own review of the evidence and law rather than adopting the IJ's decision, this Court's review "is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Hosseini v. Gonzales,* 471 F.3d 953, 957 (9th Cir. 2006). Where it is unclear whether the BIA conducted a de novo review, the court may also look to the IJ's decision "as a guide to what lay behind the BIA's conclusion." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000).

The Court reviews "questions of law, including due process challenges, de novo." *Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1023 (9th Cir. 2008); *Mendoza-Mazariegos*, 509 F.3d at 1079 (right to counsel); *Oshodi*, 729 F.3d at 889 (right to present evidence). Mixed questions of law and fact are also reviewed de novo. *Cordoba v. Holder*, 726 F.3d 1106, 1113 (9th Cir. 2013).

The denial of a continuance or motion to remand is ordinarily reviewed for abuse of discretion. *Movsisian v. Ashcroft,* 395 F.3d 1095, 1098 (9th Cir. 2005) (motions to remand); *Biwot*, 403 F.3d at 1100 (continuances). However, the BIA abuses its discretion when it acts "arbitrarily, irrationally, or contrary to the law." *Movsisian*, 395 F.3d at 1098. Thus, whether denial of a continuance resulted in denial of full and fair hearing is a question of law reviewed de novo. *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010); *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041 (9th Cir. 2008) (where denial of motion to reopen presented a "'purely legal question,' a de novo standard applies.").

"Credibility determinations are reviewed for substantial evidence." *Bassene v. Holder*, 737 F.3d 530, 536 (9th Cir. 2013).

ARGUMENT

I. The Board and IJ Violated Petitioner's Due Process and Statutory Rights to Counsel, for Which This Court Does Not Require a Showing of Prejudice.

The Board and IJ violated Petitioner's right to counsel. First, the IJ forced Petitioner to proceed without obtaining a waiver of his right to counsel. Second, failing to apply the standard required by his Court for proceeding in the absence of a waiver, the Board ignored several factors justifying a continuance, including the barriers faced by Petitioner and the lack of any dilatory tactics. It instead affirmed the IJ's decision based solely on a generic accounting of the time that had passed in

Petitioner's case. Because the continuance was justified, and because its denial was tantamount to a denial of counsel, the Board and IJ violated Petitioner's rights. Finally, no showing of prejudice is necessary for such a denial.

A. The Board and IJ Violated Petitioner's Right to Counsel.

1. The IJ Forced Petitioner to Proceed Pro Se without Obtaining a Waiver of the Right to Counsel.

"The complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Ardestani v. INS*, 502 U.S. 129, 138 (1991); *see also Biwot*, 403 F.3d at 1098 ("The high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel" as a means of ensuring the proceedings "meet the essential standards of fairness.") (citation and quotations omitted).

The right to counsel is critical in cases like Petitioner's, because "it is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter." *Hernandez-Gil*, 476 F.3d at 807. "The importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored." *Reyes-Palacios v. INS*, 836 F.2d

1154, 1155 (9th Cir. 1988). Accordingly, "[m]eticulous care must be exercised" in "guaranteeing that aliens have the opportunity to be represented by counsel." *Biwot,* 403 F.3d at 1098 (citation and quotation marks omitted).

For a respondent to proceed without counsel, "there must be a knowing and voluntary waiver of the right to counsel." *Tawadrus v. Ashcroft,* 364 F.3d 1099, 1103 (9th Cir. 2004). For such a waiver to be valid, an IJ must "(1) inquire specifically as to whether petitioner wishes to continue without a lawyer," and "(2) receive a knowing and voluntary affirmative response." *Id.* (citations omitted); *Mendoza-Mazariegos*, 509 F.3d at 1080. Failure to obtain such a waiver constitutes a denial of the right to counsel. *Tawadrus*, 364 F.3d at 1103.

The Board did not dispute Petitioner's claim that the IJ never obtained a valid waiver from him, nor could it. On February 9, 2018, the IJ did not inquire whether Petitioner wished to continue without a lawyer, but instead simply informed him, "Sir, you're going to have to go forward today and represent yourself." CAR 203-04. Then, at his merits hearing on May 8, 2018, the IJ asked Petitioner, "Are you ready to go forward today?" CAR 220-21. Petitioner responded, "In principle, I am ready, but my attorney was not able to make it today." CAR 221. The IJ then insisted on a "yes-or-no answer," to which Petitioner responded "Yes, yes," but then handed the IJ his motion requesting a continuance to allow attorney Gonzalez to appear. CAR 221-24; 279-82.

Notably, the motion indicated that Mr. Gonzalez was "very likely" to take the case, but that he had just learned of it "late last week," hadn't yet found a [redacted] interpreter to formalize the representation, and had a scheduling conflict that prevented him from appearing at Petitioner's May 8 hearing to inform the IJ of this turn of events himself. CAR 280. Without acknowledging these significant details, the IJ summarily denied the continuance and pressed forward with the hearing anyway, forcing Petitioner to represent himself. CAR 224.

Like the respondent in *Hernandez-Gil*, Petitioner "requested a continuance so he could have his lawyer… present at the hearing" and gave a clear indication that he "did not want to proceed without his lawyer." 476 F.3d at 806. "On these facts, it is clear that" Petitioner "did not knowingly and voluntarily waive his right to counsel." *Id.* Even the Board's own precedent on which it relied here, CAR 3, acknowledges "[f]ailure to obtain such a waiver is an effective denial of the right to counsel." *Matter of C-B-*, 25 I&N Dec. 888, 890 n.1 (BIA 2012) (citing *Tawadrus*). Nevertheless, the Board erroneously affirmed the IJ's decision.

2. The Board Failed to Apply this Court's Multi-Factor Test for Determining Whether a Continuance is Appropriate to Obtain Counsel, Erroneously Focusing Solely on the Generic Passage of Time.

To justify its conclusion that the IJ's failure to obtain a waiver did not violate Petitioner's right to counsel, the Board focused solely on its finding that the IJ advised Petitioner of his right to counsel and granted "multiple continuances

over the course of several months." CAR 3. This Court's precedents do not permit such a constricted or generic analysis.

When an IJ fails to obtain a waiver of the right to counsel, analysis of whether "an IJ's refusal to grant a continuance" for counsel to appear is effectively a denial of counsel "requires individualized inquiry" into several factors beyond the mere passage of time. *Mendoza-Mazariegos*, 509 F.3d at 1080. Relevant factors include "the realistic time necessary to obtain counsel; the time frame of the requests for counsel; the number of continuances; any barriers that frustrated a petitioner's efforts to obtain counsel, such as being incarcerated or an inability to speak English; and whether the petitioner appears to be delaying in bad faith." *Id.* (quoting *Biwot,* 403 F.3d at 1099). These factors unquestionably reveal that a continuance was appropriate here so that Petitioner could finally avail himself of the right to counsel that had so long eluded him.

The record reveals several significant "barriers that frustrated" Petitioner's "efforts to obtain counsel," including that he was "incarcerated" and has "an inability to speak English." *Mendoza-Mazariegos* 509 F.3d at 1080. Furthermore, Petitioner had been forcibly separated from T.U. and spent his time in custody "worry[ing] about him constantly." CAR 89. He confided that the separation was "tearing me apart inside," and his understandable concern for his son's welfare during such a traumatic experience undoubtedly hindered Petitioner's ability to

focus his efforts on securing counsel. CAR 86-89, 275-76, 363.

Next, Petitioner is indigent and had diligently tried, without success, to obtain representation from the three organizations listed on the list of free legal service providers he received. CAR 112, 224. Given the paltry options for free legal representation serving Otay detainees, CAR 112, his lack of immediate success in obtaining representation is unsurprising. Under the circumstances, when Petitioner did finally identify counsel, it was necessarily within "the realistic time necessary to obtain counsel," *Mendoza-Mazariegos* 509 F.3d at 1080, particularly given the apparent dearth of legal services available to Otay detainees particularly and to ICE detainees generally.[4]

The Board does not suggest Petitioner's motion was made "in bad faith" as a "delaying" tactic, nor is there any evidence to support such a finding. *See Biwot*, 403 F.3d at 1099. To the contrary, Petitioner stated in his motion that "I do not wish to prolong my case any longer than necessary," noted his desire to resolve his case quickly and reunite with his son, and explained that he had only been informed of the attorney's likely representation the day before his May 8 hearing. CAR 91-94.

[4] According to one study, from 2007-2012, "only 14% of detained respondents were represented" nationally. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court,* 164 U. Pa. L. Rev. 1, 32 (2015).

