IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11702-EE

CARLOS M. ARANDA,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petitions for Review of a Decision of the
Board of Immigration Appeals

Before: TJOFLAT, WILSON, and WILLIAM PRYOR, Circuit Judges.

BY THE COURT:

Respondent's "Unopposed Motion to Remand," which is construed as a motion to vacate the Board's March 16, 2016, order and to remand for further proceedings is GRANTED. The March 16, 2016, order is hereby VACATED, and this matter is REMANDED to the Board of Immigration Appeals for further proceedings as outlined in Respondent's motion.

The parties are to bear their own fees and costs.

The Clerk is directed to close the file on this petition.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11702-E

CARLOS MIGUEL ARANDA,
Agency File Number A 075-789-447
Petitioner,

v.

LORETTA LYNCH,
Attorney General
Respondent.

BRIEF OF PETITIONER

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Attorney for Petitioner Carlos Miguel Aranda

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Carlos Miguel Aranda vs. Loretta Lynch
Appeal No. 16-11702-E

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I certify that the following persons may have an interest in the outcome of this case:

1. ADKINS-BLANCH, Charles K., Board Member, Board of Immigration Appeals, Falls Church, VA;

2. ANDERSON, Aric A., Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington D.C.;

3. ARANDA, Carlos, Petitioner;

4. FRESCO, Leon, Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington D.C.;

5. GARCIA, Madeline, United States Immigration Judge, Atlanta, GA;

6. HOLIONA, Hope M., Board Member, Board of Immigration Appeals, Falls Church, VA;

7. LYNCH, Loretta, Respondent, Attorney General of the United States, Civil Division, U.S. Dep't of Justice, Washington, D.C.;

8. MALDONADO, Njeri, Assistant Chief Counsel, Department of Homeland Security, Atlanta, GA;

9. O'LEARY, Brian M., Board Member, Board of Immigration Appeals, Falls Church, VA;

10. RADFORD, Emily, Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington D.C.;

11. REBA, Stephen M., The Law Office of Stephen M. Reba, LLC, Attorney for Petitioner, Avondale Estates, GA;

12. SOLIMIANY, Carlos, Ross & Pines, LLC, Prior Attorney for Petitioner, Atlanta, GA.

Respectfully Submitted, this 20th day of June, 2016.

/s/ Stephen M. Reba
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STATEMENT REGARDING ORAL ARGUMENT

Petitioner states that his argument contained herein is complete, meritorious and there exists no need for oral argument; however, should the Court determine that oral argument would assist in the decision making process, Petitioner request same.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decisions of the Board of Immigration Appeals, which reviews the orders of immigration judges. 8 U.S.C. § 1252. Petitioner's argument is legal in its essential nature and, therefore, reviewable under 8 U.S.C. § 1252(a)(2)(D).

STATEMENT OF THE ISSUE

WHETHER THE BOARD OF IMMIGRATION APPEALS ERRED BY FAILING TO ADDRESS THE FABRICATED AND ERRONEOUS FACTUAL FINDING THAT IMPACTED THE IJ'S ULTIMATE DECISION AND DEMONSTRATED PERVASIVE BIAS

STATEMENT OF THE CASE

Course of the Proceedings and Disposition in the Court Below

On August 6, 2009, the Department of Homeland Security ("DHS") issued a Notice of Appearance charging Petitioner with removability under INA 237(a)(2)(A)(i)(I). On October 1, 2009, DHS amended the removability charge to INA 237(a)(2)(A)(i), pertaining to aliens convicted of crimes involving moral turpitude within five years of admission. Petitioner timely filed an adjustment of status application (INA 245(a)) and waiver application (INA 212(h)) as relief from removal. (R. 784, 862). Both DHS and the Immigration Judge ("IJ") found that Petitioner was statutorily eligible to apply for a 212(h) waiver.

