No. ________

In The

Supreme Court of the United States

DAGOBERTO MARRUFO MORALES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition For Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In immigration removal proceedings, Mr. Marrufo Morales, the non-citizen respondent, did not present documentary evidence in support of a defense of "cancellation of removal" prior to his scheduled final hearing. He arrived at his final hearing with new counsel, who requested an unopposed and customary continuance for preparation. The Immigration Judge ("IJ") denied the motion for a continuance and denied Mr. Marrufo Morales the opportunity to testify or to present evidence on his behalf on the day of the hearing. The IJ found that Mr. Marrufo Morales could not establish eligibility for cancellation of removal without the prior submission of documentary evidence. He therefore ordered Mr. Marrufo to voluntarily depart the United States in sixty days. The Board of Immigration Appeals ("BIA") and the Tenth Circuit Court of Appeals affirmed.

The statute authorizing the defense, 8 U.S.C. § 1129b(b), provides that the government "shall consider any credible evidence relevant to the application."

1. Can an agency or court add an eligibility requirement to a defense to removal from the United States where the requirement contravenes the statute creating the defense and the statute is clear and unambiguous on its face?

PARTIES TO THE PROCEEDINGS

Mr. Marrufo Morales is a citizen and national of Mexico. He arrived in the United States sometime in 1993, and he has been living continuously in the United States since that time. He is married to a Lawful Permanent Resident, and he has five United States citizen children.

The Government initiated removal proceedings against Mr. Marrufo Morales on March 6, 2007.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Dagoberto Marrufo Morales ("Mr. Marrufo Morales"), respectfully prays that a writ of certiorari issues to review the judgment of the United States Court of Appeals for the Tenth Circuit in Case Nos. 14-9587 and 15-9512, entered on October 8, 2015.

OPINIONS BELOW

The Immigration Judge ("IJ") in Denver, Colorado denied Mr. Marrufo Morales an opportunity to present his defense from removal and granted him "voluntary departure" on June 12, 2013. Specifically, Mr. Marrufo Morales was seeking relief from removal via a defense called "cancellation of removal." The IJ requested that thirty (30) days prior to the final hearing Mr. Marrufo Morales submit documentary evidence in support of his application for relief from removal. Mr. Marrufo Morales' then-counsel resigned from the case one month prior to the final hearing. At the final hearing on June 12, 2013, the IJ denied an unopposed and customary motion to continue for preparation time for new counsel. What is at issue here is that at the final hearing, the IJ refused to allow Mr. Marrufo Morales to testify or present evidence on his behalf. The IJ concluded:

> He says that he has children and a father that is either a legal permanent resident and the children are citizens. We have no birth

> certificates regarding the children. No ID regarding the father showing that he is a legal permanent resident. We have no medical records. We have no school records. The Court would indicate that the respondent is not ready to go forward, would not be able to show that, in fact, he is eligible for this relief . . .

In the Matter of Marrufo-Morales, File A076-803-578, Oral Decision of the Immigration Judge at 1-2 (June 12, 2013) (internal punctuation omitted).

The single-member panel of the Board of Immigration Appeals ("BIA") affirmed the IJ's order on June 12, 2013. "[T]he respondent did not present any evidence with respect to the requisite hardship or continuous physical presence requirements needed to establish eligibility for cancellation of removal . . . " *In Re Marrufo-Morales*, File A076-803-578, BIA Decision and Order(s) at 1 (Aug. 21, 2014).

Through undersigned counsel, Mr. Marrufo Morales challenged the BIA order at the United States Court of Appeals for the Tenth Circuit filing a petition for review on September 22, 2014. While that appeal was pending, Mr. Marrufo Morales petitioned the BIA to reopen his case based on his eligibility for "U" nonimmigrant status as a victim of a crime. The BIA denied the motion to reopen on January 9, 2015. Mr. Marrufo Morales appealed the BIA's denial of the motion to reopen and the Tenth Circuit reviewed both cases simultaneously.

On October 8, 2015, a panel of the Court of Appeals entered its opinion affirming the order of removal against Mr. Marrufo Morales. The opinion of the Court of Appeals is not published.

JURISDICTION

The Court of Appeals entered its judgment on October 8, 2015. On December 2, 2015, the Court of Appeals denied Mr. Marrufo Morales' request for rehearing and rehearing en banc as untimely filed. Mr. Marrufo Morales sought an extension to file this petition for writ of certiorari and that request was granted by the Honorable Justice Sotomayor on January 4, 2016. The time to file the petition for writ of certiorari was extended to March 7, 2016.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STANDARD OF REVIEW

5 U.S.C. Section 706 provides that questions of administrative law are decided de novo. "Questions of law are reviewed de novo and questions of fact for clear error." *ATT v. Concepcion*, 562 U.S. 333, 350 (2011). Whether the statute giving rise to the defense of cancellation of removal precludes judicial restrictions on presentation of the defense is a legal question that merits de novo review.