The record confirms Petitioner was diligent and eager to bring his case to completion, including by choosing the earlier May 8 hearing over July 30 when given the option. CAR 217. The Board's rationalization is particularly arbitrary in light of this fact. If Petitioner had chosen July 30, the need for a 45-day continuance, which would not have taken Petitioner's case beyond the originally offered July 30 merits hearing date, would have never arisen. Nevertheless, although the IJ specifically told Petitioner just two weeks prior that if May 8 is "too soon and you're still trying to get more documents, we can come back on July the 30th," CAR 217, the Board arbitrarily affirmed the denial of the continuance on May 8 when Petitioner did end up needing some of that time. *See Cruz Rendon*, 603 F.3d at 1110.

Under these circumstances, the "time frame of the requests for counsel" at the merits hearing does not weigh against Petitioner. *Mendoza-Mazariegos*, 509 F.3d at 1080. Although a request for a continuance to obtain counsel often occurs at the outset of proceedings, such a request at a merits hearing also may justify a continuance, particularly where, as here, counsel was specifically identified but unable to appear at the scheduled merits hearing. *See id.* at 1080 n.9; *see also Hernandez-Gil*, 476 F.3d at 808 ("Here, denying the request for a continuance and conducting the merits hearing without taking reasonable steps to permit counsel to participate, denied Hernandez-Gil his statutory right to counsel."); *Montes-Lopez*,

694 F.3d at 1090 (concluding "the IJ's refusal to grant Petitioner a continuance [of his merits hearing] was a violation of Petitioner's right to counsel").

Thus, the Board's conclusory determination that Petitioner had "a reasonable and realistic period of time and a fair opportunity to secure counsel" solely because he had been given "multiple continuances over the course of several months," without considering these other factors, was erroneous. CAR 3. A "myopic insistence upon expeditiousness" cannot be used as an excuse "to render the right to counsel an empty formality." *Hernandez-Gil*, 476 F.3d at 807 (citation and quotation marks omitted). Furthermore, the Board did not conduct an individualized analysis of even this factor, ignoring that only two of the continuances were for Petitioner to find counsel. In addition, whether Petitioner had been given a "realistic period of time" to find counsel necessarily must involve consideration of the fact that Petitioner had *actually* found counsel "very likely" to represent him when he requested the continuance. CAR 2, 224. The Board's generic analysis did not acknowledge this critical fact, which undercuts its unsupported finding that Petitioner had not presented "any evidence… demonstrating that likelihood that he would secure representation." CAR 2-3.

The Board erred in concluding that a "written statement from the attorney in question" was necessary to justify a continuance. CAR 2. Good cause for a continuance to obtain counsel cannot depend on the messenger, but on the

message. *See Montes-Lopez*, 694 F.3d at 1089-90 (finding violation of right to counsel where the IJ refused to grant continuance based on the petitioner's statements that his suspended attorney might be able to appear once reinstated). The Board ignored Petitioner's motion explaining this was impossible given the recency with which attorney Gonzalez became aware of the case and his scheduling conflict. CAR 92.

When an indigent detainee is on the verge of finally securing counsel after diligently overcoming significant obstacles, denying a continuance to allow him to retain that counsel based solely on length of detention violates his statutory and due process rights to counsel and is therefore an abuse of discretion. Indeed, the fact that someone who has been detained a long time is finally close to securing counsel cuts in favor, not against, a continuance. Because of the impediments faced by detained respondents in finding counsel and in presenting their cases pro se, once counsel has actually been identified and representation is contingent on a continuance, it is critical for a court to grant the request.

Although the "IJ was not obligated to grant indefinite continuances if [Petitioner] did not produce counsel," *United States v. Moriel-Luna*, 585 F.3d 1191, 1201 (9th Cir. 2009), Petitioner had identified specific counsel who was likely to represent him if a continuance was granted. When representation, which has long eluded a detainee, is finally within grasp, refusing the time necessary to

secure it based solely on the passage of the time would "render the right to counsel an empty formality" based on a "myopic insistence upon expeditiousness." *Hernandez-Gil*, 476 F.3d at 807. Because denying Petitioner the continuance was "tantamount to denial of counsel," it was unlawful and abuse of discretion. *Biwot,* 403 F.3d at 1100. The BIA erred in holding otherwise.

B. Prejudice is Conclusively Established for a Violation of his Right to Counsel.

Generally, "[t]he lack of a full and fair hearing… will not alone establish a due process violation. The alien must establish that she suffered prejudice." *Jacinto*, 208 F.3d at 734. However, someone whose "right to be represented by counsel in an immigration proceeding" has been violated falls under a well-recognized exception to the prejudice requirement, and he "need not also show that he was prejudiced by the absence of the attorney." *Montes-Lopez*, 694 F.3d at 1093–94. That is because, "[w]ith an attorney, [Petitioner] would not have been forced to proceed pro se, to present a case with no evidence, [or] to answer the IJ's inquiries without any idea of their legal significance," among other things. *Biwot*, 403 F. 3d at 1100. Because here, just as in *Montes-Lopez*, the denial of a continuance resulted in the denial of Petitioner's right to counsel, there is no need to prove prejudice.

This is true notwithstanding that Petitioner had not yet retained attorney

Gonzalez, because the denial of the continuance directly interfered with his ability to retain a specifically identified pro bono attorney who was interested in the case and "likely" to represent him but was only waiting on an interpreter. CAR 92. Because factors such as whether Petitioner could afford attorney Gonzalez's services were not in play, representation was not speculative but likely. The INA protects Petitioner's right to retain "counsel of the alien's choosing," not merely the right to have already retained counsel appear. 8 U.S.C. § 1229a(b)(4)(A). Accordingly, Petitioner need not establish additional prejudice beyond the violation of his right to counsel.

II. The Board and IJ Violated Petitioner's Due Process and Statutory Rights to Present Evidence, for which a Showing of Prejudice is Unnecessary, though Petitioner Demonstrates Sufficient Prejudice.

The Board and IJ also violated Petitioner's right to present evidence, guaranteed by the INA and due process as part of a full and fair hearing. *Jacinto*, 208 F.3d at 728; 8 U.S.C. § 1229a(b)(1), (b)(4). As an unrepresented asylum seeker, Petitioner's right to present evidence is safeguarded by the IJ's duty to develop the record and to ensure Petitioner's case was presented as fully as possible. The BIA and IJ abdicated this duty by failing to ensure Petitioner could present [redacted]'s testimony and by ignoring Petitioner's corroborating testimony in

his CFI and his arguments that perceived discrepancies in his written application were the result of translation errors.[5]

Prejudice for a violation of the statutory right to present evidence need not be shown for the same reasons that it is unnecessary when the right to counsel has been violated. Nevertheless, these violations prejudiced Petitioner because [redacted]'s testimony and the CFI corroborated Petitioner's claims and would have likely changed the adverse credibility determination and therefore the outcome of his case.

A. The Board and IJ Violated Petitioner's Right to Present Evidence.

1. Because Petitioner Was an Unrepresented Detainee Seeking Asylum, the IJ Had a Duty to Develop the Record and Ensure Petitioner's Case was Presented as Fully as Possible.

In addition to the right to counsel, another "vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf," which is protected by due process and guaranteed by the INA. *Oshodi*, 729 F.3d at

[5] Even if the Court determines Petitioner's right to counsel was violated, it should also reach the issue of whether his right to present evidence was also violated. If this Court does not address the Board's errors in refusing to consider [redacted]'s potential testimony, CAR 3, 5, Petitioner may face similar difficulties on remand, particularly if the Board believes its holding in regard to the relevance of [redacted]'s testimony was left untouched by a decision in this case. *See U.S. Sec. & Exch. Comm'n v. Jensen*, 835 F.3d 1100, 1116 (9th Cir. 2016) (an appeal court should reach alternative issues that are "likely to appear again on remand").

889; 8 U.S.C. § 1229a(b)(1), (4). "[W]here an applicant is not represented," the right to present evidence means that "the IJ has an affirmative duty to ensure that the record is fully developed for the benefit of the applicant." *Id*. (citing *Jacinto*, 208 F.3d at 733-34). This is because an IJ, "unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record." *Yang v. McElroy,* 277 F.3d 158, 162 (2nd Cir. 2002); *cf. Richardson v. Perales,* 402 U.S. 389, 410 (1971) (holding that an administrative law judge acts as "an examiner charged with developing facts").

In asylum cases particularly, "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner such that the role of the [IJ] is to ensure that the applicant presents his case as fully as possible and with all available evidence." *Jacinto*, 208 F.3d at 732–33 (quoting United Nations *Handbook on Procedures & Criteria for Determining Refugee Status:* Office of the United Nation's High Commissioner for Refugees, para. 196; 205(b)(i) (1979)). "The BIA itself has stated that the IJ must 'ensure that the applicant presents [her] case as fully as possible and with all available evidence.'" *Li Fang Lin v. Mukasey*, 517 F.3d 685, 695 (4th Cir. 2008) (quoting *In re S–M–J–,* 21 I. & N. Dec. 722, 729 (BIA 1997)). Where CAT relief is sought, the regulations also mandate the IJ to consider "all evidence relevant to the possibility of future torture." 8 C.F.R. § 1208.16(c)(3). Thus, for a pro se asylum seeker, the IJ

"must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Jacinto*, 208 F.3d at 733.

