No. 20-1667

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KAREN ELIZABETH RIVERA-MEDRANO

Petitioner

v.

WILLIAM P. BARR, Attorney General

Respondent

OPENING BRIEF FOR PETITIONER

On petition for review of the order of the Board of Immigration Appeals

Custody status: Non-detained

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that oral argument will assist this Court in its consideration of the legal issues presented by this appeal. Resolution of these issues, notably the statutory right to examine issue, will have significant and far-reaching effects for Petitioner and other *pro se* noncitizens in removal proceedings. *See* Local Rule 34.0(a).

PRELIMINARY STATEMENT

In removal proceedings, noncitizens bear the burden to establish their eligibility for immigration relief such as asylum, withholding of removal, or protection under the Convention Against Torture ("CAT"). As a result, the Department of Homeland Security ("DHS") does not have an affirmative obligation to present any evidence. However, there is one tactic that DHS routinely employs to argue that noncitizens are not entitled to immigration relief. Specifically, DHS attempts to identify inconsistencies between the prior fear interview/border encounter notes and in-court testimony during hearings before Immigration Judges ("IJs"). This practice has become common after the enactment of the REAL ID Act, whereby "the fact-finder is entitled to draw the *falsus in omnibus* inference based upon inaccuracies, inconsistencies, or falsehoods 'without regard to whether . . . [they go] to the heart of the applicant's claim,' 8 U.S.C. § 1158(b)(1)(B)(iii)." *See Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 23 n.6 (1st Cir. 2007).

However, serious statutory and constitutional due process concerns arise when DHS employs this tactic and presents prior fear interview notes, without prior notice, *in the middle of the cross-examination* of noncitizens to attack their credibility in immigration court proceedings. *See* 8 U.S.C. § 1229a(b)(4)(B) ("the alien shall have a reasonable opportunity to examine the evidence against the

alien"); *Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997) ("the right to notice" and "a meaningful opportunity to be heard" are "the core of these due process rights" in removal proceedings). The submission of prior fear interview notes during cross-examination, without prior notice, fails to provide critical due process protections, thereby rendering the proceedings fundamentally unfair. Indeed, IJs may adopt preventive measures by requiring DHS to provide "copies of exhibits" to noncitizens prior to their individual hearings. *See* 8 C.F.R. § 1003.21(b) (explaining IJs' authority on pre-hearing conferences); *cf.* Fed. R. Civ. P. 26(b)(3)(C) and Fed. R. Crim. P. 16(a)(1)(A) (both civil and criminal disclosure rules require that a party turn over the adverse party's own prior statements). *See also* Geoffrey Heeren, Shattering the One-Way Mirror: Discovery in Immigration Court, 79 Brook. L. Rev. 1569 (2014) (detailing severely limited discovery in removal proceedings). Unfortunately, it does not appear that the Boston Immigration Court has adopted this safeguard to preserve the fairness of removal proceedings.

Petitioner was subjected to this unconstitutional and problematic practice in her immigration court proceedings. Petitioner was 20 years old, detained, and unrepresented at the time of her final hearing. She was raped by her stepfather, which caused her to leave school and seek refuge in the United States. She lacks a high school degree. She does not speak or read English. Saddled with these

obstacles, Petitioner was allowed to be cross examined during her immigration hearing using notes from her prior fear interview without any notice and without any opportunity to review (or the ability to even read) these records. As a result, Petitioner was significantly at a disadvantage in defending her credibility before the IJ. At a minimum, the law requires that noncitizens' fundamental due process rights be protected in removal proceedings, especially the right to have a "reasonable opportunity to examine the evidence against" them. *See* 8 U.S.C. § 1229a(b)(4)(B). That basic promise was broken in this case when the IJ failed to provide notice to Petitioner when DHS submitted I-213 and the 2017 credible fear interview notes in the middle of her individual hearing. The IJ also failed to provide Petitioner with a post-hearing review opportunity after being given no time to review these records, which are in English. Because she could not read English, merely receiving those documents in the middle of her individual hearing was not meaningful.

The absence of Petitioner's ability to meaningfully review the evidence against her rendered her proceedings fundamentally unfair, and she suffered prejudice. With such review, the outcome of the IJ's credibility determination likely would have been different. The IJ observed her demeanor to be positive and hinted at the trauma she had experienced as a rape survivor, noting that "it is clear that something happened to [her], which has affected her to this day." AR 2774.

Further, the IJ focused on the persuasiveness of Petitioner's explanations on the purported discrepancies. AR 2776. Though she does not speak or read English and lacks any form of societal or economic privilege, Petitioner has nonetheless been diligent in seeking relief in immigration court, including going as far as preparing her asylum application in English using a dictionary while detained. AR 691. Had she known this information in advance of her hearing, she would have been able to better prepare her case. Alternatively, had she received a post-hearing opportunity to review the information, she would have provided persuasive explanations on the purported discrepancies. Thus, with satisfactory explanations—which can only come after having a reasonable opportunity to review the prior notes—the IJ likely would have found that her testimony was credible under the totality of the circumstances.

With this statutory and constitutional violation alone, this Court can and should reverse the agency's decision, vacate the removal order, and remand the case to the IJ for a new hearing.[1]

[1] Petitioner has elected to withdraw her challenges to the underlying removal order through collateral attack, motion to reopen, or motion to reconsider.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of removal. *See* 8 U.S.C. § 1252(a)(1).

STATEMENT OF THE ISSUES

1. Whether the IJ violated Petitioner's statutory and constitutional due process rights when the IJ allowed DHS to cross examine Petitioner using credible fear interview notes and the I-213 form without notice and without offering her a reasonable opportunity to examine these documents in advance of the hearing.

2. Whether the IJ's adverse credibility finding is irrational under the totality of the circumstances standard when the IJ cherry-picked immaterial and trivial discrepancies between the fear interview notes and her in-court testimony.

3. Whether the BIA's denial of Petitioner's motion to remand constituted an error of law and abuse of discretion in the face of new evidence presented (i) because the BIA did not analyze her mother's affidavit and (ii) because the newly submitted evidence resolves the discrepancy issues raised by the IJ.

STATEMENT OF THE CASE AND FACTS

A. Ms. Rivera-Medrano's First Removal Proceeding.

Petitioner Karen Elizabeth Rivera-Medrano ("Ms. Rivera-Medrano") was born in El Salvador and came to the United States for protection on November 27, 2017 because of sexual violence perpetrated by her stepfather, José Luis Bonilla. AR[2] 509-513. When Ms. Rivera-Medrano was young, her stepfather[3] physically hit and sexually assaulted her by inappropriate touching. *Id*. More specifically, the stepfather touched all of her body, undressed her, and hit her body and face. AR 509 at ¶¶7-8. She, through her family members, contacted the police. Yet the stepfather fled the scene prior to the police's arrival. *Id*. The police did not follow up with her family. *Id*.

In 2017, the stepfather appeared in town again and forced Ms. Rivera-Medrano to deliver a suspicious bag (which presumably contained drugs or weapons) to a possible gang member. AR 509-513. Later in the same year, the stepfather abducted her and raped her at a nearby river. *Id*. She went to the police station immediately with her mother. *Id*. The police did not take any action. *Id*.

After this rape, she fled El Salvador and presented herself to Customs and

[2] All reference to "AR" indicates the Certified Administrative Record ("AR"). This brief is arranged in order of and with reference to the page numbers of the AR for ease of reference.

[3] José Luis Bonilla is the biological father of Ms. Rivera-Medrano's brother. AR 553.

Border Protection ("CBP") to seek asylum protection on November 27, 2017, in Brownsville, Texas. AR 2896-98. She was immediately detained. Subsequently, following her credible fear interview ("CFI"), the asylum officer found her fear credible and legally valid. AR 2902.

On January 30, 2018, *pro se* Petitioner had a video hearing before an IJ at the San Antonio Immigration Court. AR 573-587. At that hearing, the IJ failed to (i) advise her of the availability of *pro bono* legal service providers and (ii) ascertain whether she had received a list of such providers. *Id*. This failure was a violation of 8 C.F.R. § 1240.10(a)(2). Similarly, even though the IJ told Ms. Rivera-Medrano that she had the right "to appeal the Court's decision[,]" the IJ did not ascertain whether she had received a document notifying her of her appeal rights. AR 577. This failure was a violation of 8 C.F.R. § 1240.10(a)(3). Lastly, the IJ failed to provide her an option of withdrawal of an application for admission despite her being apparently eligible for the relief under 8 C.F.R. § 1235.4. AR 573-587. Having no one to advocate for her, Ms. Rivera-Medrano indicated that she wanted to "[l]eave to [her] country." AR 587. While the IJ could have offered this discretionary relief, he unilaterally interpreted her intent as her willingness to receive an order of removal. *Id*. The IJ ordered her removed to El Salvador and found that she waived her appeal.

B. Petitioner's Reinstatement of Removal and Reasonable Fear Interview.

After being removed to El Salvador, Petitioner stayed inside a house in her town because she feared her stepfather. AR 511 at ¶22. Because of this constant fear, she left her country again on October 23, 2018. AR 511 at ¶23. She moved to Mexico and then attempted to present herself to CBP agents in July 2019 (like how she did before on November 27, 2017). However, that option was not available because the Mexican police officers were blocking the path to the United States border. AR 511 at ¶24; AR 1150, 1152-56. Hence, she crossed the Rio Grande River on a raft and immediately surrendered herself to CBP on or about July 27, 2019. AR 511 at ¶24, 2964. CBP immediately detained her.

CBP then reinstated her prior removal order. AR 2963. Because she expressed her fear of return, the asylum officer provided a reasonable fear interview ("RFI") for her on August 26 and 29, 2019. AR 2937. The asylum officer concluded that Ms. Rivera-Medrano's fear was credible and reasonably valid and thus referred her case to the Boston Immigration Court for withholding-only proceedings. AR 2937, 2933-34.

C. Petitioner's Withholding-Only Proceedings, and the IJ's Decision.

On October 9, 2019, while detained, *pro se* Petitioner had her first hearing before the IJ at the Boston Immigration Court. AR 2932, 2785-2790. At that time, she was detained at the Suffolk County House of Corrections in Boston,

Massachusetts. AR 2932, 2786. At this hearing, the IJ advised her of various rights, including a right to secure counsel. AR 2788. The IJ also told her that she "will have a reasonable opportunity to examine . . . the evidence against [her.]" AR 2787-88. To seek counsel, the IJ gave her 13 business days to find legal representation. AR 2789. The IJ warned her that she might have to represent herself if she could not find counsel by October 29. AR 2789-90. On October 10, 2019, one day after the first hearing, the government transferred her to the Strafford County Department of Corrections ("SCDOC") in Dover, New Hampshire. AR 2200. Because of this transfer, her efforts to secure *pro bono* counsel were significantly hampered. AR 563.

On October 29, 2019, Petitioner had her second hearing. AR 2791-98. Petitioner represented herself. AR 2793. The IJ confirmed that she received the documents related to her 2019 RFI. AR 2794. The IJ continued her case to November 12, 2019, to have her submit an asylum application to apply for withholding of removal and protection under the CAT. AR 2795.

Following the IJ's instruction, *pro se* Petitioner prepared and submitted her asylum application in English on November 12, 2019, after using a dictionary and receiving assistance from her cellmates at the SCDOC. AR 2916-2927.

On November 22, 2019, Petitioner had her last hearing before the IJ while she was detained. AR 2808-2894. At the outset of the hearing, the IJ asked her

whether she had an attorney. AR 2810. She said no. *Id*. While the IJ provided instructions to her on how the proceedings would be conducted, the IJ did not remind her about her right to examine evidence to be used against her. AR 2816. The IJ also asked whether she had any evidence in support of her relief. AR 2810-11. She said no.[4] AR 2811. During the hearing, Petitioner went into detail about the sexual assault she experienced at the hands of her stepfather. Due to this trauma, she frequently cried during her testimony, which led the IJ to offer her tissues and water and the opportunity for breaks. AR 704, 718, 724.