The ruling authority on whether constitutional questions are reviewed de novo for administrative law is 5 U.S.C. Section 706, where it states the court shall set aside any conclusions found to be "contrary to constitutional right, power, privilege, or immunity." This Court reviews constitutional issues pursuant to a *de novo* standard of review. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001) (on whether punitive damages were a constitutional issue for the Court to give de novo review). Whether the judicial restrictions on the presentation of the defense of cancellation of removal constitute a frustration of procedural due process is a question that this Court should review de novo.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, 5th Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

2. 8 U.S.C. § 1229b

(b) CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS

(1) IN GENERAL The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2)(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

3. 8 C.F.R. § 1240.12

(a) *Contents.* The decision of the immigration judge may be oral or written. The decision of the immigration judge shall include a finding as to inadmissibility or deportability. The formal enumeration of findings is not required. The decision shall also contain reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

STATEMENT OF THE CASE

Mr. Marrufo Morales presented an application for relief from removal in the form of "cancellation of removal" for non-permanent residents, pursuant to 8 U.S.C. Section 1229b(b). The statute governing applications for the defense of cancellation of removal, 8 U.S.C. Section 1229b(b)(2)(D), provides: "In acting on applications under this paragraph, the Attorney General *shall* consider *any* credible evidence relevant to the application." (Emphasis added). On the day of

his final "merits" hearing on June 12, 2013, Mr. Marrufo Morales arrived with new counsel, who requested a brief continuance to present the case. At this hearing, the Government indicated that it did not oppose the request for a brief continuance. The IJ denied the request for a continuance and refused to allow Mr. Marrufo to present any testimony or witnesses in support of his defense. The IJ's only proffered reason for the denial was that Mr. Marrufo Morales had not previously submitted any supporting documents as evidence in his case.

On the day of his final "merits" hearing on June 12, 2013, Mr. Marrufo Morales arrived with new counsel, who requested a customary and brief continuance to present the case. The Government indicated that it did not oppose the request for a brief continuance. The IJ denied the request for a continuance and refused to allow Mr. Marrufo Morales to present any testimony or witnesses in support of his defense. The IJ's only proffered reason for the denial was that Mr. Marrufo Morales had not previously submitted any supporting documents as evidence in his case. Because he was denied an opportunity to provide any testimony or evidence on his behalf at his final hearing, he was denied a fair hearing.

The BIA accepted the IJ's reasoning for denying the motion to continue in the first decision dated August 21, 2014. The BIA found that because Mr. Marrufo Morales did not present any documentary evidence prior to the final hearing, the order of voluntary departure was justified. The BIA also found that

Mr. Marrufo Morales did not show he was prejudiced by the denial of his motion to continue.

The BIA further decided that while Mr. Marrufo Morales' appeal was pending before it, he should have filed a "motion to remand" together with proof regarding his eligibility for cancellation of removal. This is an inaccurate statement of the law. A motion to remand must state new facts that will be proven if the motion is granted and must be supported by affidavits or other evidentiary material. *See* 8 C.F.R. § 1003.23(b)(3). The evidence offered must be probative and material and must not have been available or discoverable at the time of the former hearing. *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992).

If Mr. Marrufo Morales had filed such a motion, it would have been denied, because the evidence he would have submitted in support thereof was already available and discoverable at the time of the prior hearing.

In its second decision denying Mr. Marrufo Morales' request to reopen his case based on his pending U-status certification application, the BIA found that the case could be reopened when a U-status certification was approved. However, at this point, Mr. Marrufo Morales would be both time-barred and numerically barred from filing a motion to reopen. 8 U.S.C. § 1229(a)(7).

The Tenth Circuit Court of Appeals agreed that the IJ's decision denying the motion to continue was appropriate because "Marrufo failed to heed the IJ's

warnings that if he failed to submit evidence in support of his cancellation application, the IJ would order him removed." *Marrufo-Morales v. Lynch*, Nos. 14-9587 & 15-9512, 6 (10th Cir. 2015). The Court of Appeals' Order began by observing that although the case had been pending many years, "Marrufo still had not submitted any evidence supporting his cancellation application." *Id.* at 2. Thus, the Court of Appeals agreed with the IJ and BIA's analysis that Mr. Marrufo must have, prior to his final hearing, presented documentary evidence in order to have a hearing on his defense.

The Order of the Court of Appeals appears to suggest that Mr. Marrufo Morales did indeed receive a full day in court at his final hearing, but through his own fault, could not move forward: "Marrufo initially decided to proceed with the hearing and he was sworn in to testify. But his counsel soon concluded that he was not ready to move forward on Marrufo's cancellation application." *Id.* at 3.