Petitioner is an indigent asylum seeker who was detained and, due to the IJ's conduct, unrepresented. He has a limited education and does not speak English, the language in which his asylum application was prepared. CAR 307, 356. Thus, the IJ had a duty to develop the record and to ensure Petitioner presented his case as fully as possible and with all available evidence.

2. The BIA and IJ Failed to Ensure Petitioner Could Present [redacted]'s Testimony.

"Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Agyeman v. INS,* 296 F.3d 871, 877 (9th Cir. 2002) (citations and quotations omitted). In Petitioner's case, the IJ did not scrupulously probe into or explore relevant facts regarding the potential corroborating testimony of [redacted], who he knew was in ICE custody in a different detention center.

When potentially relevant evidence, including a witness with corroborating testimony, is in the custody of ICE and unavailable to an asylum applicant who

"could face a significant threat to his or her life, safety, and well-being" upon removal, an IJ's failure to fully develop the record can result in "information crucial to the alien's future remain[ing] undisclosed." *Jacinto*, 208 F.3d at 733. Thus, when DHS detention decisions potentially interfere with the right to present evidence, the IJ's duty to develop the record is vital. Such is the case when DHS forcibly splits, separately detains, and divides the removal cases of asylum-seeking families, which is an increasingly common feature of its enforcement operations.[6]

Here, the IJ was aware that DHS had separated Petitioner from his family members with related asylum claims. CAR 222-24, 275-76. Petitioner informed the court that T.U. "has been taken from me and is in the custody of the government far away." CAR 92. He also informed the Court that [redacted] was "also seeking asylum and our asylum cases involve many of the same issues. But he is in another detention center, so I do not know if he will be able to testify in my case." *Id*. Petitioner also made this clear in his CFI and asylum application, in which he

[6] *See e.g.* Women's Refugee Commission, Lutheran Immigration and Refugee Service, & Kids in Need of Defense, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families*, 13-15 (Jan. 10, 2017), https://www.judiciary.senate.gov/download/joint-organization-report_-betraying-family-values; *see also* Leigh Barrick, *Divided by Detention: Asylum-Seeking Families' Experiences of Separation*, American Immigration Council, 5-6, 10-12, 14-21 (Aug. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf.

noted that [redacted] arrived with him and their claims were linked. CAR 71, 78, 80-82. Indeed, the IJ even noted that [redacted]'s case "might have some parallels to this case." CAR 223-24. The IJ was also aware that Petitioner did not know where [redacted] was detained and had been unable to speak to him, because Petitioner stated he did not "have any connection with him" and because Petitioner believed [redacted] was detained in Oceanside, where the IJ knew there is no detention center. CAR 223, 270.

Yet, rather than "scrupulously and conscientiously probe into, inquire of, and explore" any further, *Agyeman*, 296 F.3d at 877, the IJ made no further effort to develop the record with [redacted]'s testimony. Even a cursory inquiry would have likely turned up [redacted]'s location, as it is unlikely there were many [redacted] nationals named [redacted] in ICE custody. Simply ordering the ICE attorney to search the ICE database or even the publicly available ICE Online Detainee Locator from his computer at counsel table would likely have confirmed [redacted]'s location at the Adelanto facility in moments.[7] Had he located [redacted], the IJ could have issued a subpoena or otherwise arranged for his testimony to be taken, including by telephone or video in the Adelanto immigration court. *See* 8 C.F.R. § 1003.35(a), (b)(4).

[7] ICE Online Detainee Locator System, *available at* https://locator.ice.gov/odls/#/index.

Regardless of whether it is permissible for DHS to separately detain family members with related asylum claims, it is error for the BIA or IJ to permit DHS to thwart the right to present evidence by keeping corroborating witnesses in its custody secret from asylum applicants.[8] If an IJ's refusal to order production of documentary "evidence in the Service's possession" can result in a violation of due process rights, *see Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006), then refusal to order ICE to locate and produce an identified corroborating witness in ICE custody must as well. Otherwise, it "would unreasonably impute to Congress and the agency a Kafkaesque sense of humor about aliens' rights." *Dent v. Holder*, 627 F.3d 365, 374-5 (9th Cir. 2010) (requiring DHS to produce the A-file while proceedings are pending and suggesting that it should be produced "routinely without a request").

The IJ's failures were magnified once he developed doubts about Petitioner's credibility. *Oshodi,* 729 F.3d at 891 ("The IJ's refusal to hear Oshodi's full testimony… is particularly unacceptable given that the basis for the IJ's denial

[8] Given the well-documented immigration court backlog of more than 800,000 cases, the separate processing of asylum-seeking families – in this case processing four family members through three separate immigration courts – is also alarmingly inefficient. *See, e.g.*, Denise Lu and Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants than Any Wall*, N.Y. TIMES, Jan. 24, 2019, https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html.

of relief rested solely on an adverse credibility finding."). At that point the IJ was, at minimum, required to advise Petitioner how to obtain [redacted]'s testimony. *See Agyeman*, 296 F.3d at 882 (holding that where the "bona fides" of a claim are "in question, the IJ had a duty to apprise [the applicant] of reasonable means of proving them."). The IJ should have also advised Petitioner that a motion to change venue or consolidate proceedings with [redacted]'s might be appropriate. 8 C.F.R. § 1003.20(b); *cf. Baires v. INS*, 856 F.2d 89, 93 (9th Cir. 1988) (denial of motions for continuance and to change venue violated right to present evidence). Alternatively, he simply could have granted the continuance and allowed the attorney who wished to represent Petitioner to make appropriate arrangements.

"However, the IJ did not explore these options." *Agyeman*, 296 F. 3d at 883. Instead, forsaking his duty to develop the record and ensure the application was fully complete, the IJ denied the continuance and plowed ahead with the hearing. CAR 2-3, 224. Because a "continuance would have afforded [Petitioner] time to obtain" additional evidence addressing an IJ's specific concerns, he requested it only a few months after his "initial appearance" in December 2018, and the hearing at which he requested it occurred, at Petitioner's choosing, months earlier than originally offered by the IJ, the "factors favored the grant of a continuance." *Cruz Rendon*, 603 F.3d at 1110; *see also Owino v. Holder*, 771 F.3d 527, 533 (9th

Cir. 2014) (concluding denial of motion to admit additional "critical" evidence was abuse of discretion).

Thus, because "[t]he testimony of percipient witnesses when an issue is in doubt can remove the doubt," *Morgan v. Mukasey*, 529 F.3d 1202, 1211 (9th Cir. 2008), when an IJ "refuses to permit testimony from" a witness who "could have corroborated his claims for relief by recounting the past persecution of his family," he violates the right to a fair hearing. *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005); *Kaur v. Ashcroft*, 388 F.3d 734, 737 (9th Cir. 2004) ("The IJ's failure to allow [the petitioner's son] to testify denied Petitioner a reasonable opportunity to present evidence on her behalf and, for that reason, also precluded Petitioner from receiving a full and fair hearing."); *see also Podio v. INS*, 153 F.3d 506, 507-08 (7th Cir. 1998) (IJ's refusal to allow applicant to present corroborating testimony from family members about his past persecution violated due process). Here, the IJ effectively refused to permit [redacted]'s testimony and violated Petitioner's right to present evidence.

The BIA erred in affirming the IJ's conduct on the ground that Petitioner "did not provide any details about the contents of his stepson's testimony or describe any efforts he undertook to present such evidence." CAR 3. Even if such efforts would not have been futile without the IJ's assistance given Petitioner's lack of information regarding [redacted]'s whereabouts in ICE custody, this Court does

"not require such an explanation" to find the right to a fair hearing was violated. *Colmenar*, 210 F.3d at 972. "[T]he critical question is whether the IJ's actions prevented the introduction of significant testimony." *Oshodi*, 729 F.3d at 890 (quotations and citations omitted). "The answer here is clearly yes." *Id.*

Thus, to the extent the Board faulted Petitioner for failing to produce [redacted]'s testimony through an international game of telephone, by contacting his wife in [redacted] from detention in Otay so that she could obtain a declaration from [redacted] from detention in Adelanto – even though she thought [redacted] was in a nonexistent detention center in Oceanside – and then mailing it from [redacted] to Otay, this was also error. CAR 3 n. 1. The INA does not require an asylum applicant to produce corroborating evidence that he "does not have" and "cannot reasonably obtain." 8 U.S.C. § 1158(b)(1)(B)(ii); *see Sidhu v. INS,* 220 F.3d 1085, 1091-92 (9th Cir. 2000) ("[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States-such corroboration is almost never easily available.").