In the middle of the hearing and during Petitioner's cross examination, DHS counsel introduced the I-213 form and documents related to her 2017 CFI to the Court. AR 2859, 2869. While the IJ asked Ms. Rivera-Medrano about the admission of the documents as part of the record, the IJ never offered her an opportunity to examine them. AR 2860, 2870. When the IJ and DHS counsel posed her questions on purported inconsistencies by using the newly submitted documents, Ms. Rivera-Medrano had to rely on her memory to answer them. AR 2873, 2874, 2875, 2877, 2880, 2881. While she received a copy of these documents at the hearing, they were not meaningful to her since she could not read

[4] Petitioner had difficulty obtaining corroborating evidence because she was detained. AR 2880. She relied on her friend outside of detention for the communication with her family members. *Id*. Even having access to the phone system was expensive. *Compare* AR 663 ($25.51 in her account) *with* AR 1176 (at SCDOC, the 15-min call rate is $4.35). AR 1176.

English. At least for the 2019 RFI, which she previously had received before the hearing, she was able to tell the IJ why the interview notes indicated that she said "three" to the asylum officer's question of how many times her stepfather had raped her. AR 2879.

At the end of her hearing, the IJ concluded her case. AR 2888-91. After questioning Ms. Rivera-Medrano whether she remembered the summary of the previously undisclosed 2017 CFI, the IJ asked the deputy sheriffs if they could bring her back to the courtroom at 1:00 p.m. on the same day to "wrap [the case] up by th[e] afternoon." AR 2889. When the officers told the IJ that it would be difficult to come back due to other detained docket cases and the interpreter indicated that she had to leave by 1:00 p.m., the IJ then summarily gave an oral decision and concluded the hearing. AR 2890. This oral decision lasted approximately 30 minutes. AR 1181-82.

The IJ rejected *pro se* Petitioner's withholding of removal and protection claims under the CAT based on an adverse credibility finding, primarily relying on DHS's cross examination of Petitioner using the 2017 CFI and I-213 documentation. AR 2771-77. The IJ made an adverse credibility determination because he found that there were three discrepancies between her in-court testimony, 2019 RFI, 2017 CFI, and I-213. *Id*. These purported discrepancies are summarized below.

1. Whether Petitioner knew the contents of the bag or not.

First, the IJ found that there was a discrepancy about whether Ms. Rivera-Medrano knew the contents of the suspicious bag she delivered to a possible gang member. AR 2774-75. At her 2017 CFI, Petitioner said that her stepfather forced her to sell or transport weapons or drugs. AR 2907, 2908-09. In the form I-213, the CBP agent also noted this transport. AR 2897. However, Ms. Rivera-Medrano testified before the IJ that she did not look inside the bag when she was forced to deliver. AR 2869, 2871-72, 2875, 2882. She also said at her 2019 RFI that she did not know what was inside of the bag. AR 2949.

When asked by the IJ about this purported discrepancy, Petitioner testified that she did not remember what she told the CBP agent in 2017, in part, because the agent told her that everything she was saying was a lie. AR 2884. It appears that she was even confused the difference between an asylum officer and CBP agent. However, the IJ observed that she appeared to confirm that she knew the contents inside of the bag because she previously said, "No, [w]ell, maybe[,] [y]es" in response to the asylum officer's question as to whether she delivered drugs to a gang member at her 2019 RFI. AR 2775, 2949. Petitioner also explained that she "said maybe and yes because [she] didn't know for a fact what was inside the bag." AR 2882.

2. How many times was she raped by her stepfather?

Second, the IJ stated that there was a discrepancy about how many times Ms. Rivera-Medrano suffered rape (forcible sexual intercourse). AR 2775. At her 2017 CFI and hearing before the IJ, Ms. Rivera-Medrano stated and testified that she was raped only one time by her stepfather. AR 2879 (hearing), 2912 (CFI). However, Ms. Rivera-Medrano responded with "three" when the asylum officer asked her how often the stepfather "raped" her during the 2019 RFI. AR 2942 (RFI).

When DHS counsel questioned this discrepancy, Ms. Rivera-Medrano responded that she thinks "[the asylum officer] made a mistake[.]" AR 2879. The IJ did not ask any questions about this issue. AR 2808-2894. Further, neither the IJ nor DHS counsel noted the context of this particular section of her 2019 RFI. The context of Petitioner's statement during the 2019 RFI was about what happened to her and the sexual assault she suffered at the hands of her stepfather when she was eight or nine years old, not the rape she suffered in 2017. AR 2942. Moreover, it is not clear whether she meant "forcible sexual intercourse" or "sexual assault without intercourse" when she used the term "rape" during the 2019 RFI. *Id.* In short, this purported discrepancy was the product of terminology confusion during the 2019 RFI—confusion which is understandable given the language barrier and the fact that Petitioner is unsophisticated.

3. Who reported the rape to the police and what did the police do to protect her?

Third, the IJ found that there was a discrepancy concerning who reported the rape to the police and what the police did to protect her. AR 2775. At her 2017 CFI, she responded "yes" to the asylum officer's question of whether she filed a police report of the rape. AR 2910. The summary of the interview indicates that her mother reported the stepfather to the police, and the police searched for him. AR 2912. She also said that the police were looking for him "in every alley, every road." AR 2910. Yet it is not clear whether she was referring to the police's action in 2017 or how the police responded when she was sexually assaulted by her stepfather as a young child. *Cf.* AR 2958 (police were looking for the stepfather when she was young).

During her 2019 RFI, she responded "yes" to the asylum officer when she was asked whether she reported the rape to the police. AR 2947. She said that she and her mom "went to the police but the police didn't do anything[.]" AR 2943. She further told the asylum officer that the police "said that they were going to look for [the stepfather] and detain him but they did not do that[.]" AR 2947. Before the IJ, Ms. Rivera-Medrano testified that she went to the police station with her mother. AR 2876, 2881. She did not know if the police wrote down her report of rape. AR 2876. Although her mother was next to her, her mother did not say a word to the police. AR 2881. Ms. Rivera-Medrano testified that she "went to a

police station nearby, but they didn't do anything. They didn't ask me how it was or anything. They didn't say anything." AR 2845. When the IJ asked her whether the police took a report from her, she responded, "No. I did not see them write anything or say anything." *Id*. She also told DHS counsel that, "since [she] went to the police, [she] would think that if [the police] wrote something down, there should be a report if I requested it." AR 2876. Because no report had been submitted to the IJ, the IJ did not appear to have believed her. AR 2775.

4. The IJ's other considerations.

The IJ also noted that he considered the fact that a young unaccompanied woman would be reluctant to reveal sexual violence. AR 2776. This is why the IJ "d[id] not give any weight whatsoever to the fact that, according to the I-213 in Exhibit 4, [Petitioner] did not tell the officers that she had been sexually assaulted." *Id*. Yet the IJ observed that she would have a fresher and accurate memory when she was interviewed in 2017 because she was 18 years old and the rape occurred "three months" prior to her 2017 CFI. *Id*.

With respect to her demeanor, the IJ considered Ms. Rivera-Medrano to be responsive and candid. The IJ stated in his decision that, "[i]f this court were to have judged [her] credibility based on her testimony before the court upon being questioned by the court, then this court very well may have found [her] credible." AR 2777. The IJ noted that Ms. Rivera-Medrano's case "[wa]s a sympathetic

case" and "it is clear that something happened to [her], which has affected her to this day." AR 2773-74. Further, while DHS also took the issue with the discrepancy as well, it "[did]n't dispute that this 2017 [sexual] assault occurred." AR 2882.

D. Ms. Rivera-Medrano's BIA Appeal.

On December 9, 2019, while detained, *pro se* Petitioner filed her notice of appeal to the BIA. AR 2754. On January 10, 2020, Petitioner secured counsel for her BIA appeal. AR 2743, 2752. On January 24, 2020, after her counsel reviewed the record of proceedings, Petitioner found out that her rights were violated at her first removal proceedings. AR 511 ¶21. On or about February 3, 2020, Petitioner filed her motion to reconsider with the San Antonio Immigration Court. AR 27-465. On April 28, 2020, the San Antonio Immigration Court rejected her motion to reconsider because she was supposed to file the motion with the BIA. AR 9-10. Immediately, Petitioner filed the rejected motion to reconsider with the BIA. AR 13-14.

Petitioner also filed her appeal brief packet, motion to reopen, and motion to remand. AR 469 (cover page), 1186-1901 (appeal), 1981-2717 (reopen), 477-1184 (remand).[5]

[5] On April 4, 2020, the District Court for the District of New Hampshire ordered the government to provide Petitioner with a bond hearing before an immigration judge to justify her prolonged detention by clear and convincing evidence. *See*

On June 30, 2020, the BIA dismissed Petitioner's appeal and denied all of her motions. AR 3-8. The BIA found, in part, that there was no violation of due process rights because it did not conclude that "the Immigration Judge failed to provide the applicant with an opportunity to present her claim." AR 5. Because the BIA found no violation of the right to counsel or due process, it did not address the issue of prejudice. AR 5.

The BIA upheld the IJ's adverse credibility finding. AR 5. First, the BIA found that the IJ's reasoning on the purported discrepancy concerning whether Petitioner knew the contents inside the bag/package was not clearly erroneous. AR 5. In her appeal brief, Petitioner argued that the IJ did not consider the fact that she was raped by the stepfather merely three months prior to encountering the CBP agent and the asylum officer in 2017. AR 1218. She further explained that there was no discrepancy as to whether her stepfather forced her to deliver a suspicious bag/package to a possible gang member with a number 18 tattoo. AR 1218. However, the BIA concluded that the IJ "was not required to accept [her]

Rivera-Medrano v. Wolf, No. 20-cv-194-JD, 2020 DNH 055, 2020 U.S. Dist. LEXIS 59609 (D.N.H. Apr. 4, 2020), *appeal pending*, No. 20-1573. Ms. Rivera-Medrano had a bond hearing on April 14, 2020 before the same IJ who denied her withholding of removal and CAT relief. The IJ found that DHS could not justify her continued detention and released her on $3,000 bond. DHS appealed the IJ's decision to the BIA, which is pending as of filing of this brief. Because DHS did not seek an automatic stay of her release pursuant to 8 C.F.R. § 1003.19(i), she has been released from the government's immigration custody since April 2020.

explanation where there are other permissible views of the evidence." AR 6.

Second, the BIA held that the IJ's adverse credibility determination based on the purported discrepancy of how many times the stepfather raped her was not clearly erroneous. In her appeal brief, Petitioner argued that she already explained to the IJ that it was a mistake for the asylum officer to write down three instead of one for the number of rapes she suffered. AR 1220. Further, even if it was not a mistake, she argued that how she responded to the asylum officer's question was reasonable and understandable. AR 1220. To her, there was no difference between "sexual abuse" (which she suffered as a younger child) and "rape" (which she suffered in 2017) in terms of their respective meanings. AR 1220. Accordingly, Petitioner combined these collective traumatic experiences together. Yet the BIA rejected this argument and found that "she did not proffer [this] explanation regarding her misunderstanding of the asylum officer's questions[.]" AR 6.

Third, the BIA concluded that the IJ's finding that a discrepancy existed on who and how the report was submitted to the police and its action upon the submission of the report was not clearly erroneous. AR 6-7. In her appeal brief, Petitioner argued that the record is consistent and lacked any discrepancy because "reporting" can be done verbally too, and is not limited to a written report. AR 1221. Further, with respect to what the police did in 2017 after reporting the rape,

Petitioner argued that she might have inadvertently confused the two events between the sexual touching when she was young and the rape she experienced in 2017. The police did look for the stepfather when she was young, but did not do so in 2017. AR 1221. However, the BIA rejected this argument because she "did not indicate that she had difficulty remembering her interactions with the police at that time[.]" AR 7.