However, the transcript of the hearing reveals something different. Mr. Marrufo Morales was sworn in to testify, and his then-attorney stated: "Your Honor, I have no, I have no application even to review from. So just give me a moment." At this point, the IJ had a brief conversation with the Government attorney about the Government's motion to pretermit. Without Mr. Marrufo Morales having been asked even one question, the IJ promptly concluded: "I'm not going to do it . . . And I don't like putting Mr.

Simmons in this position, but this gentleman has had 12 continuances; that's enough. We'll finish it today."

The Court of Appeals also did not discern any due process violations, either with the decision to deny the motion to continue or the IJ's refusal to permit testimony or evidence on the day of the final hearing. With respect to the motion to reopen, the Court agreed with the BIA that a future motion could be presented, notwithstanding the bars, as long as there existed the scintilla of possibility that the Government might be willing to join that future motion.

REASONS FOR GRANTING THE PETITION

I. This case involves a question of importance to the public.

A straightforward federal statute, 8 U.S.C. Section 1229b(b)(2)(D), lays out the groundwork for the commonly invoked defense of cancellation of removal: "In acting on applications under this paragraph, the Attorney General *shall* consider *any* credible evidence relevant to the application." (Emphasis added).

This case presents what appears to be a novel issue: Whether courts can fashion extra requirements for an immigration defense that are not anticipated by the statute itself. This federal statutory question bears this Court's review. *See, e.g.*, *United States v. Ruzicka*, 328 U.S. 287 (1946) (statutory

construction or application significant in the administration of statute); *American Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (the question presented is "an important one of first impression" under the statute).

The issue in this case extends beyond Mr. Marrufo Morales' narrow interest, potentially reaching all non-citizens in removal proceedings. The Government's own statistics demonstrate that the defense of cancellation of removal is the primary defense that non-citizens assert in removal proceedings. In 2013, there was a total of 6,647 grants of cancellation of removal, for non-residents and lawful permanent residents. The next most-granted form of relief was adjustment of status, for which there were 2,430 grants. *See* U.S. Department of Justice, Executive Office for Immigration Review, *FY 2013 Statistics Yearbook*.[1]

For this reason, any decision that narrows the availability of the defense of cancellation of removal will have a significant impact on non-citizens in removal proceedings. The administrative bodies tasked with carrying out immigration laws, as well as the courts that review their decisions, are not at liberty to disregard clear statutory directives that protect the rights of non-citizens in removal proceedings.

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[1] Found at https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf (last visited March 2016).

II. The extra-statutory requirement is contrary to the principles of constitutional due process.

A. When the statute is clear and unambiguous, no *Chevron* deference applies.

This Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* provided the analytical framework for assessing the validity of an administrative agency's construction of a statute that it is charged with administrating. The first step is to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842-43 (1984). Here, the statute providing for the defense of cancellation of removal is clear. 8 U.S.C. § 1229b. The particular provision at issue, which permits the defense to be presented with any credible evidence is also clear. 8 U.S.C. § 1229b(b)(2)(D). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In this case the IJ created, and the BIA and the Tenth Circuit Court of Appeals approved, a requirement that an applicant for cancellation of removal must provide documentary evidence prior to a final merits hearing to be eligible for the defense. This is an application of federal law that clearly contradicts the unambiguous language of the statute providing for the defense. This requirement, in effect, is an extra-judicial mandate that is in conflict with the statute governing the defense. It is *ultra vires*. A

regulation is *ultra vires* to a statute if there has been an error in judgment and abuse in discretion when relying on that regulation. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Immigration agencies and the courts do not enjoy discretion where the statute is clear and unambiguous, as in this case. The statute governing applications for cancellation of removal, 8 U.S.C. Section 1229b(b)(2)(D), provides: "In acting on applications under this paragraph, the Attorney General *shall* consider *any* credible evidence relevant to the application." (Emphasis added). The statute does not require any specific documentary evidence be presented, at any time, to invoke or present the defense. Thus, the IJ's blanket denial due to the absence of previously submitted documentary evidence and outright refusal to entertain either testimony or evidence at the merits hearing is reversible error.