Apart from the well-documented obstacles faced by DHS detainees in making and receiving phone calls,[9] Petitioner could not "reasonably obtain"

[9] *See, e.g., Lyon v. U.S. Immigration and Customs Enforcement*, 171 F.Supp. 3d 961, 965-971, 994-95 (N.D. Cal. 2016) (listing undisputed facts regarding

[redacted]'s testimony considering he did not even know where his stepson was detained. Requiring an unrepresented asylum seeker in a detention center to navigate such a complicated web without assistance from the IJ, or even to have been aware that he was expected to do so without instruction, is error. *Agyeman*, 296 F.3d at 882. Once the availability of potentially corroborating evidence was identified in ICE custody and it was clear that Petitioner was unable to produce it without assistance, to the extent further details were even necessary, the IJ's duty to develop the record required him to elicit this information.

The Board compounded its error by arbitrarily denying remand based on [redacted]'s asylum grant, which answered many of its questions regarding what his testimony might have been. CAR 5. Specifically, [redacted]'s order confirmed that [redacted] testified about his political activities, the 2017 incident in which he was threatened at a public pool, threats to arrest Petitioner, and threats received in 2007. CAR 102, 107-108. Ignoring this, the Board erroneously concluded that [redacted]'s testimony would have been based on his own "personal experiences in [redacted]" and therefore irrelevant.[10] CAR 5. To the contrary, "the treatment of

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telephone access and denying ICE's motion for summary judgment where plaintiffs presented evidence that obstacles to telephone access impacted, among other things, detainees' ability to obtain evidence for their immigration cases).

[10] To the extent the Board required [redacted]'s asylum grant to "be dispositive as to the [Petitioner's] eligibility for asylum" to meet his supposed "heavy burden" to warrant remand, this was error. CAR 5 (citing *Matter of Coelho*, 20 I&N Dec. 464,

[Petitioner's] similarly-situated family members is highly indicative of the abuse that [he] would encounter upon return," making it sufficiently likely to alter the outcome of the case to warrant remand. *Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004); *see also Makonnen v. INS*, 44 F.3d 1378, 1385–86 (8th Cir.1995) (holding acts of persecution against immediate family member with similar political views and active in similar political activities is relevant to show well-founded fear of persecution). The Board erred in holding otherwise.

The failure of the Board and IJ to develop the record with [redacted]'s testimony erroneously denied Petitioner his right to present evidence, rendering the denial of a continuance or remand to present his testimony an abuse of discretion because it was arbitrary, capricious and contrary to law.

3. The Board and IJ Ignored Petitioner's Corroborating CFI Testimony and His Arguments that His Written Application was Mis-Translated.

The Board also erred by ignoring Petitioner's CFI – which contained consistent testimony offered through an interpreter – and the fact that Petitioner's written application was prepared by another ICE detainee, not a certified translator. "The failure of the IJ and BIA to consider evidence" that was specifically called to

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472-73 (BIA 1988). The Board's own precedent notes that *Coelho*'s "heavy burden" standard is unwarranted in "[t]he absence of any dilatory tactics." *In Re L-O-G-*, 21 I. & N. Dec. 413, 419-20 (BIA 1996) (to warrant remand, the Board "does not require a conclusive showing on elements of eligibility").

their attention "constitutes reversible error." *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005). ("IJs and the BIA are not free to ignore arguments raised by [a party].").

"Because an adverse credibility determination" must be based on the "totality of the circumstances," the IJ "should consider and address, as necessary or otherwise appropriate, relevant evidence that tends to contravene a conclusion that a given factor undermines credibility." *Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010). "The IJ cannot 'cherry pick solely facts favoring an adverse credibility determination while ignoring facts that undermine that result'… and must consider the petitioner's explanation for any inconsistency that is 'cited as a factor supporting an adverse credibility determination.'" *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014) (quoting *Shrestha,* 590 F.3d at 1040, 1044). When the applicant is unrepresented, the requirement to consider Petitioner's explanations, address supporting evidence, and not ignore facts necessarily fall within the IJ's "duty to ascertain and evaluate all the relevant facts" and consider "all available evidence." *Jacinto*, 208 F.3d at 732–33.

Here, the IJ did not inquire about the nature of or quality of translation in the asylum application, while ignoring that the application makes clear on its face it was prepared by another ODF detainee, not a certified translator. CAR 321. Then Petitioner explicitly argued on appeal that his court testimony was consistent with

his CFI, which involved an interpreter, and that any perceived inconsistency between his testimony and his written asylum application, which was prepared by another ICE detainee, was likely due to translation error. CAR 38-41. Yet the Board did not reference the CFI or the application's preparation by a detainee at all, instead faulting Petitioner based on the unsupported contention that he did not "present any evidence to show his written declaration was incorrectly translated." CAR 4.

Where a perceived "discrepancy may be attributable to translation errors," the non-English-speaking applicant "certainly cannot be faulted for any mistakes in translation." *Cojocari v. Sessions*, 863 F.3d 616, 624 (7th Cir. 2017); *Abulashvili v. Att'y Gen. of U.S.*, 663 F.3d 197, 206 (3d Cir. 2011) ("[We] stress that the linguistic and cultural difficulties endemic in immigration hearings may frequently result in statements that appear to be inconsistent, but in reality arise from a lack of proficiency in English or cultural differences rather than attempts to deceive."). The Board's reliance on *Matter of D-R-*, 25 I. & N. Dec. 445, 455 (BIA 2011) is misplaced. That case involved competing plausible interpretations of evidence. *Id.* It has nothing to do with translation errors, much less the Board's failure to even consider, much less develop, potentially corroborating evidence identified by an immigrant who claims translation errors explain perceived discrepancies.

By ignoring the CFI and failing to inquire regarding the nature and quality of the translation provided by the ICE detainee who prepared the asylum application, the Board and IJ failed in their duty to develop the record, thereby violating Petitioner's right to present evidence and necessarily abusing their discretion. *See Ilunga v. Holder*, 777 F.3d 199, 210 (4th Cir. 2015) (finding an abuse of discretion when the agency "failed to consider the quality of the interpretation" and ignored "otherwise consistent nature of the substantive testimony."). Even if the failure to consider the CFI is not a violation of the right present evidence, it was reversible error. *Daneshvar v. Ashcroft*, 355 F.3d 615, 623 (6th Cir. 2004) (ordering adverse credibility to be "reexamined" based on "questionable quality of the interpreters").

B. Petitioner Need Not Prove Prejudice for a Violation of His Statutory Right to Present Evidence, but Even if Prejudice is Required, Petitioner was Prejudiced because the Denial of His Right to Present Evidence Clearly Affected the Outcome of Proceedings.

1. Petitioner Need Not Prove Prejudice Because the Board and IJ Violated Statutory and Regulatory Protections on the Right to Present Evidence.

As noted above, this Court has recognized an exception to the prejudice requirement when the government violates the statutory right to counsel in removal proceedings. *Montes-Lopez*, 694 F.3d at 1090-92. For the same reasons that led this Court in *Montes-Lopez* to recognize that exception, it should also conclude no prejudice is required for violation of Petitioner's statutory right to present evidence in this case.

In explaining why violation of the right to counsel does not require an additional showing of prejudice, the Court relied on two primary principles. First, unlike violations of the Fifth Amendment right to a full and fair proceeding "as a whole," the right to counsel is based in "specific law and regulations that give aliens" the right in question. *Montes-Lopez*, 694 F.3d at 1092. The Court noted that "[w]hen this court concludes that an agency has not correctly applied controlling law, it must typically remand, even if we think the error was likely harmless." *Id.* (citing *INS v. Orlando Ventura,* 537 U.S. 12, 16–17 (2002)). Second, denial of counsel "fundamentally affects the whole of a proceeding," including by "limit[ing] the evidence the alien is able to include in the record" and "prevent[ing] him or her from making potentially-meritorious legal arguments." *Id*. Determining prejudice under such circumstances would be "impractical" for a reviewing court. *Id.*

The Court found "persuasive" the reasoning for similar rules in the Second, Third, Seventh, and D.C. Circuits. *Id.* at 1091. For instance, the Second and Third Circuits have determined that "when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required," regardless of any showing of prejudice. *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993); *Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171, 178

(3d Cir. 2010) ("[V]iolations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief."). This Court agreed with the Third Circuit that this rule comports with the Supreme Court's *Accardi* doctrine, which "teaches that some regulatory violations are so serious as to be reversible error without a showing of prejudice." *Leslie*, 611 F.3d at 178 (citing *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954)); *Montes-Lopez*, 694 F.3d at 1093.

