No. 12-16586

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOB HILL,

Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,

Respondent.

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS
NO. A074 786 903

PETITIONER'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, below is a list of persons and entities who may be interested in the outcome of this case:

1. Adkins-Blanch, Charles K., Board Member, Board of Immigration Appeals, Falls Church, Virginia.
2. Delery, Stuart F., Attorney for Respondent, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C.
3. Fisher, Louis K., Attorney for the Petitioner, Washington, D.C.
4. Flentje, August, Acting Deputy Assistant Attorney General, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.
5. Greenfield, Meghan E., Attorney for the Petitioner, Washington, D.C.
6. Grim, James K., Immigration Judge, Orlando, Florida.
7. Hill, Bob, Petitioner, Pompano Beach, Florida.
8. Hoffman, Sharon, Board Member, Board of Immigration Appeals, Falls Church, Virginia.
9. Holder, Jr., Eric H., Respondent, Attorney General of the United States, U.S. Department of Justice, Washington, D.C.

10. Jones Day, Washington, D.C.

11. Joseph, Bernard A., Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.

12. Manuel, Elise L., Board Member, Board of Immigration Appeals, Falls Church, Virginia.

13. Molina, Jr., Ernesto H., Attorney for the Respondent, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.

14. Neal, David, Acting Chairman, Board of Immigration Appeals, Falls Church, Virginia.

15. Nicastro, Anthony, Attorney for Respondent, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.

16. Stanley, Kevin, Assistant Chief Counsel, U.S. Department of Homeland Security, Orlando, Florida.

/s/ Meghan E. Greenfield
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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c), Petitioner Bob Hill requests oral argument. This appeal concerns the Board of Immigration Appeals' dismissal of Hill's appeal of the decision of the Immigration Judge denying his claim for deferral of removal under the Convention Against Torture. The appeal presents a number of important issues related to the Immigration and Nationality Act, principles of administrative review, and the fairness of Hill's immigration hearing. Hill proceeded pro se before the IJ and the BIA. (AR 140; AR 3.) Pro bono counsel was appointed pursuant to Addendum Five of the Regulations of the United States Court of Appeals for the Eleventh Circuit. Oral argument will aid the Court in resolving the important questions presented.

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STATEMENT OF JURISDICTION

The Immigration Judge ("IJ") had jurisdiction over Bob Hill's removal proceeding pursuant to 8 U.S.C. § 1229a, which provides "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." The IJ entered his decision on July 10, 2012. (AR 79.) Hill appealed this decision to the Board of Immigration Appeals ("BIA") pursuant to 8 C.F.R. § 1003.1(b). (AR 69.) On December 22, 2012, the BIA dismissed Hill's appeal. (AR 3-5.)[1] On December 31, 2012, Hill filed a timely petition for review of the BIA decision in this Court. (Doc. No. 1.) Jurisdiction is proper under 8 U.S.C. § 1252(a)(2)(D), allowing for review of "constitutional claims or questions of law raised upon a petition for review." In addition, because the immigration proceedings under review took place in Orlando, Florida, venue is proper under 8 U.S.C. § 1252(b)(2).

STATEMENT OF THE ISSUES

1. Whether the BIA made a de novo finding on appeal as to the likelihood that Hill would be tortured if removed to Jamaica. This Court held in *Zhou Hua Zhu v. U.S. Attorney General*, 703 F.3d 1303, 1314 (11th Cir. 2013), that the likelihood of torture is a factual issue and that 8 C.F.R. § 1003.1(d)(3)(iv)

[1] This decision vacated the BIA's November 29, 2012 decision and issued a final order, incorporating by reference the November 29, 2012 decision, to correct an administrative error in the service of the original decision. (AR 2.)

therefore precludes the BIA from making a de novo finding on appeal as to this issue.

2. Whether the BIA failed to give reasoned consideration to the likelihood that Hill would be tortured if removed to Jamaica, where the BIA failed to address the specific grounds presented by Hill, including that he had been tortured based on his sexual orientation in the past.