B. Significant errors prevented a fundamentally fair hearing.

The IJ made other errors in his ruling that while secondary to the grounds for this writ, bear mention. First, in denying the unopposed motion to continue, the IJ declared that the case had been continued twelve times, when in fact it had been continued only four times, all customary and routine extensions, one of which was on the IJ's own accord. Second, at no point did the IJ rule on the merits of the application for cancellation of removal or provide reasons for not

doing so. Third, at the final hearing the Government orally proposed a motion to pretermit the application, and the IJ failed to rule on that motion as well. Fourth, the IJ had a duty to fully develop the record, a duty unfulfilled in this case. *See* 8 U.S.C. § 1229a(b)(1) (requiring IJs to "interrogate, examine, and cross-examine the alien and any witnesses"). Finally, the IJ failed to include a finding as to admissibility or deportability, a statutory requirement. According to 8 C.F.R. Section 1240.12(a), the IJ must: "[I]nclude a finding as to inadmissibility or deportability. The formal enumeration of findings is not required. The decision shall also contain reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge." *Id.*

The proper remedy for a violation of 8 C.F.R. Section 1240.12 is for the appellate court to remand the case to the Immigration Court. *See, e.g.*, *Matter of E-F-H-L-*, 26 I&N Dec. 319, 321 (BIA 2014) (remanding the case to the IJ for further proceedings, and stating that, "Even where an Immigration Judge is inclined to conclude that a mandatory bar applies, the statutory and regulatory provisions require the immigration judge to conduct a full evidentiary hearing on any disputed factual issues related to *that* question") (emphasis in original).

Importantly, the IJ could not have made a decision on the merits of the cancellation case at the final hearing, unless the case could have been denied on a statutory ground other than hardship, inapplicable

here. Beginning in May 1999, decisions on cancellation cases became subject to a procedure whereby the IJs reserve their decisions due to an annual cap, and cases are decided in subsequent fiscal years as grant numbers become available.[2] *See* 8 C.F.R. § 240.21. Thus, the administrative efficacy of the extra-statutory requirement appears minimal, at best.

The requirement is *ultra vires* and not entitled to deference, because the statute governing the defense of cancellation of removal is clear on its face; therefore, judicial interpretation is inapplicable. To the extent an administrative or judicial interpretation is at variance with the statute, it should not be entitled to deference.

C. The extra-statutory requirement is contrary to principles of due process.

The Fifth Amendment's Due Process Clause requires that removal proceedings be fundamentally fair. *Reno v. Flores*, 507 U.S. 292, 306 (1993). "[T]he Due Process Clause applies to all persons within the United States including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Thus, Mr. Marrufo Morales is entitled to due process and a fundamentally fair immigration proceeding. That the IJ created an extra-statutory obstacle to his

[2] *See* https://www.justice.gov/eoir/eoir-procedures-cap-on-suspension-1999 (last visited March 2016).

defense from removal, and further precluded him from presenting any testimony or evidence on his defense during his final hearing, represents a failure of due process.

Non-citizens, even those charged with entering the country illegally, are entitled to due process when threatened with deportation. *De La Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (internal citations omitted). Due process entitles a person to factfinding based on a record produced before the decisionmaker and disclosed to that person. *Id.* (quoting *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S. Ct. 1011, 1022 (1970)). Here, there is no record to review because the IJ precluded one from being created.

Due process also entitles a person to an individualized determination of his interests. *Id.* (quoting *Rhoa-Zamora v. INS*, 971 F.2d 26, 34 (7th Cir. 1992), *cert. denied*, 507 U.S. 1050, 113 S. Ct. 1943 (1993)). Due process requires that the decisionmaker actually consider the evidence and argument that a party presents. *Id.* (quoting *Morgan v. United States*, 298 U.S. 468, 481, 56 S. Ct. 906, 911 (1936)). The IJ's blanket prohibition of the availability of the defense in the absence of previously-submitted documentary evidence precluded any individualized determination of Mr. Marrufo Morales' interests.

The holding in this case impermissibly restricts the availability of the defense of cancellation of removal, at least within the jurisdiction of the Tenth

Circuit Court of Appeals, thereby affecting thousands of non-citizens and their ability to present the defense. The right to be heard in court is an essential aspect of due process. Because the statute providing for the defense of cancellation of removal clearly requires that a non-citizen respondent in immigration proceedings be provided an opportunity to present "any credible evidence" on his behalf, this right cannot be abridged by administrative or judicial fiat.

CONCLUSION

Mr. Marrufo Morales is not asking for more than that which due process of law and the federal statute already provide: an opportunity to be heard at a meaningful time to present any evidence he has relevant to the defense of cancellation of removal. Because the decisions of the administrative agencies and the Tenth Circuit Court of Appeals impose requirements beyond those the statute contemplates, they should be struck.

We respectfully request that this Honorable Supreme Court of the United States grant this writ to clarify this important federal question, to honor the plain language of the statute, and to clarify the obligations upon administrative agencies and the courts with respect to a non-citizen's evidentiary

burden in presenting the defense of cancellation of removal.

Dated: March 7, 2016 Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAGOBERTO MARRUFO-MORALES, Petitioner, v. LORETTA E. LYNCH, United States Attorney General,* Respondent.	Nos. 14-9587 & 15-9512 (Petitions for Review)

ORDER AND JUDGMENT**

(Filed Oct. 8, 2015)

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* In accordance with Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Loretta E. Lynch is substituted for Eric H. Holder, Jr., as the respondent in this action.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **HARTZ**, **PORFILIO**, and **PHILLIPS**, Circuit Judges.