Because the IJ's adverse credibility determination was not clearly erroneous, the BIA found that the IJ correctly pretermitted Petitioner's withholding of removal and protection under the CAT. AR 7.

The BIA denied her motion to remand because, in its view, new evidence does not resolve the discrepancies. AR 7. In her motion to remand, now with the benefit of counsel, Petitioner submitted the following new evidence (among others): her affidavit; photos showing the places where the stepfather sexually assaulted and raped her; a clinical psychologist's affidavit; her mother's sworn affidavit along with the mother's identification; her birth certificate; her brother's birth certificate; her aunt's death certificate; a country conditions expert affidavit; and country conditions reports. AR 505-507. The BIA did not question whether the evidence was previously available. AR 7. Nonetheless, the BIA denied the motion because the psychologist's affidavit "does not resolve the discrepancies in the adverse credibility finding[.]" AR 7. Thus, the BIA found that Ms. Rivera-

Medrano "has not demonstrated that this evidence would change the result in her case." AR 7. However, the BIA did not analyze whether her mother's affidavit and potential testimony would change the result in her case. AR 7.

Lastly, the BIA denied Petitioner's motion to remand *sua sponte* as well. AR 8.

On July 6, 2020, Petitioner filed a petition for review of the BIA's decision.

SUMMARY OF ARGUMENT

This Court should reverse the BIA's decision for three independent reasons.

First, the IJ violated Petitioner's statutory and constitutional right to examine the evidence against her and due process rights. A full and fair hearing in removal proceedings requires the IJ to provide Petitioner with a "reasonable opportunity to examine the evidence against [her]." *See* 8 U.S.C. § 1229a(b)(4)(B). The regulation also requires the IJ to advise her of this statutory right. *See* 8 C.F.R. § 1240.10(a)(4). Further, the Fifth Amendment guarantees due process in the form of "the right to notice" and "a meaningful opportunity to be heard" in removal proceedings. *See Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997). Yet the IJ failed to advise her of this right or offer such a reasonable opportunity when DHS submitted the I-213 and the 2017 CFI notes in the middle of cross-examination without prior notice. The IJ provided a copy of these documents to Petitioner in the middle of the hearing, but merely receiving them in

the middle of the hearing was deficient because she could not read English. *See Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) (the right to translation); *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) ("Congress intended this right [to seek relief to avoid deportation] to be equally available to all worthy claimants without regard to language skills"). The IJ could have cured this violation by offering a post-hearing review opportunity. However, it never occurred. Instead of such vigilance, the IJ hastily concluded her last hearing. Petitioner suffered prejudice from this violation.

Second, the IJ's adverse credibility finding, which was adopted by the BIA, is irrational because the agency failed to consider the "totality of circumstance[] and all relevant factors." *See* 8 U.S.C. § 1158(b)(1)(B)(iii). Several purported inconsistencies on which the adverse credibility finding was based would have been resolved by simply reading the surrounding context or considering the "totality of the circumstances" from which a statement or record arises. Further, this standard "does not . . . permit a judge to 'cherry pick' facts or inconsistencies to support an adverse credibility finding that is unsupported by the record as a whole." *Illunga v. Holder*, 777 F.3d 199, 207 (4th Cir. 2015). This "cherry picking" is precisely what occurred here.

Third and finally, the BIA's denial of granting her motion to remand is arbitrary and capricious. Failure to consider reasonable, substantial, and probative

evidence is a reversible error. Here, Ms. Rivera-Medrano submitted new evidence, including her mother's sworn affidavit and a psychologist's affidavit showing her diagnosed post-traumatic stress disorder ("PTSD") along with other documentary evidence that corroborate her testimony and bolster her credibility. Yet, the BIA's decision is silent on her mother's sworn affidavit. Even for the psychologist's affidavit, the BIA's conclusion that it would not change the outcome solely because it did not resolve the discrepancy issue is an impermissible basis to refuse to grant her remand request. A factfinder would find that she can meet the burden under the totality of the circumstances standard, which requires IJs to consider all relevant factors. Put another way, the mere existence of immaterial discrepancies can be cured with proper and persuasive explanations under the totality of the circumstances standard. This new evidence provides added context and rebuts the purported discrepancies found by both the IJ and BIA.

ARGUMENT

I. THE AGENCY VIOLATED PETITIONER'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO EXAMINE EVIDENCE.

A. Standard of Review.

This Court applies the *de novo* standard for claims involving due process and the statutory right provided by Congress to protect procedural fairness of removal proceedings. *See Toribio-Chavez v. Holder*, 611 F.3d 57, 62 (1st Cir.

2010) (due process); *Hernandez Lara v. Barr*, 962 F.3d 45, 54 (1st Cir. 2020) (statutory right to counsel). For fundamental statutory rights claims, this Court has not determined whether a showing of prejudice is required. *See Hernandez Lara*, 962 F.3d at 56. For due process claims, noncitizens must show whether the procedural defects have prejudiced, which means whether these defects "[are] likely to have affected the outcome of the proceedings[.]" *See Pulisir v. Mukasey*, 524 F.3d 302, 311 (1st Cir. 2008).

B. The IJ Violated Ms. Rivera-Medrano's Statutory Right to Examine the Evidence Against Her.

The IJ violated Ms. Rivera-Medrano's right to have an opportunity to examine the evidence against her and due process rights. In removal proceedings, "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness." *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945). "To assure fair treatment of aliens, the Immigration and Nationality Act sets forth procedures to be followed at a deportation hearing." *See Navia-Duran v. Immigration & Naturalization Service*, 568 F.2d 803, 808 (1st Cir. 1977). "These statutory requirements have been supplemented by regulations which delineate more particularly an alien's rights from the initiation of proceedings to the entry of a deportation order." *Id.*

The statute provides that noncitizens "*shall* have a reasonable opportunity to examine the evidence against" them. *See* 8 U.S.C. § 1229a(b)(4)(B) (emphasis

added). The regulation also provides that the IJ must advise that noncitizens "will have a reasonable opportunity to examine" the evidence against them. *See* 8 C.F.R. § 1240.10(a)(4). A violation of the statutory requirement is reversible error. *See Rapheal v. Mukasey*, 533 F.3d 521, 532-534 (7th Cir. 2008) (finding that a represented Liberian asylum seeker's statutory right to examine was violated where the IJ used a material CBP interview report to determine the adverse credibility but was not able to provide it to the noncitizen through the video hearing[6]); *but see Barrera v. Barr*, 798 F.App'x 312, 317 (10th Cir. 2020) (unpublished) (rejecting a represented petitioner's right to examine the evidence claim, because the IJ provided "a post-hearing opportunity to review" the documents and an offer to submit the desire points after the conclusion of the hearing)*; see also Tadesse v. Gonzales*, 492 F.3d 905, 909 (7th Cir. 2007) ("Receiving key evidence on the day of the hearing seems to fall well short of this [8 U.S.C. § 1229a(b)(4)(B)] standard, although the IJ may have righted the situation by giving Tadesse a continuance"). Further, the agency's violation of its own regulation is a reversible error. *See Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000).

[6] The fact that Ms. Rivera-Medrano did receive a copy of the documents here, unlike the Liberian asylum seeker's case, is a distinction without a difference since Mr. Rivera-Medrano cannot read English. Moreover, unlike the petitioner in *Rapheal*, Ms. Rivera-Medrano was *pro se*.

Here, Petitioner's right under 8 U.S.C. § 1229a(b)(4)(B) was violated. In the middle of the final hearing and without any prior notice, the IJ and DHS counsel used Petitioner's I-213 and previous 2017 CFI interview records written in English at cross examination to argue that discrepancies existed between the information contained in this evidence and her testimony. AR 2860, 2863 (2017 CFI notes), 2865 (same), 2867 (same), 2870 (I-213), 2873 (CFI), 2874 (same), 2876 (same), 2887 (same). However, the IJ never reminded Petitioner of her right to have a reasonable opportunity to review the evidence against her during this last hearing. Indeed, while the IJ previously told Ms. Rivera-Medrano that she "will have a reasonable opportunity to examine [evidence][,]" that advisal occurred *six weeks* prior to the last hearing. AR 2787. At no other time, however, did the IJ remind her of her right to have a reasonable opportunity to examine the documents to be used against her. Because this is a critical right provided by Congress, the IJ should have been more vigilant in protecting her right. *See* 8 C.F.R. § 1240.10(a)(4).

Even if the Court finds that no such reminder was needed for the IJ to fully comply with the federal regulation because he already did it six weeks prior, the absence of an offer to examine the documents was a violation of the statute. *See* 8 U.S.C. § 1229a(b)(4)(B). During the advisal on October 9, 2019 (her first hearing), the IJ told her that she would have such a reasonable opportunity. That

promise was never kept.

There were three opportunities where the IJ could have reminded Petitioner of her statutory right to examine or offer her an opportunity to review the notes in a meaningful manner. First, the IJ could have informed her of the right when DHS submitted the 2017 CFI notes in the middle of cross examination. AR 2860. However, other than merely asking Ms. Rivera-Medrano whether she would object to the *admission* of the notes, the IJ failed to inform her of her right to examine the notes. AR 2860. Second, the IJ could also have informed her of the right when DHS submitted I-213 during its cross examination. AR 2870. Again, the IJ only focused on the evidence's admission. AR 2870. Third, the IJ could have provided a post-hearing review opportunity for Petitioner. *Cf. Barrera*, 798 F.App'x at 317 (the IJ provided "a post-hearing opportunity to review" the documents and an offer to submit the desire points after the conclusion of the hearing). However, instead of such opportunity, the IJ hastily concluded Petitioner's last hearing.[7] AR 2888-

[7] In the civil litigation context, this is precisely why discovery exists—namely, to avoid unfair surprise. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."); *United States v. Procter*, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose …. They together with pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."). Further, in the criminal litigation context, non-disclosure of exculpatory or impeachment evidence may require a new trial where the evidence may have determined guilt or innocence. *See Giglio v. United States*, 405 U.S. 105, 154-55

91.

Under these facts, Petitioner's statutory right to "have a reasonable opportunity to examine the evidence against" her was violated. *See* 8 U.S.C. § 1229a(b)(4)(B). Without knowing the context of the specific pages and questions the IJ and DHS counsel were referring to, she had to rely on her memory to provide answers for them. Without an examination of the prior interview notes, it would be difficult, if not impossible, for asylum seekers or even trained lawyers to properly respond to questions concerning purported discrepancies. For Petitioner, she was further vulnerable in relying on her memory because she suffers from PTSD following her 2017 rape, lacks sophistication, and does not speak English. AR 1245-51. To be sure, merely receiving a copy of those documents in English on the day of the hearing was not sufficient. *See Perez-Lastor*, 208 F.3d at 778 (noncitizens have the right to translation under the principle of a full and fair hearing); *Augustin*, 735 F.2d at 37 ("Congress intended this right [to seek relief to avoid deportation] to be equally available to all worthy claimants without regard to language skills"). Indeed, IJs "must assiduously refrain from becoming advocates for either party." *See Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999).

(1972). *See also Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) (extending the disclosure requirements in criminal proceedings to civil actions involving denaturalization and extradition cases).

However, IJs must carefully protect *pro se* noncitizens' rights. *See Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004) (explaining the IJ's duty "[b]ecause 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") (quoting *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002)). Here, the IJ failed to protect Petitioner's right to examine this evidence to be used against her.