3. Whether the BIA failed to make a reasoned determination that the Jamaican government would not acquiesce to torture based on sexual orientation, where the BIA's analysis ignored decisive evidence and rested on a misstatement of the record.

4. Whether Hill, who was proceeding pro se and in prison, was denied due process when the IJ misinformed him of the applicable legal standard, thus precluding him from submitting evidence showing entitlement to Convention Against Torture relief under the correct legal standard.

STATEMENT OF THE CASE

Hill is a native and citizen of Jamaica. (AR 339.) On May 4, 2012, Hill was served with a notice to appear. (AR 355.) Hill filed an application for asylum and for withholding of removal on June 21, 2012. (AR 212-74.) The IJ conducted a hearing on July 10, 2012, (AR 147), and issued an oral decision denying Hill's claims for relief on the same day, (AR 79-98). Hill then filed a notice of appeal

with the BIA on July 30, 2012. (AR 69-74.) The BIA dismissed Hill's appeal on December 20, 2012. (AR 3-5.) Hill filed a notice of appeal in this Court on December 31, 2012. (Doc. No. 1.)

STATUTORY BACKGROUND

Aliens who have been convicted of crimes are subject to removal from the United States under 8 U.S.C. § 1227. Under the United Nations Convention Against Torture ("CAT"), however, "the United States has agreed not to 'expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'" Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, § 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. An alien is entitled to withholding or deferral of removal under the CAT if he is "more likely than not to be tortured in the country of removal." 8 C.F.R. § 208.16(c)(4). The term "torture" is defined to include "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id*. § 208.18(a)(1). The "[a]cquiescence of a public official 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." *Id*. § 208.18(a)(7).

STATEMENT OF THE FACTS

A. Background.

Bob Hill was born in 1968 in Kingston, Jamaica. (AR 31, 153.) Hill is bisexual, (AR 219), and has long suffered from AIDS, (AR 228).

Hill was often ridiculed as a child and called names because of his effeminate appearance. (AR 241.) When Hill was a teenager, he began dating a classmate named Troy. (AR 242.) Local men who learned of Hill's relationship with Troy would call him a "batty man" or "batty boy" (derogatory terms for a homosexual man), threaten him, and throw stones at him. (AR 219, 242, 247.)

In 1990, Hill was violently attacked by a group of five or six gang members. (AR 164.) The men beat Hill until he was unconscious and stabbed him in his hands, arms, head, leg and thigh. (AR 164-66, 240.) As they beat and stabbed him, they called him a "faggot." (AR 166.) When Hill regained consciousness, he was in a medical clinic. (AR 168.) He received stitches on his hand, arm, head and thigh. (AR 165.) Hill did not report the incident to authorities because he believed the police were prejudiced against bisexual men and would not investigate the attack. (AR 168-69.)

After the attack, Hill feared for his life. He moved away from his mother's house where he had been living and went into hiding. (AR 169.) Over the next three years, he lived with his father, his aunts, and other relatives, each for only a few months at a time to avoid being discovered and brutally attacked again. (AR 169-70.)

Around the same time, Hill became friends with a musician called "Ninja Kid" who was friends with one of his brothers. (AR 244.) Ninja Kid often traveled to the United States to put on shows. (AR 244.) Hill told Ninja Kid that he had been repeatedly threatened because he was bisexual and that he feared for his life. (AR 244-45.) Ninja Kid offered to allow Hill to travel with him on his next visit to the United States. (AR 245.) Hill's mother, father, aunts and uncles collected money to pay for Hill's plane ticket. (AR 245.) In 1993, Hill travelled with Ninja Kid to the United States. (AR 161, 245.)

While in the United States, Hill lived in New York and then in Florida. (AR 162.) He worked at car washes and in liquor stores. (AR 161.) About four years after he arrived, Hill was diagnosed with AIDS. (AR 228.) He has intermittently taken medication and has been admitted to the hospital for extended stays on at least four occasions. (AR 228-29.) Hill's illness is so severe that he has contemplated suicide and required psychiatric treatment. (AR 228.)