Dagoberto Marrufo-Morales appeared at a hearing before an immigration judge (IJ) unprepared to present evidence supporting his application for cancellation of removal. After the IJ denied his request for a continuance, he accepted the IJ's offer of voluntary departure. The Board of Immigration Appeals (BIA) affirmed the IJ's decision and denied Marrufo's subsequent motion to reopen. Marrufo petitions for review of the BIA's decisions. Exercising jurisdiction under 8 U.S.C. § 1252(a), we dismiss in part and deny in part the petition for review in appeal number 14-9587. We deny the petition for review in appeal number 15-9152.

I. Background

A. IJ's Decision

The Department of Homeland Security served Marrufo, a native and citizen of Mexico, with a notice to appear (NTA) in March 2007. He admitted the allegations in the NTA and conceded removability. While his case remained pending for over six years, with multiple hearings and continuances, Marrufo failed to cooperate with two different counsel, both of whom eventually moved to withdraw. The IJ repeatedly warned Marrufo that his failure to submit evidence to support his application for cancellation of

removal under 8 U.S.C. § 1229b(b)(1) would result in the IJ issuing a removal order.

Marrufo appeared at a hearing on June 12, 2013, with his newly-retained third counsel, who asked the IJ for a continuance. Although the government did not object, the IJ refused to grant Marrufo another continuance. The IJ noted that the case had been pending for six years and stated (inaccurately) that it had been continued twelve times. Yet Marrufo still had not submitted any evidence supporting his cancellation application.[1] The IJ told Marrufo that he could either go forward with the hearing at that time, the result of which would be a removal order based on his lack of evidence supporting cancellation of removal, or alternatively, the IJ would grant him voluntary departure.

Marrufo initially decided to proceed with the hearing and he was sworn in to testify. But his counsel soon concluded that he was not ready to go forward on Marrufo's cancellation application. Consequently, in the absence of a continuance, Marrufo opted for voluntary departure and reserved his right to appeal.

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[1] During the hearing, the IJ observed there was no evidence of Marrufo's ten years' continuous physical presence, his good moral character, his qualifying relatives, or any exceptional and extremely unusual hardship they would suffer upon his removal. *See* 8 U.S.C. §§ 1229b(b)(1)(A)-(D) (listing requirements for cancellation of removal).

Regarding the denial of a continuance, the IJ stated the following in his oral ruling:

> [T]he motion is denied. The respondent has had 12 continuances. The Court feels that he's had sufficient amount time to get ready. The first appearance before the Court was on 3/14 of 2007. This matter has been set for a merits hearing on four occasions. He's had [two previous counsel]. The Court's familiar with both of those individuals and both of them are excellent attorneys and are prepared quite well and are ready to go forward on cases. This respondent hasn't, hasn't cooperated with them. It's unfortunate because they are very capable attorneys who would have done a good job for him, so the Court feels that he's had sufficient amount of time to prepare. That he hasn't done so on his own because he hasn't wanted to, so the Court is going to go ahead and give him the voluntary departure for 60 days.

Admin. R. (filed in appeal no. 15-9512) at 417-18.

B. BIA Appeal

Marrufo appealed to the BIA. He argued that the IJ violated his right to procedural due process by rescheduling the final hearing, thereby leaving him only 30 days to prepare; by permitting his second counsel to withdraw only days before that hearing; by denying his third counsel's motion for a continuance; and by forcing Marrufo to proceed with the final hearing without adequate time to prepare. The BIA

affirmed the IJ's decision, finding that Marrufo did not establish good cause for a continuance. The BIA also rejected his due-process claim, concluding that he failed to show any prejudice from the IJ's denial of a continuance.

C. Motion to Reopen

Marrufo filed a motion to reopen. As relevant to this petition for review, he argued that he had new evidence regarding a U Visa application he planned to file. To qualify for a U Visa, an alien must demonstrate that (1) he suffered substantial physical or mental abuse as a result of being a victim of certain enumerated types of criminal activity committed in the United States; (2) he has information about that criminal activity; and (3) a law enforcement official has certified that he has been, is being, or is likely to be helpful in its investigation or prosecution of the criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(I)-(IV); *id.* § 1184(p)(1) (requiring application to include the law-enforcement certification). The BIA denied Marrufo's motion to reopen. It first noted there was no evidence that he had obtained the required law-enforcement certification. Further, the BIA said that Marrufo could pursue his U Visa application with United States Citizenship and Immigration Services (USCIS) independent of his removal proceedings, and if USCIS approved the application, Marrufo could then move to reopen and terminate his removal proceedings.