On July 22, 2014, the IJ found Petitioner removable and denied his applications for relief. On August 20, 2014, Petitioner filed a timely appeal before the Board of Immigration Appeals ("BIA"), which dismissed the appeal in a decision dated March 16, 2016. On April 15, 2016, Petitioner filed his petition for review with this Court. The administrative record was filed on May 10, 2016, and this principal brief of Petitioner timely follows.

STATEMENT OF RELEVANT FACTS

Thirty-four-year-old Petitioner, a native a citizen of Mexico, has lived in the United States for more than twenty-five years, since the age of six. (R. 3, 87). As the BIA noted, Petitioner "presented various social and humane considerations that weigh in his favor," such as: a son born in 2007 that he has with his wife; his gainful employment since the age of 18; and his regular attendance at church. *Id.* Despite these facts, a burglary committed at the age of seventeen—which was entirely forgiven by the victim, who issued a sworn statement (R. 991-92), and remains a neighbor of Petitioner to this day—is purportedly operating to serve as a complete bar to Petitioner's eligibility for adjustment or waiver, meaning permanency with his wife and child in the United States. (R. 68-88).

To that point, Petitioner states "purportedly" because this appeal centers on the IJ's patent bias toward Petitioner because of a subsequent conviction for disorderly conduct that was reduced from child molestation after the victim admitted she was lying, and the IJ's efforts to fabricate the record to her liking in what she even called "a very close case." (R. 88).

Specifically, in her final order, the IJ simply created quoted testimony out of thin air, shockingly stating the following:

> The most telling thing that the witness said was the following. She was asked by this Judge, if in [sic] heart of hearts as a mother, if she believed her daughter. She paused and the Court had the opportunity to observe her demeanor. She paused and looked straight at the Court and took a

> deep breath and she said, "It's not that we don't believe her. It's that we don't want it to be true."

(R. 82).

However, the hearing transcript to which the Judge was referring yields only the following:

> Judge: In your heart of hearts, what do you believe, that [your daughter] is telling the truth or not as a mother?
>
> Victim's Mother: As a mother.
>
> Judge: What do you believe?
>
> Victim's Mother: I, I don't know. I would hope that. I don't know.

(R. 590: 14-22).

Beyond this blatant creation of fact, the IJ's prosecutorial approach is further demonstrated by the IJ's taking issue with Petitioner's acceptance of the disorderly conduct plea deal, instead of fighting the case "tooth and nail," and, the IJ stating that "it does not necessarily mean that the Court does not believe the child" when the state prosecuting authority believes it cannot sustain a conviction due to the victim's lies. (R. 75, 83).

Failing to address any of these points or apply the appropriate legal standard, the BIA simply concluded, "…the record before us (including the extensive hearing transcript) [does not] show any indications of bias or lack of impartiality by the Immigration Judge towards the respondent." (R. 4).

SUMMARY OF THE ARGUMENT

In her final order, and as a basis for her ruling against Petitioner, the IJ fabricated quoted testimony that can be found nowhere in the extensive hearing transcripts. In failing to address this factual error or apply this fabrication by the IJ to the "pervasive bias and prejudice" standard for non-extrajudicial claims of bias, the BIA erred. Accordingly, this error requires remand to the BIA as (1) a finding of fact not supported by the record; and/or (2) for a determination as to whether this creation of fact by the IJ, in light of and in addition to her other biased comments on the record, meets the aforementioned legal standard of bias.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS ERRED BY FAILING TO ADDRESS THE FABRICATED AND ERRONEOUS FACTUAL FINDING THAT IMPACTED THE IJ'S ULTIMATE DECISION AND DEMONSTRATED PERVASIVE BIAS

A. Standard of Review

This Court reviews issues of law *de novo*. *Kazamzadeh v. U.S. Attorney General*, 577 F.3d 1341 (11th Cir. 2009). Findings of facts made by administrative agencies "may be reversed by this court only when the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings." *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004); 8 U.S.C. § 1252(b)(4)(B); *see also Al Najjar v.*

Ashcroft, 257 F.3d 1262 (11th Cir. 2001) (discussing the deference involved in the substantial evidence standard).