On April 5, 2004, Hill pled guilty to possession of cocaine with an intent to

distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). (AR 313.) Judgment was entered on June 16, 2004, (AR 355), and Hill was sentenced to 120 months imprisonment, (AR 314).

B. Proceedings before the Immigration Judge.

1. Initial Proceedings

On May 1, 2012, while Hill was in prison, the Department of Homeland Security served him with a notice to appear ("NTA") charging him with unlawful presence in the United States. (AR 355.) Four days later, he appeared before the IJ. (AR 100-102.) The proceedings were held entirely by video conference. (AR 100-02, 112-13, 130-31, 139-40.) The IJ gave Hill a "Legal Aid list" to assist him in finding counsel. (AR 103.) Six days later, on May 10, 2012, Hill appeared before the IJ again. (AR 113.) Hill explained that he was "still looking" for pro bono counsel because he was indigent. (AR 113.) The IJ responded, "I'm not sure what any attorney could do for you to keep you from being deported." (AR 114.) At his next hearing, on May 17, 2012, Hill again told the IJ that he was continuing to look for an attorney. (AR 118.) Nevertheless, the IJ sustained the allegations in the NTA and held that Hill was removable. (AR 122-23.) The IJ then explained that, because of Hill's conviction, he was eligible only for deferral of removal

under the CAT.[2] The IJ informed Hill that at his merits hearing he would have "an hour, two hours, three hours to testify about [his] fear" of torture. (AR 124.) And the IJ advised that Hill should specify the sections of the U.S. Department of State 2011 Country Report for Jamaica ("Country Report") that were "all about [his] *fear*." (AR 126 (emphasis added).) The IJ failed to inform Hill that under 8 C.F.R. § 1208.16(c)(2) he could establish entitlement to CAT relief only if he put forth *objective* evidence that it was more likely than not that he would be tortured if removed to Jamaica. (*See* AR 124-26.)

Hill was unable to locate an attorney and prepared his application for relief from removal pro se. (AR 140.) Hill's application sought asylum, withholding of removal, and CAT relief, and it described his fear of returning to Jamaica. (AR 212.) Hill attached three declarations from friends who had lived in Jamaica, (AR 234-37), as well as several online articles about the conditions in Jamaica for homosexual men, (AR 248-74).

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[2] An alien who has been convicted of an "aggravated felony" is eligible only for deferral of removal under the CAT. 8 C.F.R. § 208.16(d)(2) (mandatory denial of withholding of removal when alien has committed "particularly serious crime" defined as an "aggravated felony"); *id.* § 208.17(a) (an alien "subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) . . ., shall be granted deferral of removal"). The term "aggravated felony" includes "illicit trafficking in any such controlled substance." 8 U.S.C. § 1182(a)(2)(C)(i).

2. Merits Hearing

At the merits hearing on July 10, 2012, Hill testified that he feared for his life if removed to Jamaica. (AR 163.) He explained that in 1990 "five, six of them, gang members . . . started beating me. I got cut on my arms, chopping my head, my leg, my thigh. They leave me unconscious, sir. When I wake up I was in the clinic." (AR 165.) Hill knew that the men were attacking him because of his sexual orientation because as they beat him they called him a "faggot." (AR 166.) Hill testified that he did not go to the police station or otherwise report the incident, because "[y]ou can't report incident[s] like that because the police, they [are] just like the gang members. They ain't going to do nothing." (AR 168.)

Hill said that, after he had left Jamaica, whenever he spoke with his family in Jamaica, they told him the gang members continued to ask about him: "[T]hey always [say they're] waiting for the bisexual batty man son to come back." (AR 173-74.) Hill feared mistreatment from the police as well, testifying that "[i]f the gay go to a police station, [the police] want to mistreat [them] . . . . They don't want to take no statement. They will only always say batty man, you have a disease, all type of stuff." (AR 179.) Finally, Hill testified that he feared abuse because of his AIDS status and did not believe he could receive medical treatment because of his bisexual orientation. (AR 179-81.)