II. Discussion

Marrufo seeks review of the BIA's decisions affirming the IJ's denial of a continuance and denying his motion to reopen. We review the agency's factual determinations for substantial evidence. *Mena-Flores v. Holder*, 776 F.3d 1152, 1162 (10th Cir. 2015). We will reverse a factual finding only if "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). We review constitutional and other legal questions de novo. *Mena-Flores*, 776 F.3d at 1162. We review the agency's denial of a request for a continuance and its denial of a motion to reopen for an abuse of discretion. *See Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011) (continuance); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir. 2004) (motion to reopen). "The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Infanzon*, 386 F.3d at 1362 (internal quotation marks omitted).

A. The BIA Did Not Err in Dismissing Marrufo's Appeal (Appeal No. 14-9587)

Marrufo contends that the BIA erred in dismissing his appeal because the IJ's denial of a continuance at the June 12, 2013, hearing was an abuse of discretion so egregious that the IJ's decision violated his right to procedural due process. But the

procedural history of Marrufo's removal proceedings belies this claim. "The Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. We agree with the BIA that Marrufo did not establish good cause for a continuance. Marrufo failed to heed the IJ's warnings that if he failed to submit evidence in support of his cancellation application, the IJ would order him removed. From the time that Marrufo informed the IJ he was seeking cancellation of removal in December 2008, he had four and a half years to collect and submit his evidence. Yet he came to the June 12, 2013, hearing unprepared to proceed on that application. He did not demonstrate – before the IJ or in his BIA appeal – that the cause of his failure to prepare was his second counsel's withdrawal on the eve of that hearing. Marrufo fails to show that the IJ abused his discretion in denying another continuance at that time.[2]

The BIA also rejected Marrufo's due-process claim. "Because aliens do not have a constitutional right to enter or remain in the United States, the only protections afforded are the minimal procedural due process rights for an opportunity to be heard at a meaningful time and in a meaningful manner."

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[2] We reject Marrufo's claim that the IJ abused his discretion because the IJ misstated the number of previous continuances. The IJ's denial of a continuance was based on the totality of the circumstances, including the amount of time the case had been pending, multiple previous hearings and continuances, and Marrufo's failure to provide his counsel with evidence supporting his cancellation application.

Arambula-Medina v. Holder, 572 F.3d 824, 828 (10th Cir. 2009) (internal quotation marks omitted). Marrufo now argues that the IJ denied him a fundamentally fair hearing by refusing to grant a continuance, by precluding him from testifying and presenting other evidence, by failing to rule on the merits of the government's motion to pretermit[3] and his cancellation application, and by failing to make a removability finding.

We have already addressed the due-process arguments Marrufo made in his BIA appeal and concluded that he failed to show an abuse of discretion by the IJ. These contentions likewise do not support a due-process claim. The Attorney General argues that we lack jurisdiction to consider Marrufo's due-process arguments that he failed to present to the BIA. Ordinarily, an alien need not exhaust his constitutional claims before the BIA, "because the BIA has no jurisdiction to review such claims." *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1094 (10th Cir. 2008). But "objections to procedural errors or defects that the BIA could have remedied must be exhausted even if the alien later attempts to frame them in terms of constitutional due process on judicial review." *Id.*

[3] At or shortly before the June 12, 2013, hearing, the government filed a motion to pretermit, contending that Marrufo failed to meet his burden to show that he had not been convicted of an offense that made him ineligible for cancellation of removal. The government ultimately stated it would withdraw that motion if it was the basis for Marrufo's request for a continuance.

Because Marrufo's additional due-process arguments relate to "procedural errors or defects that the BIA could have remedied," he was required to exhaust them in his BIA appeal. *Id.* His failure to do so deprives this court of jurisdiction to consider these additional contentions. *See Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1017-18 (10th Cir. 2007); 8 U.S.C. § 1252(d)(1). We therefore dismiss Marrufo's petition for review in appeal number 14-9587 to the extent he raises these unexhausted arguments.

B. The BIA Did Not Abuse its Discretion in Denying Marrufo's Motion to Reopen (Appeal No. 15-9512)

Marrufo argues that the BIA should have granted his motion to reopen because he was prima facie eligible for a U Visa. Moreover, because a U Visa is a defense to removal, he also claims that the BIA erred in concluding that his application was not relevant to his removal proceedings. And he contends that the BIA erred in concluding he could move to reopen his removal proceedings if a U Visa were approved by USCIS. Marrufo maintains that such a motion would be both number- and time-barred.