1. No showing of prejudice should be required.

This Court has yet to hold whether a showing of prejudice may be assumed when a noncitizens' statutory right, created to protect fundamental procedural fairness, is violated in removal proceedings. *See*, *e.g.*, *Hernandez Lara*, 962 F.3d at 56-57; *Nelson*, 232 F.3d at 262. Here, no showing of prejudice is required. The Court can find that prejudice is presumed when the agency violates its own regulation or statutory requirement designed to protect the fundamental fairness of removal proceedings. *See Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) (statutory right fundamental to be circumscribed by the prejudice test); *Yiu Fong Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969) (same); *Montilla v. INS*, 926 F.2d 162, 168-69 (2d Cir. 1991) (rejecting the prejudice test for different reasons). *See also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954) (the Supreme Court held that when the agency did not follow its

own regulation requiring it to exercise its discretion independently, reversal was warranted, and the Court did not require a showing of prejudice). However, if this Court disagrees and requires a showing of prejudice, such a showing is satisfied here.

2. Even if a showing of prejudice is required, Petitioner made her showing of suffering prejudice.

Ms. Rivera-Medrano suffered prejudice from this statutory violation. *See Pulisir*, 524 F.3d at 311. The IJ concluded that Ms. Rivera-Medrano was not credible primarily based on the following discrepancies: whether she knew the contents of the suspicious bag, who reported the rape to the police in 2017, and what the police did. With a reasonable opportunity to review the I-213 and 2017 CFI notes, Ms. Rivera-Medrano would have provided persuasive and satisfactory explanations to the purported discrepancies.

As a preliminary matter, it is important to note that the IJ considered Petitioner's demeanor to be positive and candid. A demeanor can be a dispositive factor in credibility determinations. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). This is intuitive because "the IJ has the best vantage point from which to assess the witnesses' . . . demeanors[.]" *Cuko v. Mukasey*, 522 F.3d 32, 37 (1st Cir. 2008). Courts give "'special deference' to a credibility determination that is based on demeanor." *See Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999); *e.g.*, *Dehonzai v. Holder*, 650 F.3d 1, 9 (1st Cir. 2011) (considered the IJ's finding of

the petitioner's intentionally evasive demeanor and manner of response). "[A] witness's demeanor is often a critical factor in determining [her] truthfulness[.]" *See Laurent v. Ashcroft*, 359 F.3d 59, 64 (1st Cir. 2004).

Here, the IJ stated in his decision that, "[i]f this court were to have judged [her] credibility based on her testimony before the court upon being questioned by the court, then this court *very well* may have found [her] credible." AR 2777 (emphasis added). The IJ further noted that Ms. Rivera-Medrano's case "is a sympathetic case." AR 2773. Lastly, hinting at the sexual abuse Petitioner has suffered, the IJ observed that "it is clear that something happened to [Ms. Rivera-Medrano], which has affected her to this day." AR 2774. This finding leads to the conclusion that she was telling the truth during her testimony before the IJ. Despite this positive finding, the IJ made an adverse credibility determination based on the purported discrepancies between her testimony and earlier fear interviews. Moreover, as an example, Ms. Rivera-Medrano could have exaggerated what happened to her after her removal to El Salvador in 2018. But she did not. Instead, she told the truth and informed the IJ that she did not see the stepfather after she was returned to El Salvador. AR 2851. This absence of any exaggeration further supports the truthfulness of her testimony.

First, as explained below and after an opportunity to review the evidence used against her, Ms. Rivera-Medrano explained to the BIA as to why she said that

she transported drugs or weapons to a gang member in 2017 during the border encounter and CFI. AR 1227 ¶15 (affidavit), 1218-19 (BIA brief). Although she "did not look inside of the bag[,]" she "thought that it was drugs or weapons because the delivery was made to a man without a shirt with number 18 tattoo." *Id*. Hence, she "thought that that man was a 18th [street] gang member." *Id*. In this context, it is reasonable to observe why she told the asylum officer in 2017 that the stepfather "want[ed] [her] to be selling drugs." AR 2906. Again, during her immigration hearing, Petitioner had to rely on her memory of what happened in 2017 because she was not provided her 2017 CFI notes in advance of the final hearing. Thus, she only remembered her negative reaction towards the CBP agent and could not provide the complete picture that she was ultimately later able to convey to the BIA. AR 1228 ¶19. This is why Ms. Rivera-Medrano kept referring to her negative interaction at the border during her testimony before the IJ. AR 2869.

Upon careful review of the 2017 CFI notes, Ms. Rivera-Medrano would have provided this explanation to the IJ, as she did to the BIA. Yet such a reasonable explanation could not have been provided in the absence of her examination of the 2017 CFI notes. The BIA, without addressing whether her right to examine was violated, merely concluded that the IJ "was not required to accept [her] explanation where there are other permissible views of the evidence." AR 6.

However, the presence of this explanation would likely have affected the IJ's adverse credibility determination. It is obvious that the IJ focused on the sufficiency of her explanation, which only would have been buttressed by this further explanation had the IJ given Petitioner the opportunity to thoroughly review this evidence. AR 2776 ("it does not explain the number of inconsistencies that [Ms. Rivera-Medrano] has told immigration authorities in 2017 compared to 2019").

Second, as addressed in more detail below and after an opportunity to review the evidence used against her, Ms. Rivera-Medrano explained to the BIA why she thinks she told the asylum officer in 2017 that the police "w[as] looking for [the stepfather] in every alley, every road" after the report to the police about the rape. AR 1221. She explained to the BIA after reviewing the record that she "may have inadvertently confused the two events between the sexual touching when she young and rape[] in 2017" concerning what the police did after each report. AR 1221. The police did look for the stepfather when she was young and reported being sexually abused, but it did not do so in 2017 after she reported that she was raped. AR 1221. The IJ would likely have found this explanation satisfactory given its focus on the sufficiency of Petitioner's explanation as to this purported discrepancy. *Cf.* AR 2776. Such persuasive and satisfactory explanations should be considered as a factor in determining Petitioner's credibility under the totality of

the circumstances. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (requires the agency to consider *all relevant factors*). Further, with the finding of positive credibility, Petitioner would have prevailed her withholding of removal and protection under the CAT. *See infra* Section III.C.2-3.

In sum, because she suffered prejudice from the absence of having a meaningful opportunity to examine the documents used against her, this Court should find that her statutory right was violated. Thus, this Court should reverse the agency's decision, vacate the removal order, and remand the case to the IJ for a new hearing.

C. The IJ Violated Ms. Rivera-Medrano's Due Process Rights.

If the Court concludes that the IJ neither had to remind her of her statutory right when DHS submitted the evidence nor had to offer her a reasonable opportunity to review this evidence under 8 U.S.C. § 1229a(b)(4)(B) and 8 C.F.R § 1240.10(a)(4), then it should hold that her constitutional due process rights were violated because the absence of any meaningful review of the evidence used by DHS in the middle of cross examination rendered her proceedings fundamentally unfair.

At the most element level, due process requires notice and an opportunity to be heard in a meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Reno v. Flores*, 507 U.S. 292, 306 (1993). Courts have found the agency's

removal proceedings constitutionally-deficient in a variety of different contexts. *See, e.g.*, *Garcia v. INS*, 20 F.3d 725, 728-29 (9th Cir. 2000) (holding that due process requires opportunity to present evidence in support of one's case); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405-406 (3d Cir. 2003) (finding due process violation where the BIA solely relied on one letter from the Department of States for the adverse credibility finding because it does not satisfy the due process standard of reliability and trustworthiness); *Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (finding due process violation where the IJ failed to give the petitioner an opportunity to testify and consider the testimonial evidence).

This Court has emphasized that "the right to notice" and "a meaningful opportunity to be heard" are "the core of these due process rights" in removal proceedings. *See Choeum*, 129 F.3d at 38. Here, the BIA did "not conclude that the [IJ] failed to provide [Ms. Rivera-Medrano] with an opportunity to present her claim." AR 5. Yet, there was no sufficient prior notice because the new evidence was submitted to the IJ *in the middle of the last hearing*. Moreover, as aforementioned, "a meaningful opportunity to be heard" can hardly be achieved when Ms. Rivera-Medrano had no meaningful opportunity to review the documents against her. She did not have any time to review the documents, nor was she able to examine them during the hearing because she cannot read English. Because of this deficiency in her procedural process, Petitioner suffered prejudice.

See supra Section I.B.2.

II. THE AGENCY'S ADVERSE CREDIBILITY FINDING IS IRRATIONAL AND NOT SUPPORTED BY THE RECORD UNDER THE TOTALITY OF THE CIRCUMSTANCES STANDARD.

A. Standard of Review.

This Court ordinarily reviews only the decision of the BIA. *See Romilus v. Ashcroft*, 385 F.3d 1, 5 (1st Cir. 2004). But where, as here, the BIA either defers to or adopts portions of the IJ's decision while also providing additional analysis of its own, this Court also must review the IJ's decision as well as the BIA's. *See Acevedo-Aguilar v. Mukasey*, 517 F.3d 8, 9 (1st Cir. 2008); *Settenda v. Ashcroft*, 377 F.3d 89, 93 (1st Cir. 2004).

The Court reviews the factual finding of the BIA under the substantial evidence standard and will uphold the BIA's decision if it is "supported by reasonable, substantial, and probative evidence on the record as a whole." *See Attia v. Gonzales*, 477 F.3d 21, 23 (1st Cir. 2007). The Court reverses the agency's decision if "any reasonable adjudicator would be compelled to conclude the contrary." *See* 8 U.S.C. § 1252(b)(4)(B); *Lin v. Gonzales*, 503 F.3d 4, 7 (1st Cir. 2007).

B. Evidence is Contrary to the Conclusion that Petitioner's Testimony was Not Credible under the Totality of the Circumstances.

The IJ found Ms. Rivera-Medrano not credible based on three grounds: (1)

whether she knew the contents of the suspicious bag; (2) how many times the stepfather raped (forcible sexual intercourse) her; and (3) who reported the rape to the police in 2017 and what the police did. The agency's finding must be reversed because the record compels the contrary conclusion under the totality of the circumstances. These purported discrepancies were, at best, minor, immaterial, and/or the result of confusion (especially where Petitioner does not speak English).

Under the REAL ID Act, while the IJ has the broad discretion in the assessment of credibility, the IJ does not have the *carte blanche* discretion to base an adverse credibility determination on inconsequential shortcomings. *See Castañeda-Castillo*, 488 F.3d at 23 n.6 (noting that irrationality of the agency's adverse credibility finding would not survive appeal even under the REAL ID Act). Even under the REAL ID Act, "credibility determinations nonetheless must be reasonable and take into consideration the individual circumstances of the applicant." *See Rivas-Mira v. Holder*, 556 F.3d 1, 5 (1st Cir. 2009) (internal quotation marks omitted).

Further, the agency must distinguish between inconsistencies "that are material and those that are not[.]" *See Cojocari v. Sessions*, 863 F.3d 616, 620 (7th Cir. 2017). That is because adverse credibility findings should not be based on trivial inconsistencies, even under the REAL ID Act. *See Ferreira v. Lynch*, 831 F.3d 803, 810-11 (7th Cir. 2016). Put another way, a witness's entire credibility

can be doomed "if [the] person testifies *falsely*, *willfully*, and *materially* on one matter[.]" *Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013) (emphasis added).

As a preliminary matter, as aforementioned, the IJ considered her demeanor to be positive. AR 2773, 2774, 2777. Despite this positive finding, the IJ found three purported discrepancies between her testimony and earlier fear interviews. As explained below, these discrepancies are either nonexistent, the product of confusion, or trivial.