Hill explained that he had no documentary evidence of the 1990 attack

because he did not have sufficient time to send and receive letters to and from Jamaica before his merits hearing. (AR 186.) He asked for the court to telephone his mother in Jamaica to "verify" his testimony, but the IJ declined. (AR 187.)

In addition, Leroy Fuller testified in support of Hill's application. (AR 190-203.) Fuller had lived in Jamaica and was close friends with Hill's parents. (AR 172, 192.) He testified that shortly after Hill was attacked, Hill's mother had called Fuller to ask for money to pay Hill's medical bills. (AR 172, 192-96.) Fuller also testified that Hill's mother told him that gang members called Hill a "batty man," beat him so that he had "a lot of bruises and stuff like that, stabbed and cuts," and then "le[ft] him to die on the sidewalk." (AR 194.) He explained that, if Hill had reported the beating, the police "wouldn't do nothing that much" and "no one would get arrested." (AR 195.) Fuller also testified that Hill's mother had told him that gang members are "still looking for him and every time they see her, they . . . still mess with her, say he's supposed to die and batty man and he's a faggot. He's supposed to die, . . . and they should have killed him when he was there. They should have killed him and he [got] away." (AR 201.)

3. U.S. Department of State 2011 Country Report for Jamaica

The government submitted as evidence the U.S. Department of State 2011 Country Report for Jamaica. The Country Report described Jamaica's human rights problem of "violence against persons based on their suspected or known

sexual orientation." (AR 277.) It stated that same-sex sexual conduct was broadly stigmatized in Jamaica and that "[h]omophobia was widespread in the country," (AR 291) Two laws prohibit same-sex contact. (AR 291.) "'[A]cts of gross indecency' (generally interpreted as any kind of physical intimacy) between persons of the same sex, in public or in private," are "punishable by 10 years in prison." (AR 291.) And, an "anti-buggery" law "prohibits consensual same-sex sexual conduct between men." (AR 291.)

In addition, the Country Report explained that "[n]o laws protect persons with HIV/AIDS from discrimination," so that infected individuals suffer "severe stigma and discrimination." (AR 292). While "[h]ealth-care facilities were prepared to handle patients with HIV/AIDS, . . . health-care workers often neglected such patients." (AR 292.)

The Country Report also found "brutality against [homosexuals], primarily by private citizens, was widespread in the community." (AR 292.) It described incidents of "assault with deadly weapons, . . . arbitrary detention, mob attacks, stabbings, harassment of gay and lesbian patients by hospital and prison staff, and targeted shootings of [homosexuals]." (AR 291.) Furthermore, "[p]olice often did not investigate such incidents," and "[g]ay men were hesitant to report incidents against them because of fear for their physical well-being." (AR 291-92.) In a number of incidents, "[m]embers of the police force reportedly were the

perpetrators." (AR 291.)

C. IJ Decision

On July 10, 2012, the IJ issued his decision. (AR 79.) The IJ held that Hill was ineligible for asylum and withholding of removal because of his 2004 conviction. (AR 90.) Next, the IJ found that Hill was not credible because he had misrepresented his country of origin when initially confronted by immigration authorities, used aliases in the past, and been convicted of a drug offense. (AR 91.) The IJ opined that "[w]hat is lacking in this case are seemingly available corroborating declarations from [Hill]'s family members." (AR 93.) Because Hill was not deemed credible and had failed to provide such declarations, the IJ held that he had failed to "me[e]t his burden of proof as to corroboration" and thus failed to "establish[] a basis for the Court to grant relief." (AR 94.) Finally, the IJ analyzed the Country Report. (AR 94-96.) In his view, the evidence did not "indicate that any public officials or law enforcement officers . . . would subject [Hill] to torture or would allow such torture to take place and turn 'a blind eye.'" (AR 96.) For these reasons, the IJ held that Hill failed to prove that he was more likely than not to be tortured, denied his applications for relief, and ordered Hill removed to Jamaica. (AR 97-98.)