This Court has relied on similar principles to presume prejudice when considering whether evidence obtained in violation of a regulation should be suppressed in a removal proceeding. *Perez Cruz v. Barr*, 926 F.3d 1128, 1145 (9th Cir. 2019) ("[W]here, as here, compliance with the regulation is mandated by the Constitution, prejudice may be presumed.") (quoting *Sanchez v. Sessions*, 904 F.3d 643, 652 (9th Cir. 2018)).

Applying the same principles from *Montes-Lopez*, Petitioner need not show prejudice based on the IJ and Board's denial of a meaningful opportunity to present [redacted]'s testimony. Like the right to counsel, the right to present evidence is fundamental to a free and fair hearing, which is protected by the Fifth Amendment. *Oshodi*, 729 F.3d at 889. Like the right to counsel, it derives from a "specific law" that "gives aliens a right" that the Board and IJ violated. *Montes-Lopez*, 694 F.3d at 1092. Specifically, 8 U.S.C. § 1229a(b)(4)(B) appears in a section of the INA

entitled "Alien's rights in proceedings" – the same section in which the right to counsel is found – and it confers the right to "have a reasonable opportunity… to present evidence on the alien's own behalf," which the IJ and Board violated by not providing Petitioner an opportunity to present [redacted]'s testimony.[11]

Furthermore, like the violation of his right to counsel, the violation of Petitioner's right to present [redacted]'s testimony "limit[ed] the evidence" that Petitioner was "able to include in the record" and "prevent[ed] him" from "making potentially-meritorious legal arguments" about his credibility and eligibility for relief, "fundamentally affect[ed] the whole of [his] proceeding." *Id.*; *see also Dent*, 627 F.3d at 374 (holding, without having to "examine" the A-file, that when it is withheld, "[p]rejudice here is plain"). Finally, as an unrepresented detainee without access to his witness because his location in ICE custody has been kept secret, it is "impractical" for Petitioner to demonstrate prejudice in the record when the IJ forsakes his duty to develop the record by asking Petitioner details about the potential testimony. *Montes-Lopez*, 694 F.3d at 1092.

Accordingly, like denial of the right to counsel, denial of the right to present evidence "is serious enough to be reversible without a showing of error." *Id*. at

[11] In addition to the statutory right to present evidence, the IJ and Board also violated the regulation requiring that "all evidence relevant to the possibility of future torture shall be considered" in CAT applications. 8 C.F.R. § 1208.16(c)(3).

1093. Under the facts of this case, the violation of Petitioner's right to present evidence is sufficient, without a showing of prejudice, to require remand.

2. Even if Prejudice is Required, the Violations of Petitioner's Right to Present Evidence Prejudiced Him Because it Potentially Affected the Outcome of Proceedings.

Even if Petitioner is required to show prejudice, he easily does so here. Prejudice is established if "the IJ's conduct potentially [affected] the outcome of the proceedings." *Cano-Merida*, 311 F.3d at 965 (citing *Colmenar,* 210 F.3d at 972) (brackets in original). Petitioner meets this low threshold.

As a threshold matter, the fact that another IJ found [redacted] credible and granted him asylum based on common factual issues makes clear that denying Petitioner the opportunity to obtain [redacted]'s corroborating testimony prejudiced him, because no "rational system could tolerate such inconsistent treatment." *Wang v. Ashcroft*, 341 F.3d 1015, 1019 n.2 (9th Cir. 2003) (rejecting argument that "two different IJs could reach different results" for a husband and wife based on the same set of facts, "and that the government either could not or would not take steps to seek reconciliation" of those results); *see Podio*, 153 F.3d at 510–11 (finding a due process violation where an IJ refused to allow an asylum applicant's brother and sister, who had been granted asylum, to testify on the applicant's behalf); *see also Shao Mei Li v. B.I.A.*, 148 Fed. Appx. 70, 71 (2d Cir. 2005) (remanding where "the agency appears to be in disagreement with *itself*" as to the petitioner's

credibility, "discrediting the account when advanced directly by petitioner but then crediting it when advanced derivatively by her husband.") (emphasis in original).

More specifically, [redacted]'s testimony, the CFI, and the fact that Petitioner's written application was prepared by another detainee corroborated Petitioner's claims and explained any perceived inconsistencies in the record. The excluded evidence would have potentially affected the outcome of the proceedings had it been considered, because Petitioner was eligible for asylum, withholding of removal, and CAT relief in the absence of the adverse credibility determination.[12] *Cf. Zi Lin Chen v. Ashcroft*, 362 F.3d 611, 620 (9th Cir. 2004) ("[W]e have held that due process requires that an applicant be given a second opportunity to establish eligibility for asylum where the adverse credibility determination was based, without notice to the applicant, on a failure to produce a relative as a corroborating witness."); *see also Gathungu v. Holder*, 725 F.3d 900, 910 (8th Cir. 2013) (holding Board denial of motion to remand was abuse of discretion because evidence, if credited, would likely change the credibility determination in the case).

[12] For the same reasons described herein, Petitioner also challenges the adverse credibility determination and the denial of asylum, withholding of removal, and CAT relief as unsupported by substantial evidence in the record.

The Board found four aspects of Petitioner's testimony justified the IJ's adverse credibility determination. First, the Board found supposed inconsistencies between his written declaration indicating [redacted] was threatened by police in 2017, and his testimony, as characterized by the Board, that [redacted] was threatened by criminals in 2017 but not police in 2017. CAR 4. As an initial matter, the Board's characterization of the testimony is unsupported by the record, which reveals that Petitioner testified that "criminal people" threatened [redacted] at the pool in 2017, CAR 254-55, and that later "party members" threatened [redacted], and that later "police… told me to tell him to stop." CAR 255-56. This is not an inconsistency. Criminals and police both threatened [redacted] in 2017, though in the later instance, the threat was made through Petitioner. Had the Board considered the CFI, it would have noted Petitioner testified consistently through an interpreter – that in summer 2017, "police" threatened [redacted], CAR 365-66, and that "criminal authorities" also threatened [redacted]. CAR 366-67. Had the Board considered [redacted]'s asylum grant, it would have noted he testified consistently that, in 2017, a party deputy and a "criminal agent" threatened him at the pool. CAR 102.

Second, the Board identified a perceived inconsistency between his hearing testimony through an interpreter that police did not threaten him with anything more than arrest and his asylum application which indicated police threatened to kill him and T.U. CAR 4. Petitioner tried to explain that it must have been

something "wrong with the translation," that it was criminals who made threats to his sons, and that he only heard about it "later on." CAR 255, 260. Had the Board considered the CFI, it would have noted that when he was asked if "criminal authorities" ever said they would "hurt you," Petitioner responded that they said it to "my son." CAR 366. Had the Board considered [redacted]'s asylum grant it would have noted he had relevant testimony about the 2017 threats by criminals that could have corroborated Petitioner's claims – which were only inconsistent, if at all, with the written application prepared by another detainee, which the Board ignored.

Third, the Board identified perceived inconsistencies between his testimony through an interpreter that his wife lent money to the woman in 2002 and his written application which, as described by the Board, indicated Petitioner lent the money. CAR 4. While part of Petitioner's asylum application stated, "I lent his wife money," CAR 317, his declaration he submitted simultaneously with that application – and which does not indicate it was prepared by another detainee – clearly states his wife lent the money. CAR 325. Had the Board considered the CFI, it would have noted he testified through an interpreter that "my wife lended some money to some woman." CAR 364. Had the Board considered that the asylum application was prepared by a detainee, not a professional translator, it would have discounted the supposed discrepancy.

Finally, the Board relied on a perceived omission of a 2007 incident from the written application, about which he testified through an interpreter that police threatened him to tell [redacted] to stop his political activities. CAR 4; CAR 252-254. This testimony was not inconsistent with anything in the record, and had the Board considered [redacted]'s asylum grant, it would have noted [redacted] testified that he had been detained by security services in 2007, CAR 103, tending to corroborate Petitioner's claims of threats at that time. In any event, "failure to file an application form that was as complete as might be desired cannot, without more, properly serve as the basis for a finding of a lack of credibility." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990); *Lopez–Reyes v. INS*, 79 F.3d 908, 911 (9th Cir.1996) ("It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application.").

This Court's decision in *Kin v. Holder*, on which the Board relied for the proposition that Petitioner's omission of the 2007 threat justifies its adverse credibility holding, is inapposite. 595 F.3d 1050 (9th Cir. 2010). The Court in *Kin* confirms that "[o]missions are not given much significance because applicants usually do not speak English and are not represented by counsel," particularly when applicants have "someone prepare the application for them." *Id.* at 1056. However, asylum applicants' omission of "their participation in the key political

demonstration" that formed "the basis for their arrests and subsequent persecution" was too significant to ignore. *Id.* at 1057. That holding cannot apply to Petitioner's omission of threats in 2007 by a regime that is no longer in power in [redacted], CAR 102, 238-39, when the more immediate threats that led to his family's flight and request for asylum came ten years later under a different regime and were mentioned in his application.