1. Petitioner's testimony about selling or transporting drugs.

The purported discrepancy about whether Petitioner knew the contents of the suspicious bag that the stepfather forced her to deliver to a possible gang member is trivial. *First*, Petitioner has been consistent that her stepfather forced her to deliver a suspicious bag to a possible 18th Street gang member. AR 2907-09 (credible fear interview), 2869 (testimony), 2871-72 (same), 2875 (same), 2882 (same), 2949 (reasonable fear interview).

Second, it is understandable why Ms. Rivera-Medrano told the asylum officer in 2017 that the stepfather "want[ed] [her] to [] sell[] drugs" even though she did not know the contents of the bag AR 2906. It is apparent that the stepfather is related to gangs, and the suspicious package likely would have contained drugs, money, weapons, or other contrabands based on Petitioner's reasonable inferences. AR 2949-50 (delivered the bag to a person with a number

18 tattoo). This is why she told the asylum officer at her 2019 RFI "[n]o, [w]ell, maybe[,] [y]es[.]" AR 2775, 2949. AR 2882.

Third, contrary to the IJ's observation, she was under extreme PSTD at the time of her border encounter and CFI in 2017, as she had been raped by her stepfather three months prior. The IJ did not meaningfully consider the fact that she was a recent rape victim (even though the IJ claims to have considered it). *Cf. Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002) (discussing female rape victims' reluctance to reveal details). Indeed, the psychologist's report was not part of the record before the IJ. Yet, it was reasonable for any factfinder to consider that a victim of rape may have cognitive problems, especially right after the rape. *Cf.* AR 1245-51 (she has PTSD).

This inconsistency, even assuming that it is indeed an inconsistency for the purpose of the credibility assessment, is not material but trivial. Thus, the agency's finding on this issue must be reversed.

2. <u>How many times the stepfather raped (forcible sexual intercourse) her?</u>

The agency's finding that there is a discrepancy in the number of rapes Ms. Rivera-Medrano suffered is also trivial. In her 2019 RFI note, Ms. Rivera-Medrano responded "three" to the asylum officer's question of "[h]ow often did he [her stepfather] rape you?" AR 1220. Upon being confronted, Ms. Rivera-Medrano told the IJ that it was a mistake for the asylum officer to write down

"three" instead of "one" for how many times the stepfather raped her. AR 2879. The IJ found this explanation insufficient. The IJ's conclusion is irrational because this reference to "three" "rapes" was a simple mistake. No other record indicates that she previously said or claimed that the stepfather made forcible sexual intercourse with her more than one time.

Even assuming that it was not a mistake, Ms. Rivera-Medrano—again, who does not speak English—used the term "rape" more inclusively than "forcible sexual intercourse" at her 2019 RFI. AR 2942. There was confusion as to terminology, which is understandable given the language barrier and Petitioner's lack of sophistication. In other words, she over-inclusively used the term "rape" during the 2019 RFI when she described how her stepfather sexually assaulted her when she was younger. AR 2942. Despite this explanation to the BIA, it erroneously observed that she "did not proffer an explanation regarding her misunderstanding of the asylum officer's questions." AR 6. However, whether she understood the asylum officer's question accurately is beside the point. The relevant question is whether she meant "rape" for the meaning of "forcible sexual intercourse." Again, here, she understandably used this term more inclusively to capture the sexual assault she experienced at the hands of her stepfather as a young child. Thus, the Court should find that this inconsistency is not only trivial, but understandable.

3. The existence of police report and what the police did after the report.

The IJ's adverse credibility finding based on the purported discrepancy concerning who reported the rape to the police in 2017 and what the police did is irrational and also should be reversed. Ms. Rivera-Medrano has consistently said that she reached out to the police with her mother after the 2017 rape. AR 2909 (CFI), 2957 (RFI), 2858 (testimony). The only issue is whether the police accepted the rape report in writing or orally and whether it created a written report. It is logical to consider that "reporting" can be done in verbally too. Further, as a victim of the rape, she may not precisely remember what the police did at that moment. Again, Petitioner has been consistent from the outset that she sought protection from the police. At her 2017 CFI, she responded "[y]es" to the asylum officer's question of whether she "ever file[d] a police report[.]" AR 2910. During her 2019 RFI, she told the asylum officer that she went to the police station with her mother. AR 2957. Before the IJ, she testified that she went to the police station with her mother after the rape in 2017. AR 2858. There is nothing inconsistent about these statements.

The IJ also observed that there was a material inconsistency on what the police did after the report of rape to the police in 2017. AR 2775. The IJ pointed out that Ms. Rivera-Medrano previously said that the police looked for the stepfather "in every alley, every road." AR 2910. Yet, before the IJ, she testified

that the police did not do anything to protect her in 2017. AR 2858. This inconsistency is immaterial. It appears that Ms. Rivera-Medrano thought that the asylum officer was asking a question of what the police did when she was younger and was subjected to inappropriate touching from her stepfather (after which the police did look for him), not what they did in 2017 in response to her stepfather's rape (which was nothing). AR 2910. This interpretation is supported by the specific question the asylum officer posed in 2017. The asylum officer's question was, "[w]hy did Jose [her stepfather] run when he found out your mother was calling the police?" AR 2910. The particular context of this question addresses whether Petitioner's stepfather was on notice of police's involvement following the inappropriate touching she experienced when Ms. Rivera-Medrano was a minor, not in 2017 following the rape. There is no record indicating that Petitioner's stepfather found out whether Ms. Rivera-Medrano or her mother contacted the police after the 2017 rape. AR 2909. However, Petitioner's stepfather knew that the police was on notice after the sexual assault Ms. Rivera-Medrano experienced when she was young, which is why her stepfather fled the scene. AR 2908 (CFI), 2942 (RFI), 2862 (testimony). Thus, it is reasonable to interpret that, in response to the asylum officer's question, Petitioner was referring to what the police did when she was younger after the report of sexual assault. AR 2910.

In sum, assuming that this Court does not find a statutory and/or due process

violation per Section I of this brief, the IJ's adverse credibility determination should be reversed on these independent grounds.

III. THE BIA'S DENIAL OF MOTION TO REMAND FOLLOWING THE SUBMISSION OF NEW EVIDENCE WAS AN ERROR OF LAW AND ABUSE OF DISCRETION.

A. Standard of Review.

The BIA has held that an applicant must show that "the new evidence would likely change the result in the case." *See Matter of Coelho*, 20 I. & N. Dec. 464, 471-72 (BIA 1992). This Court has also held that "the movant must make a showing of prima facie eligibility for the relief that he seeks." *See Falae v. Gonzales*, 411 F.3d 11, 14 (1st Cir. 2005). The applicant "also must show that the evidence sought to be introduced on remand is material and that is was not previously available." *Id*. (citing 8 C.F.R. § 1003.2(c)(1)).

This Court reviews the BIA's denial of a motion to remand for abuse of discretion. *See Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006). "This means that [the Court] will interfere with the BIA's disposition of such a motion only if the petitioner can establish that the BIA made an error of law or acted in a manner that is fairly characterizable as arbitrary or capricious. *See Falae*, 411 F.3d at 14; *see also Barsoum v. Holder*, 617 F.3d 73, 81 (1st Cir. 2010).

B. The absence of the BIA's analysis of new evidence other than a psychologist's affidavit is an error of law.

Here, the BIA did not appear to contest that the new evidence was

unavailable at the time of her hearings before the IJ, especially given the fact that Petitioner was detained and *pro se* during the proceedings before the IJ. AR 7. Nonetheless, the BIA denied her motion to remand because, in its view, the clinical psychologist's affidavit would not resolve the discrepancy. AR 7. The BIA's reasoning is silent on the impact of the other new evidence Petitioner presented. AR 7. This absence of analysis is an error of law. While there is no obligation for the agency to "spell out every last detail of its reasoning where the logical underpinnings are clear from the record[,]" "the agency is obligated to offer more explanation where the record suggests strong arguments for the petitioner that the [agency] has not considered." *See Enwonwu v. Gonzales*, 438 F.3d 22, 35 (1st Cir. 2006); *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008). That is because "the absence of specific findings problematic in cases in which such a void hampers [the Court's] ability meaningfully to review the issues raised on judicial review." *See Renaut v. Lynch*, 791 F.3d 163, 169 (1st Cir. 2015). This Court has agreed with the Eleventh Circuit's approach that "an adverse credibility determination does not alleviate the BIA's duty to consider other evidence produced by an applicant for relief." *See Aguilar-Escoto v. Sessions*, 874 F.3d 334, 337 (1st Cir. 2017) (internal quotation marks omitted). Thus, "[e]ven assuming that [the agency's] credibility ruling was supportable, the BIA was required to go further and address whether, setting [Ms. Rivera-Medrano's] testimony to one side, the

documentary evidence entitled her to relief." *Id.* The BIA failed to do so here.

C. New corroborating evidence would change the outcome.

The BIA's reasoning and conclusion are also arbitrary and capricious because new evidence would change the outcome of Ms. Rivera-Medrano's case. First, the new evidence would save her withholding of removal and protection under the CAT despite the agency's erroneous adverse credibility determination. Second, Ms. Rivera-Medrano has made the required showing of *prima facie* eligibility for the relief she has sought with the new evidence.

1. New evidence would save her relief despite the erroneous adverse credibility determination.

Ms. Rivera-Medrano submitted, *inter alia*, her affidavit, photos showing the places where the stepfather sexually assaulted and raped her, a clinical psychologist's affidavit, her mother's affidavit, her birth certificate, her brother's birth certificate, and her aunt's death certificate. AR 505-507. *First*, this documentary evidence proved the veracity of her testimony. She testified that her aunt, Norma Marisol Rivera, passed away in 2014 because of cancer. AR 2834-35. She submitted Ms. Rivera's death certificate to show the veracity of this testimony. AR 557. Ms. Rivera-Medrano testified that José Luis Bonilla is her stepfather who sexually assaulted and raped her. She submitted her brother's birth certificate proving that Mr. Bonilla is her stepfather. AR 553.

Second, Ms. Rivera-Medrano submitted her mother's sworn affidavit

corroborating her claim that her stepfather sexually assaulted and raped her.[8] AR 538-541. Ms. Rivera-Medrano also submitted a clinical psychologist's affidavit showing her PTSD. AR 528-534. The new evidence would change the outcome of her case. As aforementioned, the agency's credibility determination "must be reasonable and take into consideration of the individual circumstances of the applicant" under the totality of the circumstances standard. *See Rivas-Mira*, 556 F.3d at 5. This Court has held that "corroborating evidence may be used to bolster an applicant's credibility" where a noncitizen "is found not to be entirely credible." *See Dehonzai*, 650 F.3d at 9 n.8.

Here, in addition to the new documentary evidence proving the veracity of her claims such as the death of her aunt and her relationship with her stepfather, her mother's affidavit corroborates her claim that her stepfather sexually assaulted and raped her. AR 538. Courts have found that lack of credibility of the applicant is not always fatal if there is other evidence that can corroborate the applicant's claim. *See, e.g., Aguilar-Escoto*, 874 F.3d at 337-38; *Adekpe v. Gonzales*, 480 F.3d 525, 532 (7th Cir. 2007) (the IJ failed to adequately consider letters from the applicant's family members "as it most plausibly fits together as a whole"); *Arrazabal v. Lynch*, 822 F.3d 961, 965 (7th Cir. 2016) (the IJ "overlooked key

[8] Petitioner indicated that it would be difficult to get a letter from her mother due to their unstable relationship. AR 2847. Nonetheless, she could secure this sworn affidavit through undersigned counsel, who worked as an intermediary.

evidence" including "an affidavit from [the petitioner's] mother-in-law" despite the adverse credibility finding).