D. BIA Decision

Hill appealed the IJ's order and also filed a motion to submit additional documentary evidence, including an affidavit from his mother. (AR 3; *see also* AR 14-18.) The government did not file a brief in response. The BIA dismissed Hill's appeal and denied the motion to remand. (AR 5.) "Assuming *arguendo*" Hill's credibility, the BIA found that Hill had not established eligibility for CAT relief because "the respondent's speculation as to what may happen to him if removed to Jamaica on account of his sexual orientation is too remote to bring respondent within the ambit of protection of the CAT." (AR 5.) In addition, the BIA held that Hill had the burden to show that the Jamaican government would acquiesce to torture based on sexual orientation, but he "made no such showing." (AR 5.) Lastly, it denied Hill's motion to remand. (AR 5.)

STANDARD OF REVIEW

The Court reviews only the BIA opinion, "except to the extent that it expressly adopts the IJ's opinion." *Jean-Pierre v. U.S. Att'y Gen.*, 500 F.3d 1315, 1320 (11th Cir. 2007) (citation omitted). The Court reviews the BIA's legal conclusions de novo, according *Chevron* deference to its interpretation of the immigration laws. *Id*. at 1321; *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Constitutional claims are also decided de novo. *Cole v. Att'y Gen.*, 712 F.3d 517, 523 (11th Cir. 2013).

SUMMARY OF ARGUMENT

The BIA ignored its governing regulations, basic principles of administrative review, and the requirements of due process in dismissing Hill's appeal. It erred as a matter of law in four independent ways.

First, the BIA undertook a de novo review of the record and made a fact finding on appeal as to the likelihood Hill would be tortured if removed to Jamaica. The BIA's governing regulations instruct that the BIA *may not* make findings of fact on appeal. 8 C.F.R. § 1003.1(d)(3)(iv). And this Court in *Zhou Hua Zhu v. U.S. Attorney General* held that the determination that the BIA made here—the likelihood of torture—is a finding of fact that may only be made by the IJ. 703 F.3d at 1314.

Second, even if such a finding was permissible, the BIA's analysis of the likelihood Hill would be tortured lacks reasoned consideration. The BIA did not address the specific grounds Hill presented, including that he had been tortured based on his sexual orientation in the past. The BIA is required to consider this evidence of past torture under its governing regulations. *See* 8 C.F.R. § 208.16(c)(3)(i).

Third, the BIA also failed to give reasoned consideration to whether the Jamaican government would acquiesce to torture based on sexual orientation. Its analysis of the Country Report misstates the contents of the record. The BIA

ignored the Country Report's conclusion that Jamaican officials do not investigate (and, in fact, often perpetrate) torture based on sexual orientation.

Fourth, Hill was denied due process in the proceedings before the IJ. Hill did not receive a "full and fair" merits hearing because the IJ misinformed him that he could establish entitlement to CAT relief by showing a *subjective* fear of removal. This misrepresentation substantially prejudiced Hill because it precluded him from submitting evidence establishing entitlement to relief under the correct, *objective* legal standard.

These errors require that the BIA's decision be vacated and that the petition remanded to the BIA for further consideration.

ARGUMENT

The BIA decision dismissing Hill's appeal consists of two parts. First, the BIA addressed the likelihood that Hill would be tortured if removed to Jamaica. Second, the BIA addressed whether the Jamaican government would acquiesce to torture of individuals based on their sexual orientation. The BIA's analysis of each issue rests on legal errors. In addition, the BIA's decision is erroneous because Hill was denied due process in the hearing before the IJ.

I. THE BIA LEGALLY ERRED IN DETERMINING THAT HILL WAS NOT LIKELY TO BE TORTURED BASED ON SEXUAL ORIENTATION IF REMOVED TO JAMAICA.

The BIA committed two independent errors of law in its determination that Hill did not face a likelihood of torture if removed to Jamaica. First, the BIA made a factual finding on a de novo review of the record, which INA regulations and this Court's precedent forbid. (*See* Section I.A.) Second, even if such fact finding *was* permissible, the BIA failed to give reasoned consideration to the issue because it did not address the specific grounds Hill presented—that he had been tortured based on his sexual orientation in the past. (*See* Section I.B.)