Marrufo fails to demonstrate an abuse of discretion. He does not challenge the BIA's determination that there was no evidence he had obtained the law-enforcement certification required for a U Visa application. Moreover, the BIA did not say that a U Visa was irrelevant to his removal proceedings; rather, it

accurately stated that he could pursue that application independent of his removal proceedings. *See* 8 C.F.R. § 214.14(c)(1)(ii) (stating aliens subject to final removal orders are not precluded from filing U Visa applications with USCIS). And the BIA also correctly concluded that Marrufo could move to reopen his removal proceedings in the event USCIS approved his U Visa application. *See id.* § 214.14(c)(5)(i) (permitting alien with U Visa to file a motion to reopen removal proceedings, and stating the government has discretion to join the motion to overcome any time and numerical limitations). The BIA did not abuse its discretion in denying Marrufo's motion to reopen.

III. Conclusion

The petition for review in appeal number 14-9587 is dismissed in part and denied in part. The petition for review in appeal number 15-9152 is denied. The stay of removal entered in appeal number 14-9587 is lifted.

Entered for the Court

John C. Porfilio
Circuit Judge

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

Falls Church, Virginia 20530

Decision of the Board of
Immigration Appeals

File: A076 803 578 – Denver, CO   Date: JAN -9 2015

In re: DAGOBERTO MARRUFO-MORALES

IN REMOVAL PROCEEDINGS

CERTIFICATION[1]

ON BEHALF OF RESPONDENT: Catherine A. Chan, Esquire

ON BEHALF OF DHS: Christy Romero
Assistant Chief Counsel

APPLICATION: Reopening

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to apply for withholding of removal and protection under the Convention Against Torture, and to pursue a Petition for U Nonimmigrant Status (Form I-918) with the U.S. Citizenship and Immigration Services ("USCIS"). In our decision dated August 21, 2014, we dismissed his appeal from the Immigration Judge's June 12, 2013,

[1] In order to avoid any question regarding our jurisdiction over the respondent's motion, we take jurisdiction over this matter by certification pursuant to 8 C.F.R. § 1003.1(c).

decision which found him removable, denied his application for cancellation of removal for certain nonpermanent residents, but granted him 60 days voluntary departure. We also reinstated the 60-day period of voluntary departure.[2] The Department of Homeland Security ("DHS") opposes the motion. The motion will be denied.

The respondent's motion was filed on November 21, 2014, and was supplemented on November 24, 2014.[3] For purposes of this decision we assume that the respondent's family [including at least him, his sister in Mexico, his girlfriend, and his three U.S. citizen children] is a particular social group. The respondent does not show that the Mexican Government would be unwilling or unable to control any persecutory acts by his estranged spouse and her family in Mexico upon his return there. *See Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013) (for purposes of asylum and withholding of removal under the Act, persecution may involve a government's inability or unwillingness to control private conduct).

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[2] Because the respondent filed a petition for review, the grant of voluntary departure was automatically terminated. The penalties for failure to depart under section 240B(d) of the Act, 8 U.S.C. § 1229c(d), shall not apply to the respondent, notwithstanding any period of time that he remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

[3] Motion Exhibits 7, 8, and 9 were inadvertently not included in either the November 21, 2014, filing or the November 24, 2014, filing.

The respondent's estranged spouse and family ended up in jail for attacking his sister in Mexico, and they were charged with attempted murder. The respondent recently learned that they were released from jail (Motion Exh. 1, at 8). He does not specify in his affidavit whether they were released from jail pending final disposition of their criminal case or released following the dropping of the charges or findings of not guilty. Also, he is using the civil courts in Mexico to try to get custody of his three children (Motion Exh. 1, at 8-9; Motion Exh. 15). In addition, the respondent does not show that the Mexican Government would be willfully blind to any torturous acts which might be committed against him by his estranged spouse or her family upon his return there.

The respondent also does not show that he could not relocate within Mexico and that it was not reasonable for him to do so. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012) (a determination must be made whether an asylum applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and whether, under all the circumstances, it would be reasonable to expect the applicant to do so). The respondent is from the State of Durango in Mexico, where his estranged spouse and her family live. While she has relatives in the Denver – Aurora, Colorado, area, there is no evidence that she has relatives in other areas of Mexico. He could relocate to Mexico City or any of the 11 states for which the U.S. Department of State does not have a current travel advisory (Motion Exh. 19).

The respondent could continue to pursue his custody case through his Mexican attorney.

The respondent also moves to reopen proceedings to pursue his Form I-918 before the USCIS. He does not provide any evidence to show that a law enforcement agency certified his Form I-918, Supplement B (U Nonimmigrant Status Certification). Further, he can pursue his Form I-918 with the USCIS independent of these removal proceedings, and may apply to the DHS for a stay of removal while his Form I-918 is pending before the USCIS.

Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.[4]

/s/ Neil P. Miller
FOR THE BOARD

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[4] If the USCIS should approve the respondent's Form I-918, he may move to reopen and terminate proceedings without prejudice.