Even with respect to the psychologist's affidavit, the BIA's reasoning is erroneous. This evidence confirms Ms. Rivera-Medrano's PTSD assessment, which explains why there any purported (immaterial) inconsistencies. *See Fiadjoe v. U.S. Att'y Gen.*, 411 F.3d 135, 152-160 (3d Cir. 2005) (reversing adverse credibility where a female applicant suffering PTSD was repeatedly emotionally and sexually abused by her father, where inconsistencies existed between asylum interview and in-court testimony). Here, the IJ observed that she would have a fresher and accurate memory when she was interviewed in 2017 because she was no longer a minor and the rape occurred "three months" prior to her 2017 CFI. AR 2776. This rationale is incorrect because victims of sexual violence may not provide or recall the details of the rape or sexual assault right after such events occur. According to the psychologist, Ms. Rivera-Medrano said "she will often get a 'blank' when thinking about [the trauma], and will ruminate about it" and "it did seem 'odd' to her that she even now can remember many events from her childhood more clearly than she can the specifics and sequence of what happened after her rape." AR 531 ¶28. This is "all very consistent with the cognitive disorganization experienced by victims of sexual assault." *Id.* The psychologist observed that "Ms. Rivera-Medrano has areas of competent cognitive functioning,

though at a much younger developmental level than her age would suggest, and she has other areas of extreme disorganization and emotional reactivity which she tries to keep cordoned off from the rest of her consciousness." *Id*. at ¶27. The psychologist concluded that she has PTSD. AR 533 ¶32.

Despite this material evidence, the BIA denied her motion to remand solely based on its view that the psychologist's affidavit does not resolve the discrepancy issues and thus it would not change the outcome. The BIA appears to have observed that its affirmance of the IJ's credibility finding should not be reviewed under the totality of the circumstances standard. Again, however, this standard requires the agency to consider *all relevant factors*. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). Under this standard, the outcome would likely be different with the newly submitted evidence.

2. Petitioner has made a *prima facie* showing her eligibility for withholding of removal and protection under the CAT

Although the BIA did not address whether the merits of her withholding of removal, she has met her burden that she would be eligible for these forms of relief. AR 7 n.4.

The new evidence would affect her eligibility for withholding of removal. To qualify for withholding of removal, an applicant must establish a "clear probability" that his or her life or freedom would be threatened in the proposed country of removal because of a protected ground. *See Ang v. Gonzales*, 430 F.3d

50, 58 (1st Cir. 2005). The type of harm Ms. Rivera-Medrano suffered in El Salvador—namely, rape—constitutes the very definition of persecution. *See Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985). With the new evidence, Ms. Rivera-Medrano can make a *prima facie* case for eligibility because the harm she suffered is on account of at least two cognizable particular social groups ("PSG").

First, the motive of the stepfather's sexual assault and rape is due to her immediate family relationship with her mother. This Court has long recognized the nuclear family as a legally cognizable particular social group for withholding of removal claims. *See Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). Here, from the outset, Ms. Rivera-Medrano was forced to live with her stepfather, despite the absence of any biological relationship between them, because her mother had a romantic relationship with the stepfather. As the same household member, the stepfather assaulted her physically and sexually. Further, when her stepfather raped her in 2017, he told her that he "was going to seek revenge on [her] because [her] mother left him and he was going to do to [her] what he was not able to do before." AR 510 ¶14. At the time of the rape, the stepfather emphasized that "it was [her] fault that he was not with [her] mom." AR 510 ¶16. Thus, her immediate family relationship was at least one central reason for the persecution. *See Enamorado-Rodriguez v. Barr*, 941 F.3d 589, 596 (1st Cir. 2019).

Second, she suffered sexual assault and rape on account of her being young and unaccompanied Salvadoran young woman. This social group is recognizable under the law. *See De Pena-Paniagua v. Barr*, 957 F.3d 88, 97-98 (1st Cir. 2020) (citing other circuit cases that found "the possibility of a broad social group based on gender"); *Cece v. Holder*, 733 F.3d 662, 674-75 (7th Cir. 2013) (en banc) ("Young Albanian women who live alone" is a social group); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) ("Somali females" constitute a particular social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("Iranian women" meet the social group definition).

In the context of the Salvadoran culture and society, this social group is immutable and socially distinctive. In El Salvador, violence against women, including rape and domestic violence, is a serious problem. AR 797. The violence perpetrated against women in El Salvador is due to a culture of deep-rooted machismo. AR 798-99. This culture is premised on the notation that men have the power and authority to control women and renders them as subservient to men. AR 801-02. Due to the pervasive violence and discrimination against women, the Salvadoran government has also recognized the need to protect women and has enacted laws to combat violence against women. AR 797. Yet, despite laws, women continue to routinely face violent crimes. This is further true when women are young and unaccompanied. AR 797.

Here, the stepfather sexually assaulted and raped Ms. Rivera-Medrano because of her status as a young and unaccompanied woman. Her experience of abuse at the hands of the stepfather fits into the pattern of violence inflicted on young and unaccompanied women in El Salvador. In short, they are subjected to high levels of violence.

Ms. Rivera-Medrano has shown *prima facie* eligibility for relief because the new evidence supports the conclusion that the Salvadoran government is unable or unwilling to protect her. Here, Ms. Rivera-Medrano, with her family members, reached out to the authorities for their help twice. Yet no arrest has ever occurred. The country conditions expert provides that "the police and judicial authorities have been unable and unwilling to charge or apprehend the perpetrators of all too many crimes against women[,]" which demonstrates "not only the impunity the abusers enjoy, but a very hostile, unprotected environment for women in general and [Ms. Rivera-Medrano] in particular." AR 799 ¶17. Moreover, no internal relocation is feasible for her. AR 807 ¶¶37-38. Her mother's affidavit provides that there is a rumor that the stepfather is in town or nearby. AR 539 ¶10. The expert also states that she would not be safe due to "the small size of the country, the interconnectedness of its residents, and Ms. Rivera-Medrano's clear identity as a member of this family, her family related." AR 807 ¶37. Thus, internal relocation would be virtually impossible.

3. Petitioner has made a *prima facie* showing her eligibility for protection under the CAT

Similarly, Ms. Rivera-Medrano has established *prima facie* eligibility for the CAT protection. The CAT standard requires that an applicant prove that it is "more likely than not that" she would be tortured upon removal to the country of removal. *See* 8 C.F.R. § 208.16(c)(2). Torture is "any act which severe pain or suffering is intentionally inflicted on a person for such purpose as . . . punishing him or her for an act he or she . . . has committed . . . when such pain or suffering is inflicted by or . . . with the consent or acquiescence of a public official or other person acting in an official capacity." *See* 8 C.F.R. § 208.18(a)(1). Acquiescence "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." *See* 8 C.F.R. § 208.18(a)(7).

Here, despite reporting the physical assault, sexual abuse, and rape to the Salvadoran police authorities, no action has been taken to protect her by the police. The country conditions expert reports support the conclusion that the police's intervention is futile because of its unwillingness to protect Ms. Rivera-Medrano like other young women and family members in domestic relations matters. AR 799. Moreover, the fact that the stepfather has ties to the 18th Street gang demonstrates that she likely would be raped again and possibly murdered by the stepfather while the police would willfully ignore this harm. Thus, she has met the

burden for a *prima facie* eligibility for the CAT protection.

CONCLUSION

For the foregoing reasons, Ms. Rivera-Medrano requests that this Court grant this petition.

Dated: September 22, 2020

Respectfully submitted,

Karen Elizabeth Rivera-Medrano
By and through Counsel,

/s/ SangYeob Kim
Gilles Bissonnette (No. 123868)
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) [no more than 13,000 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 12,971 words, exclusive of those items that, under Fed. R. App. P. 32(f) and Local Rule 34.0, are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

/s/ SangYeob Kim
SangYeob Kim (Bar: 1183553)

Dated: September 22, 2020

CERTIFICATE OF SERVICE

I certify that this brief and addendum is served to all counsel of record registered in ECF on September 22, 2020.

/s/ SangYeob Kim
SangYeob Kim (Bar: 1183553)

Dated: September 22, 2020

ADDENDUM

Page

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A216-208-174 – Boston, MA Date: JUN 30 2020

In re: Karen Elizabeth RIVERA-MEDRANO

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF APPLICANT: SangYeob Kim, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of El Salvador, appeals from the Immigration Judge's November 22, 2019, decision denying her application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), as well as her request for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18. The applicant also seeks to reopen and/or remand proceedings. The appeal will be dismissed, and the motions will be denied.[1]

This Board reviews the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant was previously in proceedings before the San Antonio Immigration Court, and she was ordered removed on February 22, 2018 (Exh. 1). Subsequently, the applicant reentered the United States on or about July 27, 2019 (Exh. 1). Pursuant to section 241(a)(5) of the Act, the Department of Homeland Security reinstated her removal order (Exh. 1). The applicant thereafter sought withholding of removal and protection under the Convention Against Torture before the Boston Immigration Court.

As an initial matter, we note that the applicant filed a motion with the Board to reopen her original proceedings before the San Antonio Immigration Court. She specifically argues that her right to counsel was violated in those proceedings because the Immigration Judge did not provide her with a list of pro bono legal services (Applicant's Mot. to Reopen at 10). She further argues that the Immigration Judge did not inform her of her right to withdraw her application for admission (Applicant's Mot. to Reopen at 10-11). The applicant also argues, inter alia, that the deadline for filing a motion to reopen should be equitably tolled and that she was prejudiced by the violations of her rights because she has established prima facie eligibility for asylum under section 208 of the Act, 8 U.S.C. § 1158 (Applicant's Mot. to Reopen at 6-10, 12-25).[2]

[1] The applicant's fee waiver request is granted.

[2] We observe that the applicant also filed with the San Antonio Immigration Court a Motion to Reconsider and Rescind Order of Removal, which raises similar arguments. The San Antonio (continued...)

The applicant's motion to reopen is barred under section 241(a)(5) of the Act, which provides that, if an alien unlawfully reenters the United States after having been removed, the prior removal will be reinstated "and is not subject to being reopened or reviewed." Based on the clear language of the statute, we lack the authority to reopen the applicant's reinstated removal proceedings regardless of the basis for the motion, and regardless of whether equitable tolling might otherwise have been warranted had proceedings not been subject to reinstatement. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006) (stating that section 241(a)(5) of the Act insulates removal orders from review).

The applicant contends that her motion is not barred under section 241(a)(5) because her due process rights were violated (Applicant's Mot. to Reopen at 6). However, the case relied on to support this argument – *Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018) – addresses circumstances where an alien had lacked notice of the original removal proceedings and had been ordered removed in absentia. In those limited contexts, reopening "at any time" is explicitly permitted under section 240(b)(5)(C)(ii) of the Act, 8 U.S.C. § 1229a(b)(5)(C)(ii), and the United States Court of Appeals for the Ninth Circuit in *Miller* concluded that the right to reopen in section 240(b)(5)(C)(ii) of the Act takes precedence over the prohibition on reopening in section 241(a)(5) of the Act. Although the applicant also cites *Santana v. Holder*, 731 F.3d 50, 60-61 (1st Cir. 2013), this case does not address the bar to motions to reopen under section 241(a)(5) of the Act (Applicant's Mot. to Reopen at 6). In sum, the applicant's circumstances provide no countervailing statutory right to reopen proceedings, and therefore we conclude the bar to reopening in section 241(a)(5) of the Act applies.