A. The BIA improperly engaged in fact finding on appeal when it reviewed the record de novo and found there was no likelihood that Hill would be tortured if removed.

INA regulations "command that the BIA 'will not engage in factfinding in the course of deciding appeals.'" *Zhu*, 703 F.3d at 1314 (quoting 8 C.F.R. § 1003.1(d)(3)(iv)). This means that the BIA may not rely on "its own *de novo* consideration of the evidence." *Zhu*, 703 F.3d at 1305. Rather than review the record de novo and "reweigh the evidence" to make an "independent fact finding," *id*. at 1315, the BIA must instead "remand the proceeding to the immigration judge" if new factual findings are necessary to address a petitioner's claims, 8 C.F.R. § 1003.1(d)(3)(iv). Appellate fact finding in lieu of remand to the IJ is a "legal error," *Zhu*, 703 F.3d at 1314, and requires that the BIA decision be vacated,

id. at 1316.

The predictive "determination that a petitioner faces a likelihood" of a future event occurring, including the likelihood of persecution or torture, "is a finding of fact." *Zhu*, 703 F.3d at 1314. Thus, under § 1003.1(d)(3)(i), the BIA cannot make its own factual finding as to the likelihood of persecution or torture. *Id*. In *Zhu*, for example, the issue was whether the petitioner was likely to be forcibly sterilized if removed to China. *Id*. at 1307. The IJ found that such a likelihood existed, but the BIA reviewed the issue de novo and disagreed. *Id*. at 1306-07. The BIA claimed that its de novo determination was permissible because "in evaluating either a persecution claim or a torture claim under the Convention Against Torture, [it did] not consider the likelihood of a future outcome to be a fact pursuant to 8 C.F.R. § 1003.1(d)(3)(i)." *Zhu*, 703 F.3d at 1308. This Court concluded that the BIA's definition of what constituted a "fact" under § 1003.1(d)(3)(i) was inconsistent with the regulation's plain language. *Id*. *Zhu* held that, as to both persecution claims and claims under the CAT, the likelihood of a future event is a fact that the BIA may not find de novo. *Id*. at 1314.

Under *Zhu*'s binding interpretation of 8 C.F.R. § 1003.1(d)(3)(i), the BIA here was precluded from reweighing the evidence to reach a new factual determination as to the likelihood that Hill would be tortured if removed to Jamaica. *See id*. But the BIA issued its decision here without the benefit of *Zhu*,

which was decided two weeks later. Consistent with its erroneous, pre-*Zhu* interpretation of § 1003.1(d)(3)(i), the BIA treated the likelihood of future torture as a legal issue and decided it "on ***de novo*** *review*." (AR 4 (emphasis added).)

The BIA's improper fact finding was triggered by its decision to resolve this factual issue "assuming *arguendo* the respondent's credibility." (AR 4.) The IJ, by contrast, had concluded that Hill's testimony was not credible. (*See* AR 91.)[3] The IJ stated: "As the Respondent lacks credibility and the Court can give little weight to his testimony . . . [he] therefore has not established a basis for the Court to grant relief." (AR 94.) Having discredited Hill's testimony about his prior torture, the IJ weighed whether the Country Report *alone* showed that Hill faced a likelihood of torture, and found that it did not. (*See* AR 94-96.) The IJ concluded that "Respondent has not provided sufficient evidence to find that his case would meet the necessary more-likely-than-not standard that he would be subjected to the