Thus, had the excluded and ignored evidence been considered, the only potential discrepancies come from the asylum application completed by another ICE detainee. However, "[a]sylum forms 'filled out by ... people who ... are unable to retain counsel' should be read charitably, especially when it comes to the absence of a comprehensive and thorough account of all past instances of persecution." *Smolniakova v. Gonzales*, 422 F.3d 1037, 1045 (9th Cir. 2005) (quoting *Aguilera–Cota*, 914 F.2d at 1382); *see also Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (reversing adverse credibility finding based on inconsistencies that a "preparer' other than the applicant "included in the application").

Without the disqualifying adverse credibility determination, Petitioner is eligible for asylum, withholding of removal, and CAT relief. 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 208.16. Specifically, Petitioner established at least a well-founded fear of persecution on account of either his imputed political opinion or

his membership in a particular social group of immediate family members of [redacted]. *See Agbuya v. INS*, 241 F.3d 1224, 1228-29 (9th Cir. 2001) (imputed political opinion); *Rios v. Lynch*, 807 F.3d 1123, 1127-28 (9th Cir. 2015) ("[F]amily remains the quintessential particular social group."). He is also eligible for CAT relief based on evidence of past torture and the likelihood of future torture. CAR 364-65. Even the IJ acknowledged that "[t]he most recent State Department report notes that there are significant human rights issues in that country. Some of these issues include law enforcement's use of torture, and arbitrary arrests, and detentions." CAR at 191; *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001) (holding "country conditions alone can play a decisive role in granting relief under the Convention").

Because the excluded evidence would have likely changed the outcome of the adverse credibility determination, it would have also likely changed the outcome of his case. Thus, the violation of Petitioner's right to present the evidence caused him prejudice.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for review and remand to the Board with instructions to permit the taking of additional evidence, including [redacted]'s testimony, render new

credibility findings, and consider Petitioner's eligibility for asylum, withholding of removal, and CAT relief.

Dated: July 22, 2019

Respectfully submitted,

/s/ Bardis Vakili
Bardis Vakili

Counsel for Petitioner
[redacted] U[redacted]

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,549 words.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioner is not aware of any related cases currently pending before this Court.

ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, Petitioner includes the following addendum containing the orders of the BIA and IJ in his case.

ADDENDUM

IMMIGRATION COURT
7488 CALZADA DE LA FUENTE
SAN DIEGO, CA 92154

In the Matter of

U[redacted], [redacted]
Respondent

Case No.: [redacted]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on **May 8, 2018**. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to [redacted].

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to [redacted].

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $ _____ with an alternate order of removal to [redacted].

Respondent's application for:

[X] Asylum was ( )granted (X)denied( )withdrawn.

[X] Withholding of removal was ( )granted (X)denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal (X) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: May 8, 2018

ALL
SCOTT SIMPSON
Immigration Judge

Appeal: Waived/Reserved (B/R) Appeal Due By: 6/7/18

ALIEN NUMBER: [redacted] NAME: U[redacted], [redacted]

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [P] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [P] DHS

DATE: 5/8/18 BY: COURT STAFF AL

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q6

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
OTAY MESA, CALIFORNIA

File: [redacted] May 8, 2018

In the Matter of

[redacted]U[redacted]) IN REMOVAL PROCEEDINGS
)
RESPONDENT)

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration Nationality Act as an alien not in possession of valid entry document.

APPLICATIONS: Asylum, withholding of removal under Section 241(b)(3), and withholding of removal under the United Nations Convention Against Torture.

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Guy Grande

ORAL DECISION OF THE IMMIGRATION JUDGE

I PROCEDURAL HISTORY

Respondent is a 54-year-old married, native, and citizen of [redacted].

The United States Department of Homeland Security has brought these removal proceedings against the respondent under the authority of the Immigration And Nationality Act. The proceedings were commenced with a filing of the Notice to Appear with the immigration Court. See Exhibit Number 1. In a master calendar hearing, the

respondent admitted all of the allegations contained on the Notice to Appear and he conceded that he is removable as charged as an alien who is not in position of a valid entry document. Based on the respondent's prior admissions and concessions, the court found him to be removable as charged, and that his removability has been established by clear and convincing evidence.

At the prior master calendar hearing, the respondent declined to designate a country for removal and [redacted] was directed by the court upon the recommendation from the government. The respondent applied for relief from removal in the form of asylum under Section 208 of the Act. Applications for asylum shall be considered as applications for withholding of removal under Section 241(b)(3) of the Act. Respondent also requested withholding of removal under the United Nations Convention Against Torture.

In a merits hearing on May the 8th, 2018, the respondent appeared and was unrepresented by counsel. The government advised at that time that the biometrics in the case were complete.

The respondent was offered an opportunity to make any changes or corrections to his form I-589 and his declaration. The respondent indicated that he did not want to make any changes.

The court proceeded with administering the oath to the respondent set out in Part G of the application. The respondent knowingly and voluntarily gave the oath. The court accepted the application as noted in Part G.

The court then discussed the exhibits with the respondent and the government. A total of eight exhibits were marked in the record. No objections were made by either party to any of the exhibits in the record.

The court considered the evidence in the case, and at the conclusion of

the hearing, the court determined that the respondent was not credible, and he had not met the legal tests required for the forms of relief that he was seeking, and he was ordered removed to [redacted].

II SUMMARY OF EVIDENCE

A. TESTIMONY OF THE RESPONDENT

The respondent testified in this matter and he was the only witness. He testified that he left his native country of [redacted]. His problems he had related to his son's political activities. Specifically, he said that his son was a member of the [redacted], and based on his involvement in this political party, he was threatened to stop his political activities, specifically his support of one specific candidate over another within that party. Because of his son's political activities, the respondent claims that local authorities attempted to rehash old criminal charges from approximately 15 years ago against the respondent. The respondent indicated that in approximately 2002, he had been arrested, and charged with kidnapping, and these charges were being brought up again as a result of his son's political activities, and this forms the basis of his reasoning to leave [redacted].

B. DOCUMENTS

As previously noted, the court has marked eight exhibits in the record. The court has considered all of these documents, even if they are not specifically mentioned in this decision. Significantly, the record contains both the State Department Human Rights Report for [redacted] 2016 and the most recent report from 2017. These reports provide background information on political climate within that country and the court has reviewed both of these documents.

III LEGAL ANALYSIS

A. CREDIBILITY

The court must make a threshold determination of the respondent's credibility before considering whether he meets any statutory criteria for asylum, withholding of removal, or protection under the Convention Against Torture. Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998).

The burden of proof is on the respondent to establish that he is eligible for asylum or withholding of removal under Section 241(b)(3) of the Act for relief under the United Nations Convention Against Torture. The provisions of the REAL ID Act of 2005 apply to the respondent's application as it was filed on or after May 11, 2005.

Under the REAL ID Act, an applicant's own testimony without corroboration can be sufficient to meet his burden of proving a claim for relief from removal, but only if it is believable, consistent, and sufficiently detailed to provide a plausible, and coherent account of the basis for relief.

Considering the totality of circumstances and all relevant factors a trier of fact may base a credibility determination on the demeanor, candor, responsiveness of the applicant, inherent plausibility of the applicant's acount, the consistency between the applicant's oral and written statements, the internal consistencies of such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. See INA Section 208(b)(1)(B)(iii); See also Matter of J-Y-C-, 24 I&N Dec. 260 (BIA 2007).

In making a finding of adverse credibility, an immigration judge must provide legitimate, articulable basis, and offer a specifying, cogent reason for questioning the applicant's credibility. Wang v. INS, 352 F.3d, 1250 (9th Cir. 2003). In assessing the totality of circumstances, the court should refer to the specific factors that form the basis of the adverse credibility finding and refer to specific instances in the record.

Based on the reasons set forth below, the court finds the respondent has failed to testify in a credible manor under the standards set fort in the REAL ID Act. In this matter, there are omissions of important details on the respondent's application. There are also inconsistencies in his testimony, also portions of his claim are implausible. Finally, many of his answers in court are nonresponsive.

In terms of omissions, the respondent described in court an incident in 2007, when the police contacted him and threatened him over the political activities of his son. This 2007 incident was completely omitted from both his application and his declaration. When asked why it was omitted, the respondent simply said, that he might have missed it. When asked how he could miss such an important detail, he simply said that he didn't remember. The court is not satisfied with his attempt to explain this omission. The next omission of significance concerns threats his son received. The respondent claims that in 2017, criminals threatened his son. However, there's no mention of criminals threatening his son in either his declaration or his application. When asked to explain this omission, he simply said that he was writing in brief, which the court interprets it to be a summary. However, this is an important detail, and the court is not satisfied with his explanation to explain the omission of this detail.