The applicant also argues that her reinstated removal order should be vacated based on a claim that the San Antonio Immigration Court proceedings resulted in a gross miscarriage of justice, relying on, inter alia, the Ninth Circuit's reasoning in *Vega-Anguiano v. Barr*, 942 F.3d 945, 948 (9th Cir. 2019) (Applicant's Br. at 1, 27-30). In *Vega-Anguiano*, the Ninth Circuit found a gross miscarriage of justice occurred based on the fact that there was no valid legal basis for the alien's removal order at the time of its execution in 2008, as the conviction on which it had been based had been expunged in 1999. *See Vega-Anguiano v. Barr*, 942 F.3d at 948. Therefore, even if the Ninth Circuit's decision were controlling in the instant matter, the applicant has not sufficiently explained how *Vega-Anguiano* applies to her case. Furthermore, although the applicant also relies on *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967), in support of her argument that an original removal order may be reviewed when a gross miscarriage of justice occurred, this case is inapplicable because it predated the enactment of section 241(a)(5) of the Act (Applicant's Br. at 28). *See generally Fernandez-Vargas v. Gonzales*, 548 U.S. at 34-35 (indicating that, unlike prior section 242(f) of the Act, 8 U.S.C. § 1252(f), section 241(a)(5) does not allow for judicial review of the underlying previous removal order). Consequently, we do not conclude that the applicant has established an exception to the bar to reopening in section 241(a)(5) of the Act.

(...continued)
Immigration Court rejected this motion on April 28, 2020, due to a lack of jurisdiction. Thereafter, the applicant forwarded this motion to the Board to preserve the record for appeal.

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Turning to the instant proceedings, the applicant seeks relief and protection from removal based on past abuse by her mother's boyfriend. The applicant testified that this man sexually abused her as a child (IJ at 2; Tr. at 35-38). The applicant's aunt reported the abuse to the police, and the applicant moved in with her grandmother (IJ at 2; Tr. at 41, 47). The applicant later moved back in with her mother in 2015 (IJ at 2; Tr. at 50). She further asserts that her mother's boyfriend raped her in 2017 (IJ at 2; Tr. at 56- 57).

The applicant alleges that her right to counsel was violated in the Boston Immigration Court proceedings because the Immigration Judge did not grant her reasonable time to seek and retain counsel. Specifically, she states that the Immigration Judge granted her a 20-day continuance to find counsel before her next hearing, but she experienced some difficulty retaining counsel during that time (Applicant's Br. at 7-9). However, the applicant acknowledges that, when asked if she had an attorney, she stated that she wanted to represent herself (Tr. at 7; Applicant's Br. at 9). Under these circumstances, we do not conclude that the Immigration Judge violated the applicant's right to counsel. *Cf. Hernandez Lara v. Barr*, No. 19-1524, 2020 WL 3168144 (1st Cir. June 15, 2020); *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012).

The applicant further alleges that the Immigration Judge violated her due process rights because he handled her proceedings in an expeditious manner and did not fully develop the record (Applicant's Br. at 13-14). Yet, the Immigration Judge explained the applicant's duty to obtain corroborating evidence, asked the applicant questions about her claim, provided her with an opportunity to present any information she wanted the Immigration Judge to know, and made findings of fact based on the record before him (IJ at 2-7; Tr. at 17-18, 30-64, 94). On this record, we do not conclude that the Immigration Judge failed to provide the applicant with an opportunity to present her claim. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010) ("Immigration Judges have broad discretion to conduct and control immigration proceedings . . . ."); *see also* 8 C.F.R. § 1003.36. Consequently, we need not address the applicant's allegations that she was prejudiced by the alleged violation of her right to counsel and due process before the Boston Immigration Court (Applicant's Br. at 10-12, 14-27).

Furthermore, the Immigration Judge's adverse credibility finding is not clearly erroneous. *See Wen Feng Liu v. Holder*, 714 F.3d 56, 60 (1st Cir. 2013). First, the Immigration Judge observed that the applicant gave conflicting reports regarding whether she was asked to transport drugs and weapons. Specifically, she told immigration officials at the border that a gang member asked her to transport drugs, but did not disclose any past harm perpetrated by her mother's boyfriend (IJ at 4-6; Exh. 4).[3] During her 2017 asylum interview, she spoke about her past sexual abuse and rape, but told asylum officers that her mother's boyfriend also asked her to transport drugs and weapons (IJ at 4; Exh. 3). Yet, she testified at the hearing that her mother's boyfriend wanted her to deliver a package, but she was unaware of its contents (IJ at 4; Tr. at 56). When asked to explain the discrepancy, the applicant testified that she told border

[3] The Immigration Judge further observed that she confirmed the statements she made to border officials during her 2019 reasonable fear interview (IJ at 5; Exh. 1).

agents that she had been asked to sell drugs – rather than telling them about her past sexual abuse and rape – because an immigration officer told her everything she was saying was a lie (IJ at 4; Tr. at 96-97). The Immigration Judge found that the applicant's explanation regarding the statements she made to border officials did not sufficiently clarify why she told an asylum officer in 2017 that she was asked to transport drugs and weapons (IJ at 6).

On appeal, the applicant argues, inter alia, that the Immigration Judge did not adequately consider that she was raped 3 months prior to applying for asylum at the border in 2017, that she has consistently maintained that she was asked to deliver a bag to a potential gang member, and that she had a negative interaction with the border agent in 2017 (Applicant's Br. at 31-33). Nevertheless, the applicant has not persuasively explained why she told an asylum officer in 2017 that her mother's boyfriend asked her to transport drugs and weapons (IJ at 6; Exh. 3). The Immigration Judge was not required to accept the applicant's explanation where there are other permissible views of the evidence. *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011), *pet. for review granted and remanded on other grounds by Radojkovic v. Holder*, 599 F. App'x 646 (9th Cir. 2015).

Second, the Immigration Judge found that the applicant told an asylum officer in 2019 that she was raped 3 times by her mother's boyfriend, but testified that she was raped once (IJ at 5; Tr. at 91; Exh. 1). When asked to explain this discrepancy, she stated that she believed the asylum officer made a mistake (IJ at 5; Tr. at 91). The applicant argues on appeal that, during the 2019 interview, she may have understood the definition of rape as broad and inclusive of the sexually inappropriate touching she experienced as a child (Applicant's Br. at 33). However, the applicant was asked to address the discrepancy during the hearing, but did not proffer an explanation regarding her misunderstanding of the asylum officer's questions (IJ at 5; Tr. at 91). We discern no clear error in the Immigration Judge's finding. *See Matter of Vides Casanova*, 26 I&N Dec. 494, 506 (BIA 2015) (stating that the Board must be "convinced" that the Immigration Judge "clearly erred" to overturn a credibility finding, and citing 8 C.F.R. § 1003.1(d)(3)(i)).

Third, the Immigration Judge found that there were several discrepancies in the record regarding the circumstances around the 2017 report made to police about the applicant's rape and what actions the police took thereafter. The applicant told the asylum officer in 2017 that her mother reported the 2017 rape to the police, and that the police searched for the perpetrator (IJ at 5; Exh. 3). Yet, the applicant testified that her mother accompanied her to report the rape, but did not say anything at the police station (IJ at 5; Tr. at 84-86, 93). Furthermore, despite her prior statement that the police searched for the perpetrator, the applicant testified that the police did nothing when she reported the rape in 2017 (IJ at 5; Tr. at 57).

Relatedly, the Immigration Judge found that the applicant told an asylum officer in 2017 that she filed a report at the station (IJ at 5; Exh. 3). Yet, the applicant later testified that she was unsure if the police took a report when she went to the station in 2017 (IJ at 5; Tr. at 88). When asked to explain why she told the asylum officer in 2017 that she filed a report, she testified that she believed the police would have a report on file if they wrote down her complaint (IJ at 5; Tr. at 88). The Immigration Judge noted that she had not presented a police report to the

Immigration Court, and found overall that her testimony was not credible, persuasive, or reliable (IJ at 5-6).

The applicant argues on appeal, inter alia, that the record is consistent as a whole because it reflects that the police were informed about the 2017 rape (Applicant's Br. at 34). She further states that she previously told asylum officers that the police attempted to apprehend her mother's boyfriend after her aunt called the police when she was a child (Exhs. 1, 3; Applicant's Br. at 34). Accordingly, she alleges that she mistakenly referred to the actions the police took when she was a child when she told an asylum officer in 2017 that the police looked for her mother's boyfriend after she reported the rape (Applicant's Br. at 34). Yet, the applicant was asked to address discrepancies regarding the 2017 report during the hearing, but did not indicate that she had difficulty remembering her interactions with the police at that time (IJ at 5; Tr. at 87-88). Moreover, she has not identified clear error in the Immigration Judge's finding, and we do not discern any. *See, e.g., Conde Cuatzo v. Lynch*, 796 F.3d 153, 156 (1st Cir. 2015) (finding inconsistencies across three interviews to support the Immigration Judge's adverse credibility determination); *Matter of Vides Casanova*, 26 I&N Dec. at 506.

As the applicant did not provide credible testimony, the Immigration Judge correctly denied her applications for relief. *See, e.g., Matter of M-S-*, 21 I&N Dec. 125, 129 (BIA 1995) (a persecution claim that lacks veracity cannot satisfy burdens of proof necessary to establish eligibility for withholding of removal); *see also Segran v. Mukasey*, 511 F.3d 1, 7 (1st Cir. 2007) (Convention Against Torture eligibility is not established when "any hint of torture . . . is purged by the adverse credibility determination").

The applicant also seeks remand to present previously unavailable evidence in support of her applications for relief from removal (Applicant's Mot. to Remand at 5-10). A motion to remand during the pendency of an appeal must conform to the same standards as a motion to reopen and will only be granted if the evidence was previously unavailable and would likely change the result in the case. *See Matter of Coelho*, 20 I&N Dec. 464, 471-73 (BIA 1992); 8 C.F.R. §§ 1003.2(c)(1), (4). The applicant seeks to submit, among other documents, an affidavit from a clinical psychologist, an affidavit from her mother, her brother's birth certificate, and her aunt's death certificate (Applicant's Mot. to Remand at 10, Tabs 3-7). Although the applicant states that the psychologist's affidavit identifies her memory problems, she has not persuasively explained how the new evidence resolves the discrepancies identified by the Immigration Judge (IJ at 6; Tr. at 96-97; Applicant's Mot. to Remand at 10). As this evidence does not resolve the discrepancies in the adverse credibility finding, the applicant has not demonstrated that this evidence would change the result in her case. *See generally Matter of F-S-N-*, 28 I&N Dec. 1 (BIA 2020) (To prevail on a motion to reopen alleging changed country conditions where the persecution claim was previously denied based on an adverse credibility finding in the underlying proceedings, the alien must either overcome the prior determination or show that the new claim is independent of the evidence that was found to be not credible.).[4]

[4] Because the adverse credibility finding is dispositive of her claims, we need not address her allegations that the new evidence would also affect the merits of her withholding of removal and Convention Against Torture applications (Applicant's Mot. to Remand at 10-23). While the (continued...)

Finally, to the extent that the applicant's request for a remand constitutes a request for sua sponte reopening, we do not conclude that this remedy is warranted (Applicant's Mot. to Remand at 25). *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) ("As a general matter, we invoke our sua sponte authority sparingly, treating it . . . as an extraordinary remedy reserved for truly exceptional situations."); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). On this record, the applicant has not demonstrated that she experienced a due process violation, or otherwise offered sufficient evidence that a truly exceptional situation is present in this case. *See Matter of J-J-*, 21 I&N Dec. at 984.

Accordingly, the following order will be entered.

ORDER: The applicant's appeal is dismissed, and the motions to reopen and remand are denied.

NOTICE: If an applicant is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the applicant's departure pursuant to the order of removal, the applicant shall be subject to a civil monetary penalty of up to $799 for each day the applicant is in violation. *See* Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

(...continued)
applicant also alleges that the new evidence would allow her to challenge her underlying removal order issued by the San Antonio Immigration Court, she has not explained how she is able to overcome the bar to reopening under section 241(a)(5) of the Act (Applicant's Mot. to Remand at 23-25).

IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

In the Matter of: Case No: A216-208-174

RIVERA- MEDRANO, KAREN ELIZABETH

Applicant IN WITHHOLDING-ONLY PROCEEDINGS

On Behalf of the Applicant On Behalf of the DHS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on and is issued 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.