B. <u>Argument</u>

The BIA has established a clear legal standard for claims that immigration judges have demonstrated bias or impartiality. In cases such as *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982), the BIA has required an alien to demonstrate that the IJ had a personal bias stemming from an "extrajudicial" source. However, noting an exception to the "extrajudicial" rule, the BIA has held where bias is alleged and no "extrajudicial" source is demonstrated, an alien still may prevail where "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Matter of Dale*, 2006 WL 2008280, fn. 2 (BIA 2006) (*citing Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975)).

In the present case, the BIA failed to apply this established standard to Petitioner's claim of the IJ's bias and impartiality toward him due to an arrest for child molestation that was reduced to disorderly conduct. (R. 4). Most concerning was that the IJ, in her final order, fabricated testimony given by the victim's mother. Specifically, in the IJ's order she states as follows:

> The most telling thing that the witness said was the following. She was asked by this Judge, if in [sic] heart of hearts as a mother, if she believed her daughter. She paused and the Court had the opportunity to observe her demeanor. She paused and looked straight at the Court and took a

> deep breath and she said, "It's not that we don't believe her. It's that we don't want it to be true."

(R. 82).

However, if one looks at the hearing transcript to which the Judge was quoting, not even the essence of such a quote can be found, let alone the words stated as the IJ quoted in her final order. The portion of the hearing transcript between the IJ and the victim's mother reads as follows:

> Judge: In your heart of hearts, what do you believe, that [the victim] is telling the truth or not as a mother?
>
> Victim's Mother: As a mother.
>
> Judge: What do you believe?
>
> Victim's Mother: I, I don't know. I would hope that. I don't know.

(R. 590: 14-22).

Petitioner derives no pleasure in asserting this claim that impugns, but the IJ's factual finding appears to be entirely invented. Although raised by Petitioner, the BIA failed entirely to address this fabricated and erroneous factual finding, stating only that "…the record before us (including the extensive hearing transcript) [does not] show any indications of bias or lack of impartiality by the Immigration Judge towards the respondent." (R. 4, 28).

While opposing counsel can attempt to argue that the IJ was merely giving a synthesis of the witness's entire testimony, that argument is not plausible. The IJ

states both that this quoted testimony came during her questioning and, most importantly, after "looking straight at the Court" and taking a "deep breath." (R. 82). Additionally, a fair reading of the entire testimony of the victim's mother does not even come close to yielding such a sentiment as that quoted.

In a case that the IJ called a "very close" one, facts mattered dearly. (R. 87, 88 ("This is a very close call. This is not as clear as one would think")). While the United States Supreme Court has held that judicial decisions only "in the rarest circumstances evidence the degree of favoritism or antagonism required when no extrajudicial source is involved," it should be up to the BIA to determine whether or not the creation of fact by the IJ meets the pervasive bias standard. *See Liteky v. United States*, 510 U.S. 540 (1994). In addition, and alternatively, the case should be remanded, as the BIA clearly erred by letting this factual finding stand (conjured or not) when it is not supported by the record and fundamental to the ultimate decision by the IJ.

CONCLUSION

As such, Petitioner asks for remand to the BIA as (1) a finding of fact not supported by the record; and/or (2) for a determination as to whether this creation of fact by the IJ, in light of and in addition to her other biased comments on the record, meets the aforementioned legal standard of bias.

Respectfully Submitted, this 20th day of June, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: it contains fewer than 14,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportional-spaced typeface using Microsoft Word in 14 point Times New Roman.

This 20th day of June, 2016.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the original of this Brief of Petitioner with the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit via CM/ECF and mailing via United States Mail seven (7) copies of this Brief of Petitioner. I further certify that I served via this Court's CM/ECF and mailing via United States Mail one (1) copy of Petitioner's Brief to the following:

Aric Allan Anderson
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
PO Box 878, Ben Franklin Station
Washington, D.C. 2004-0878

This 20th day of June, 2016.

/s/ Stephen M. Reba
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