In terms of inconsistences, there are several of significance. The first inconsistency deals with who actually threatened his son in 2017. The respondent testified in court that his son was threatened by criminals. However, the written materials submitted by the respondent indicate that his son was threatened by the police. When asked to explain this inconsistency, the responded attempted to blame it on a mistranslation. It should be noted that the court gave the respondent the opportunity at the beginning of the hearing to fix any mistakes on his application, and he did not fix this issue. The next inconsistency deals with what the police said to the

respondent in 2017. During his testimony, the respondent said the police told him that his son should stop his political activities. He was questioned in further detail on this. The respondent indicate that the police didn't threaten anything else. However, on his declaration, it specifically says that the police threated to kill the respondent and his son. The respondent failed to mention this when questioned in court. The respondent attempted to explain this by saying it wasn't the police who threatened to kill his son, it was actually the criminals. Again, he attempted to try to explain this by saying that the translation on his declaration and his application was in error, but once again the court gave him opportunities to fix mistakes to the application and declaration prior to the start of testimony, and he did not fix this, either. The final inconsistency of significance the court notes deals with who actually lent money to the lady the respondent was accused of eventually kidnapping. The respondent insisted during his testimony that it was his wife who provided money to the lady. This is in direct contrast to his form I-589, which specifically says I lent the money. The respondent was unable to explain this inconsistency. Again, he attempted to blame the translation. The court is not satisfied with that attempt to explain away the inconsistency.

The court also finds portions of the respondent's testimony to be implausible. Specifically, one thing stands out. The respondent indicated that he had been threatened by the police. He fears that if he goes back to [redacted] the police will want to do him harm. However, by his own admission, government officials in [redacted] reviewed his passport, and allowed him to leave the country with a visa to go to Japan. The court finds it is implausible for the government to want to do the respondent harm as he claims, and at the same time allow him to easily leave the country.

The court also notes that many of the respondent's answers to questions

during his direct testimony and his testimony during cross-examination can only be considered what is called nonresponsive. He was asked several questions and he did not directly answer the questions. He provided other details, sometimes unrelated details. Anyone who reviews this record will note that there are numerous and nonresponsive answers.

Based on the reasons set forth previously, the court finds the respondent has failed to testify in a credible manor, and the court makes an adverse credibility finding in this case.

B. ASYLUM

To qualify for asylum under Section 208 of the Act, the respondent must show he is a refugee within the meaning of Section 101(a)(42) of the Act. The definition of refugee requires the respondent to demonstrate either that either a separate past persecution where that he has a well-founded fear of future persecution in his country of nationality, or if stateless, the country of his last habitual residence on account of race, religion, nationality, membership in a particular social group, or a political opinion.

In the present matter, the respondent has failed to find credible testimony in support of his application for asylum. Given the respondent's incredible testimony, significant questions remain concerning the alleged persecution he claims to have suffered in [redacted], and whether that persecution was on account of a statutorily protected ground, and whether he has a well-founded fear of persecution.

According, the court finds the respondent has not demonstrated his eligibility for asylum by showing that he suffered past persecution in [redacted] or he has a well-founded fear of future persecution. As a result, the court denies the respondent's application for asylum because his testimony was not credible, and the independent evidence in the record does not establish his claim.

C. WITHHOLDING OF REMOVAL

To qualify for withholding of removal under Section 241(b)(3) of the Act, the respondent's facts must show past persecution or a clear probability that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 461 U.S. 407 (1984)

Having failed to demonstrate the lower burden for relief for asylum, the respondent has also failed to meet the higher burden for relief under withholding of removal pursuant to INA Section 241(b)(3). Accordingly, the respondent's request for withholding of removal is also denied.

D. PROTECTION UNDER THE CONVENTION AGAINST TORTURE

The applicant for withholding of removal under the United Nations Convention Against Torture bears the burden of proving that it is more likely than not that he would be tortured as defined in the regulations if removed in the proposed country of removal. The torture must be inflicted by, or at the instigation of, or with the consent, or acquiescence of a public official, or other person acting in an official capacity. Acquiescence requires that the public official have prior awareness of the activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

In assessing whether it is more likely than not that an alien would be tortured, the court should consider among other things evidence of past torture inflicted on the alien, evidence that the applicant cannot relocate to another part of the country, evidence of gross, flagrant, or mass violations of human rights, and any other relevant information.

If the evidence presented is inconclusive, the respondent has failed to

meet his burden. Matter of J-F-F, 21 I&N Dec. 912 (Attorney General 2006).

The respondent's lack of credibility impacts the courts analysis for relief under the United Nations' Convention Against Torture as well. The court determined that the respondent was incredible for the purpose of establishing eligibility for asylum, and withholding of removal, and he's also not credible for the purpose of demonstrating eligibility for protection under the Convention Against Torture.

After considering the other evidence in the record reviewed independently from the respondent's testimony, the court finds that the respondent has not shown that it is more likely than not that he would be tortured if he were required to return to [redacted]

Documents in the record, specifically the two State Department Human Right's Reports for [redacted] shows there are problems in that country. The most recent State Department report notes that there are significant human right's issues in that country. Some of these issues include law enforcement's use of torture, and arbitrary arrests, and detention. However, this information alone is not sufficient for the respondent to overcome his burden. The independent evidence in the record fails to establish that the respondent has been the victim of past torture. The independent evidence in the record fails to show the respondent could not safely relocate to another part of the country. And while the independent evidence in the record does show that there are some human rights violations that exist in [redacted], the court does not find that they are to the level of being gross, flagrant, or mass violations that will allow the respondent to satisfy his burden based on country conditions alone.

Consequently, the court finds the respondent has failed to carry his burden of demonstrating that it is more likely than not that he will suffer torture if removed to [redacted] and his application for protection under the Convention Against

Torture is denied.

E. MOTION TO CONTINUE

At the start of the merits hearing on May 8, 2018, the respondent handed the court a written motion to continue. The basis for the motion to continue was so that he could obtain assistance from an attorney, someone to represent him in court. However, the court has not received any notice from any attorney saying that they represent the respondent. Additionally, the respondent has been detained since approximately October the 18th, 2017. The respondent had his very first master calendar hearing on December the 20, 2017. This case was reset two times to give him the chance to look for an attorney. The respondent's case was reset two times to give him the opportunity to file his application for asylum. The court may grant a continuance for a good cause to show. See 8 C. F. R. §1003.29, 1240.6. However, because of the length of time the respondent has been detained, and because this case was reset numerous times to give him the chance to find an attorney, the court denied his motion to continue finding that there was no good cause for an additional continuance for that specific purpose.

IV ORDERS

It is ordered that the respondent be removed from the United States and return to [redacted]. It is further ordered that the respondent's application for asylum be denied. It is further ordered that the respondent's application for withholding of removal be denied. It is further ordered that the respondent's application for protection under the Convention Against Torture be denied.

SCOTT SIMPSON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE SCOTT SIMPSON, in the matter of:

[redacted] U[redacted]

[redacted]

OTAY MESA, CALIFORNIA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Amy Johnson

AMY JOHNSON (Transcriber)

NATIONAL CAPITOL CONTRACTING

June 18, 2018

(Completion Date)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Gonzalez, Luis M
Catholic Charities Diocese of San Diego
4575-B Mission Gorge Place
San Diego, CA 92120

DHS/ICE Office of Chief Counsel - OTM
880 Front St, Room 2246
San Diego, CA 92101

Name: U[redacted], [redacted] **[redacted]**

Date of this notice: 10/5/2018

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.

SchwartzA
Userteam: Docket

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] – Otay Mesa, CA Date: OCT - 5 2018

In re: [redacted] U[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Luis M Gonzalez, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture; continuance

The respondent, a native and citizen of [redacted], appeals from the Immigration Judge's decision dated May 8, 2018, denying his applications for asylum pursuant to section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c)-.18. The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be dismissed.

We review findings of fact determined by an 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).

As an initial matter, we are not persuaded by the respondent's claim that the Immigration Judge erred in not granting an additional continuance on May 8, 2018. The decision to grant or deny a continuance is within the discretion of the Immigration Judge, if good cause is shown, and that decision will not be overturned on appeal unless it appears that the alien was deprived of a full and fair hearing. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983); *see also* 8 C.F.R. § 1003.29.