ORDER: It is hereby ordered that the applicant's request for:

[✓] 1. Withholding of Removal under INA 241(b)(3) is:
[ ] Granted
[ ] Withdrawn
[✓] Denied

[✓] 2. Withholding of Removal under the Convention Against Torture is:
[ ] Granted
[ ] Withdrawn
[✓] Denied

[ ] 3. Deferral of Removal under the Convention Against Torture is granted.

Date: ~~Oct 9, 2019~~ Nov 22, 2019

JOHN M. FURLONG Jr
Immigration Judge

APPEAL: NO APPEAL Reserved by Respondent
APPEAL DUE BY: Due December 23, 2019

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [✓] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [✓] DHS
DATE: Nov 22 2019 BY: COURT STAFF Furlong
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q5

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A216-208-174 November 22, 2019

In the Matter of

KAREN ELIZABETH RIVERA-MEDRANO) IN WITHHOLDING ONLY PROCEEDINGS
APPLICANT)

CHARGES:

APPLICATIONS:

ON BEHALF OF APPLICANT: Pro Se

ON BEHALF OF DHS: Justin Bavaro
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 20-year-old native and citizen of El Salvador. The Department initiated withholding only proceedings by filing an I-863 with this court on September 16th, 2019. See Exhibit 1.

In a hearing before this court on November 22nd, 2019, respondent testified at length in support of her claim. This court is issuing an addendum of law; is incorporating the addendum of law by reference into this oral decision; is serving the addendum of law on both parties at this time; and is placing the addendum of law in the

record of proceeding. In essence, respondent's claim is that she has been harmed by her mother's boyfriend, her brother's stepfather, Jose, since she was eight or nine years old when Jose initially sexually abused her and touch her inappropriately. Respondent testified that her mother did not support her. Meaning that she, the mother, did not believe her complaints, the respondent's complaints about what Jose had been doing to her, nor the complaints of respondent's brother, Edwin. When the respondent told an aunt, her mother's sister, action was taken. Specifically, the aunt confronted her sister, the respondent's mother, about what the respondent had told the aunt and a report was made to the police. A medical exam of the respondent was conducted, and in fact, the respondent no longer lived with her mother. Specifically, she moved into her grandmother's home, which was about an hour and a half away from her mother's home by car. It's important to note that respondent's aunt, who appears to be the individual who recognized the serious nature of this incident, passed away in 2014 from kidney cancer.

Respondent continued to live with her grandmother until approximately 2015 when she returned to live with her mother because the home in which she was living with her grandmother could no longer accommodate her grandmother, the respondent, her uncle, and the uncle's new wife.

When the respondent was asked why Jose had done what he had done to her, respondent testified she did not know why.

Upon respondent's return to her mother's house in 2015, she encountered Jose, when Jose would stare at her, but it was not until 2017 when Jose, according to the respondent, sexually assaulted her and raped her. According to the respondent's testimony, Jose attacked the respondent because she, the respondent, was the reason why he, Jose, could no longer be with the respondent's mother.

Respondent testified that she reported the 2017 incident to the police, but they did not take a report. She did not see them write down anything or say anything, nor was the respondent taken for a medical exam as happened when she was eight or nine years old when Jose's inappropriate touching was brought to the authorities' attention.

As an initial matter, this court must assess the respondent's credibility. This court has had the opportunity to observe the respondent's testimony before the court today. On several occasions, respondent became quite upset recounting what she said had happened to her. Respondent struggled to articulate the details of what Jose had done to her, and was clearly upset in recounting what had taken place in El Salvador.

Respondent testified that her mother never supported her; never believed her concerning the actions Jose was taking against her and her brother Edwin, and indeed, at first blush, it appears the respondent's aunt is the only individual, other than maybe the grandmother, who took the respondent's claim seriously.

Respondent's case is a sympathetic case. However, the evidence of record calls into question the credibility of the respondent and this court simply cannot ignore the lengthy evidence of record concerning when this respondent has entered the United States on two different occasions in 2017 and 2019. This court is called upon to assess whether the events the respondent has testified to did in fact take place, and the respondent may sustain her burden of proof for withholding of removal or relief under the Convention Against Torture if this court is satisfied that her testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate the applicant is a refugee. This court is not going to place unreasonable expectations on the respondent when taking into account her credibility. This court does take into account the individual

circumstances of the respondent, and it is clear that something happened to this respondent, which has affected her to this day. However, the evidence of record in this case calls into question the respondent's credibility, and this court is making an adverse credibility finding based on the evidence of record contained in the asylum officer's notes from 2019, Exhibit 1; 2017, Exhibit 3; and the initial encounter with immigration authorities in 2017, Exhibit 4.

This court is required to provide specific cogent reasons as to why this respondent's testimony is not credible. This court finds that there are, in fact, specific cogent reasons to support such an adverse credible finding. In 2017, respondent's interview before the asylum office as reflected in Exhibit 3 contains numerous references to a gang member forcing or wanting the respondent to sell drugs for him. See Exhibit 3, page 3 of 10, page 4 of 10, page 5 of 10, page 9 of 10, page 6 of 10. Respondent, before this court, denied that she was asked to sell drugs or anyone wanted her to sell drugs. Respondent did testify that Jose wanted her to deliver a package, but she did not look into the package or the bag and does not know whether there were drugs. When confronted with this inconsistency, respondent explained that she had been told by officers back in 2017 that everything she was saying was a lie. Upon further questioning by the court, it appears that if such statement ever took place, it was made by the officers when the respondent was initially encountered, not during her asylum interview which took place in December of 2017, approximately a little over two weeks after respondent initially presented herself for admission in November of 2017. See Exhibit 4. Yet, the respondent's encounter in 2017 with immigration authorities at the border and with the asylum officer is very consistent in 2017. According to the I-213, she told the officers, the border patrol officers and the inspectors, that she was seeking asylum in the United States because in January this

year a gang member in her home country asked her one time to transport some drugs for the local gang. And, then the respondent's interview before the asylum office again makes repeated reference to those requests to sell drugs. Yet, respondent denies that at today's hearing. And, indeed in the interview notes for the 2019 interview before the asylum officer, see Exhibit 1, the officer confronted the respondent and asked her whether she had ever told a prior officer that Jose or a gang member had ever given drugs or that she had ever given drugs to a gang member, and her reply was, "No. Well, maybe. Yes." This is something which the respondent appeared to confirm before this court today. Respondent testified that she was raped one time by Jose. However, but when confronted with the 2019 asylum officer interview notes, which indicate she had been raped three times, respondent testified she thinks they made a mistake. She had been raped one time. There are contradictions between who reported respondent's rape in 2017. The asylum officer's notes in Exhibit 3 reflect that the mother reported the rape and a police report had been filed. See page 7 of Exhibit 3. And yet, the respondent testified today that her mother accompanied to go the police to report the rape in 2017, but her mother said nothing. And yet, page 9 of 10, a summary of the respondent's testimony back in 2017 before the asylum officer reflects that respondent's mother reported to the police the rape and the police searched for Jose. However, before this court, the respondent testified that the police did nothing in 2017. When asked by government's counsel if she filed a report in 2017, respondent said no, she did go, but did not know if they wrote anything down. When asked why did she tell the asylum officer in 2017 that she filed a report on August 25th, 2017, respondent testified, "Yes. I would think if they wrote it down, they'd have a report." And yet, no report has been presented to the court.

When asked to explain why she told the officer in 2017 that a gang member would hurt her, respondent explained and attributed it to pressure from everything having been told by one of the officers that everything she was a lie. But yet again, if this court evens credits that explanation, and this court does not, that would not explain the respondent's repeated references to being told to sell drugs when she was interviewed in 2017 by an asylum officer.

This court readily understands why a young woman in the United States unaccompanied by family would be reluctant to initially tell border authorities that she had been repeatedly raped, or raped at all. This court does not give any weight whatsoever to the fact that, according to the I-213 in Exhibit 4, respondent did not tell the officers that she had been sexually assaulted. The court understands why a young woman in that position would not do that. But, it does not explain the number of inconsistencies that this respondent has told immigration authorities in 2017 compared to 2019. This is not a matter of the respondent trying to recount what took place when she was eight or nine years old. This court recognizes that, in assessing a child's credibility or what happened to a child, the court would need to take into account unique circumstances of a child's memory and experiences. Rather, the issues at hand and the contradictions and inconsistencies at hand have to do with when the respondent was 18 years old and she was interviewed in 2017 by immigration authorities about events that had taken place three months earlier. Arguably, her memory of those events would be fresher and more accurate in November of 2017 than in November of 2019, and yet, the respondent denies many of the statements contained in the asylum officer's interview notes from the 2017 interview.

In short, this court finds that the respondent has not provided to the court testimony that is credible and persuasive and reliable. Respondent has failed to meet

her burden of proof. If this court were to have judged the respondent's credibility based on her testimony before the court upon being questioned by the court, then this court very well may have found the respondent credible. However, the evidence put forward by the Department clearly reflects that respondent's story as to what took place in El Salvador has changed significantly over time. Consequently, this court cannot place any faith in the respondent's testimony, cannot credit the respondent's testimony, and finds that the respondent has not met her burden of proof to establish it is more likely than not she will be tortured on account of one of the five protected grounds within the Immigration and Nationality Act, or that she will be tortured upon her return to El Salvador.

This court finds that this is a situation where respondent's adverse credibility finding dooms her application for relief under the Convention Against Torture. The evidence of record in this case is something the court just simply cannot ignore in spite of the respondent's very emotional testimony upon being questioned by the court. Consequently, this court finds respondent has not met her burden of proof for withholding of removal under Section 241 of the Act, nor has respondent met her burden of proof to establish relief under the Convention Against Torture. Having determined that respondent is not a credible witness, this court need not further analyze respondent's applications pursuant to the attorney general's decision in the Matter of A-B-.

ORDER

Respondent's application for withholding of removal under Section 241 of the Act is denied. Respondent's application for withholding of removal under the Convention Against Torture is denied.

FURLONG, JOHN M., JR.
Immigration Judge

§ 1229a. Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its

repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections [1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

[1] So in original.

§ 1240.10 Hearing.

(a) *Opening.* In a removal proceeding, the immigration judge shall:

(1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;

(2) Advise the respondent of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized pursuant to §1292.2 of this chapter, located in the district where the removal hearing is being held;

(3) Ascertain that the respondent has received a list of such programs, and a copy of appeal rights;

(4) Advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government (but the respondent shall not be entitled to examine such national security information as the government may proffer in opposition to the respondent's admission to the United States or to an application by the respondent for discretionary relief);

(5) Place the respondent under oath;

(6) Read the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language; and

(7) Enter the notice to appear as an exhibit in the Record of Proceeding.

(b) *Public access to hearings.* Removal hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in §1003.27 of this chapter.

(c) *Pleading by respondent.* The immigration judge shall require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein. If the respondent admits the factual allegations and admits his or her removability under the charges and the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent. The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.

(d) *Issues of removability.* When removability is not determined under the provisions of paragraph (c) of this section, the immigration judge shall request the assignment of an Service counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The alien shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the immigration judge when such recommendation will be the basis of denying any charge(s) brought by the Service in the proceedings against the alien. No JRAD is effective against a charge of deportability under former section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

(e) *Additional charges in removal hearings.* At any time during the proceeding, additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by the Service in writing. The alien in removal proceedings shall be served with a copy of these additional charges and allegations. The immigration judge shall read the additional factual allegations and charges to the alien and explain them to him or her. The immigration judge shall advise the alien, if he or she is not represented by counsel, that the alien may be so represented, and that he or she may be given a reasonable continuance to respond to the additional factual allegations and charges. Thereafter, the