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

Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A076 803 578 – Denver, CO   Date: AUG 21 2014

In re: DAGOBERTO MARRUFO-MORALES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David N. Simmons, Esquire

ON BEHALF OF DHS: Christy Romero
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b) of the Act; continuance

The respondent has appealed the Immigration Judge's June 12, 2013, decision ordering him to voluntarily depart this county within 60 days. *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The appeal will be dismissed.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

We decline to disturb the Immigration Judge's decision. The respondent, through counsel, has conceded that he is subject to removal from the United

States as a result of entering this country without inspection by an immigration officer (Tr. at 2; Exh. 1). *See* section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). As the respondent is subject to removal from the United States, it is his burden to establish eligibility for relief from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). For the reasons set forth below, we conclude that the respondent did not establish that he was eligible for any form of relief from removal which can be granted to him during the course of these proceedings or that good cause existed for a continuance. As such, we agree with the Immigration Judge's decision to conclude these proceedings by entering a voluntary departure order.

We acknowledge that the respondent filed an Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (Form EOIR-42B). However, the Immigration Judge correctly determined, and the respondent does not contest, that the respondent did not present any evidence with respect to the requisite hardship or continuous physical presence requirements needed to establish eligibility for cancellation of removal under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1). Considering the lack of evidence presented by the respondent, we conclude that the respondent did not establish good cause for a continuance. *See Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that an alien should not be granted a continuance "as a dilatory tactic to forestall the

conclusion of removal proceedings" where it is unlikely that his application will be granted); *cf. Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (recognizing that a continuance may be warranted where an alien has demonstrated that he is the beneficiary of a pending immigrant visa petitoin [sic] and established a likelihood of success on an application for adjustment of status). The respondent has not presented any persuasive argument on appeal to cause us to conclude otherwise.

To the extent that the respondent alleges a due process violation, he has not shown how he was actually prejudiced by the denial of his request for a continuance. *See Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983) (recognizing that an Immigration Judge's discretionary decision denying a continuance will not be reversed on appeal unless the alien establishes that the denial caused actual prejudice and harm, and materially affected the outcome of the case). Over a year has elapsed since the Immigration Judge's decision and the respondent has made no offer of proof or submitted any evidence, together with a motion to remand, regarding his eligibility for relief.

Accordingly, the following orders shall be entered:

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge

and the statute, the respondent is permitted to voluntary depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

/s/ Edward R. Grant
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DENVER, COLORADO

File: A076-803-578 June 12, 2013

In the Matter of

DAGOBERTO MARRUFO-MORALES	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: MR. SIMMONS

ON BEHALF OF DHS: MS. RAMIRO

ORAL DECISION OF
THE IMMIGRATION JUDGE

The Court would indicate the matter was set for a hearing regarding cancellation of removal. The Court would indicate that the only thing that is in the file is an application for cancellation of removal. The Court has nothing showing that the respondent has been here for ten years. The Court does have Ms. Ramiro's motion to pretermit this matter. It looks to the Court like there was a crime involving moral turpitude which would exclude him from this particular relief.

He says that he has children and a father that is either a legal permanent resident and the children are citizens. We have no birth certificates regarding the children. No ID regarding the father showing that he is a legal permanent resident. We have no medical records. We have no school records.

The Court would indicate that the respondent is not ready to go forward, would not be able to show that, in fact, he is eligible for this relief, so the Court will grant him 60 days of voluntary departure; 60 days is August 12, 2013. The Court will also impose a $500 departure bond that must be posted with Immigration authorities within five working days from today. I have noted that Mr. Simmons has reserved his right to appeal. That appeal is due on July 12, 2013.

DAVID J. CORDOVA
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAGOBERTO MARRUFO-MORALES, Petitioner, v. LORETTA E. LYNCH, United States Attorney General, Respondent.	Nos. 14-9587 & 15-9512

ORDER

(Filed Dec. 2, 2015)

Before **HARTZ**, **PORFILIO**, and **PHILLIPS**, Circuit Judges.

This matter is before the court on "Petitioner's Request for a Rehearing En Banc." The order and judgment resolving these appeals was issued on October 8, 2015. Pursuant to Fed. R. App. P. 40(a)(1), Fed. R. App. P. 35(c) and Fed. R. App. P. 26(a)(1)(C) any petition for rehearing and/or for rehearing en banc was due on or before November 23, 2015. Petitioner's Request for a Rehearing En Banc was not

filed until Friday, November 27, 2015; it was four days late. Petitioner's Request for a Rehearing En Banc is, therefore, denied.

Entered for the Court,
ELISABETH A.
SHUMAKER, Clerk

/s/ Chris Wolpert
by: Chris Wolpert
Chief Deputy Clerk