The Immigration Judge granted continuances on December 20, 2017, and January 12, 2018, to allow the respondent to find an attorney (Tr. at 2, 5). At the hearing on February 9, 2018, the respondent indicated that he was not able to find an attorney and stated that he feared returning to his country (Tr. at 7-12). A new hearing was scheduled for March 9, 2018, to allow the respondent to file an application for asylum (Tr. at 12). On March 9, 2018, the respondent indicated that he had not completed his application and requested an additional continuance, which the Immigration Judge granted over the objection of the DHS (Tr. at 15-16). On April 20, 2018, the respondent filed his application and a hearing on the merits of the application was scheduled for May 8, 2018 (Tr. at 18).

On May 8, 2018, the respondent filed a written motion to continue the proceedings for an additional 45 days on the grounds that an attorney might be representing him in the future and because he wanted to present testimony from his stepson, who was also in removal proceedings and detained at a different facility (Exh. 8). However, the respondent did not present any evidence, such as a written statement from the attorney in question, demonstrating that likelihood that he

[redacted]

would secure representation. The respondent also did not provide any details about the contents of his stepson's testimony or describe any efforts he undertook to present such evidence.[1] For these reasons, and in light of the previous continuances granted by the Immigration Judge, we agree that the respondent did not establish good cause for an additional continuance.

We are not persuaded by the respondent's claim that the Immigration Judge violated his right to counsel. The Immigration Judge clearly advised the respondent of his right to be represented by an attorney or qualified representative (Tr. at 2), verified that the respondent was provided with a list of legal service providers (Tr. at 2), and granted the respondent multiple continuances over the course of several months, thereby ensuring that he had a reasonable and realistic period of time and a fair opportunity to secure counsel. Under these circumstances, the respondent has not demonstrated that his right to counsel was violated. *See Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (holding that, in order to meaningfully effectuate the statutory and regulatory privilege of legal representation where it has not been expressly waived by a respondent, an Immigration Judge must grant a reasonable and realistic period of time to provide a fair opportunity for the respondent to seek, speak with, and retain counsel).

The respondent sought relief and protection from removal based on a fear of criminals and government officials in [redacted].[2] He testified that he and his family members were threatened because of his stepson's political activities. The Immigration Judge made an adverse credibility determination and concluded that the respondent did not meet his burden to demonstrate his eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.

On review, we are not persuaded that the Immigration Judge's adverse credibility findings are clearly erroneous. The Immigration Judge offered specific, cogent reasons for finding the respondent did not testify credibly (IJ at 5-9). *See* section 208(b)(1)(B)(iii) of the Act; *see also Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010) (stating that an Immigration Judge may base an adverse credibility determination on any relevant factor that, considered in light of the totality of the circumstances, can reasonably be said to have a bearing on the applicant's veracity).

---

[1] We note that the respondent testified that he was in contact with his wife, who was also in contact with his stepson (Tr. at 70). The respondent did not provide a persuasive answer when questioned about why he did ask his wife to communicate with his stepson about providing a written declaration in support of the respondent's claim (Tr. at 71).

[2] We acknowledge that the transcribed version of the Immigration Judge's oral decision incorrectly states that the respondent is native and citizen of [redacted] and orders his removal to that country. This appears to be a transcription error, however, as the audio recording of the decision reflects that the Immigration Judge correctly identified the country as [redacted]. Furthermore, the transcript of the proceedings makes clear that the Immigration Judge correctly understood the respondent to be a native and citizen [redacted] and the "Order of the Immigration Judge" summarizing the Immigration Judge's oral decision correctly reflects that the respondent was ordered removed from the United States to [redacted].

[redacted]

The respondent's testimony that his stepson was threatened by criminals in 2017 but was not threatened by the police is inconsistent with his written declaration, in which he indicates that his stepson was threatened by the police (IJ at 5; Tr. at 56; Exh. 5A). We agree that the respondent's claim that this inconsistency was the result of a translation error is unpersuasive, particularly where he has not presented any evidence to show that his written declaration was incorrectly translated (IJ at 5). *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (explaining that an Immigration Judge is not required to accept a respondent's assertions, even if plausible, where there are other permissible views of the evidence based on the record). This inconsistency directly relates to the respondent's claim that his family was threatened in [redacted] and significantly undermines his credibility as a witness.

The respondent's testimony that the police did not threaten him with anything beyond arrest is inconsistent with his asylum application, which indicates that the police threatened to kill the respondent and his youngest son (IJ at 5-6; Tr. at 60; Exh. 5). The respondent's uncorroborated assertion that the statement in his asylum application was the result of a translation error is insufficient to explain this inconsistency, which directly relates to his claim that he was threatened in [redacted] and further undermines his credibility as a witness.

The respondent's testimony that he and his wife were arrested in 2002 because of a dispute that arose after his wife lent money to another woman is inconsistent with his asylum application, which indicates that the respondent lent money to the woman (IJ at 6; Tr. at 45-47, 72; Exh. 5). Once again, the respondent's uncorroborated assertion that these conflicting statements were the result of a translation error is insufficient to explain the inconsistency, which further undermines his credibility.

The respondent testified that he was threatened by the police in 2007, in connection to his stepson's political activities, but did not mention this incident in his application or his written declaration (IJ at 5; Tr. at 53; Exhs. 5, 5A). We are not persuaded by the respondent's claim that the Immigration Judge erred in relying on this omission in assessing the respondent's credibility (Respondent's Br. at 23-24). Whether or not the omission, by itself, would be sufficient to support an adverse credibility determination, it supports the Immigration Judge's ultimately determination that the respondent was not a credible witness, particularly when considered in conjunction with the inconsistencies in his testimony. The respondent's assertion on appeal that he merely provided additional details during his testimony is insufficient to explain the omission, which involves a fundamental aspect of his claim that he was and will be persecuted in [redacted] and further undermine his credibility as a witness. *See Kin v. Holder*, 595 F.3d 1050, 1056-57 (9th Cir. 2010) (concluding omissions from asylum application of political demonstration and aliens' participation in it were significant where the information was crucial to establishing persecution claim).

For the foregoing reasons, the Immigration Judge's adverse credibility determination is not clearly erroneous.[3]

[3] In affirming the adverse credibility determination, we do not rely on the Immigration Judge's finding that some of the respondent's testimony was implausible or his finding that many of the respondent's answers were nonresponsive (IJ at 6-7).

[redacted]

We agree with the Immigration Judge that the respondent did not meet his burden to demonstrate his eligibility for asylum, particularly in light of his lack of credibility. The documentary evidence in the record consists of two State Department Human Rights Reports on [redacted] (Exhs. 4, 7). Although these reports demonstrate that police misconduct, corruption, and politically-motivated prosecutions are issues in [redacted], they contain no information about the respondent or his family members and are insufficient to independently meet the respondent's burden to show that he suffered past persecution or has a well-founded fear of persecution in [redacted] on account of a statutorily protected ground. Because the respondent's testimony was not credible, and because no other evidence independently established his claim, he did not meet his burden of proof for asylum (IJ at 7-8). *See Matter of M-S-*, 21 I&N Dec. 125, 129 (BIA 1995) (stating that a persecution claim that lacks veracity cannot satisfy the burden of proof necessary to establish eligibility for asylum). Accordingly, we affirm the denial of his application for asylum.

Inasmuch as we affirm the denial of asylum for reasons unrelated to nexus, *see Barajas-Romero v. Lynch*, 846 F.3d 351, 356-60 (9th Cir. 2017) (holding that "'a reason' is a less demanding standard than 'one central reason'"), we agree with the Immigration Judge that the respondent did not meet the higher burden of proof for withholding of removal, *see Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006).

We also affirm the Immigration Judge's denial of the respondent's application for protection under the Convention Against Torture. The respondent did not present credible evidence that he was tortured in [redacted]. Although the country reports indicate that human rights abuses do occur in [redacted], we agree that the respondent has not met his burden to show that it is more likely than not that he would be tortured there by, or with the consent or acquiescence (to include the concept of willful blindness) of, a public official or an individual acting in an official capacity. Accordingly, he is not eligible for protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(c)-.18.

The respondent has submitted a copy of an Immigration Judge's decision granting the respondent's stepson's application for asylum. We construe this submission as a motion to remand. We note that this decision, which was issued in separate proceedings and was based on the respondent's stepson's personal experiences in [redacted], is not dispositive as to the respondent's eligibility for asylum. Given the respondent's lack of credibility, he has not shown that this evidence would likely change the results of his case such that a remand is warranted. *See Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1988) (explaining that a party who seeks a remand or to reopen proceedings to pursue relief bears a "heavy burden" of proving that if proceedings before the Immigration Judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case).

For the foregoing reasons, the respondent's appeal will be dismissed and his motion to remand will be denied. The following orders will be entered.

[redacted]

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FOR THE BOARD

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

/s/ Bardis Vakili
Bardis Vakili
Counsel for Petitioner