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[3] Hill challenged the IJ's adverse credibility finding before the BIA. *See, e.g.*, AR 15 (arguing "The I.J. further used Mr. Hill's criminal record as a deceiding Factor, even though an Aliens Criminal Convictions, however serious is not a Bar to deferral of Removal under the convention against Torture."); AR 14 ("[T]he I.J. did not correctly deceide the issues Presented by the petitioner . . . Hill Presented a witness who backed up his story . . . ."). *See also Montano Cisneros v. U.S. Att'y Gen*., 514 F.3d 1224, 1228 n.3 (11th Cir. 2008) (holding that exhaustion requires only that the petitioner argued the core issue before the BIA); *Lorisme v. INS*, 129 F.3d 1441, 1444 n.3 (11th Cir. 1997) (providing that the court "read[s] liberally briefs filed *pro se*"). Thus, the BIA was wrong in stating that Hill "neither addressed nor challenged the IJ's findings as to his credibility." (AR 4.) The BIA did not address whether this finding was supported by the record. (*See* AR 4.)

same harm" because "one weakness in the Respondent's case is his credibility." (AR 96.)

Thus, Hill's supposed *lack* of credibility was an essential premise of the IJ's fact finding. (*See* AR 94-96.) The IJ certainly never made a finding of fact on the assumption that Hill's testimony was credible. Accordingly, when the BIA assumed that Hill *was* credible, it made necessary a wholly new determination—distinct from the IJ's finding—as to the likelihood of future torture. Instead of remanding the case to the IJ, however, the BIA improperly engaged in independent fact finding: it assumed Hill testified credibly about being beaten unconscious and repeatedly stabbed based on his sexual orientation, it purported to weigh this evidence and the other record evidence "de novo," (AR 4), and it found that Hill did not face a likelihood of torture, (AR 5). This was legally erroneous under *Zhu*'s binding interpretation of the prohibition against appellate fact finding. *Zhu*, 703 F.3d at 1314. Accordingly, the BIA's decision should be vacated and the case remanded to the IJ for a finding on this issue—whether assuming Hill's credibility there is a likelihood he would be tortured. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

B. In the alternative, the BIA did not give reasoned consideration to whether Hill faced a likelihood of torture.

Principles of administrative review dictate that the BIA and the IJ "must 'consider the issues raised and announce their decision in terms sufficient to enable a reviewing court to perceive that they have heard and thought and not merely

reacted.'" *Ayala v. Att'y Gen.*, 605 F.3d 941, 948 (11th Cir. 2010) (*citing Tan v. U.S. Att'y Gen.*, 446 F.3d 1369, 1374 (11th Cir. 2006)); *see also Enwonwu v. Gonzales*, 438 F.3d 22, 35 (1st Cir. 2006) (holding BIA is affirmatively "obligated to offer more explanation when the record suggests strong arguments for the petitioner that the agency has not considered").

A decision is insufficiently reasoned as a matter of law where it "fail[s] to address the petitioner's essential legal argument," *Jean-Pierre*, 500 F.3d at 1325-26, "ignore[s] the import" of relevant evidence, *Ayala*, 605 F.3d at 949, "misstates the contents of the record," of fails to adequately explain any illogical conclusions, *Tan v. U.S. Att'y Gen.*, 446 F.3d 1369, 1375 (11th Cir. 2006). "When the BIA or the Immigration Judge has failed to give reasoned consideration" to the issues presented by the petition, the court must "remand for further proceedings." *Ayala*, 605 F.3d at 948 (*citing Mezvrishvili v. U.S. Att'y Gen.*, 467 F.3d 1292, 1295 (11th Cir. 2006)).[4] Because the BIA "is obliged to resolve the basic questions raised in

[4] Whether the BIA gave "reasoned consideration" to its evaluation of the IJ's findings on likelihood of torture is a legal question that the court has jurisdiction to review under the REAL ID Act, 8 U.S.C. § 1252(a)(2)(D). *Perez-Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1232-33 (11th Cir. 2013) (per curiam) (stating that REAL ID Act limits jurisdiction to legal and constitutional questions and evaluating whether BIA gave reasoned consideration to its analysis of the IJ's finding that petitioner was not "likely to suffer severe pain or suffering" if removed); *see also Jean-Pierre*, 500 F.3d at 1326 (remanding REAL ID Act case where BIA did not give reasoned consideration to likelihood of torture issue).

[a] CAT petition in the first instance," remand is required for the BIA to "squarely address" issues to which it has failed to give reasoned consideration. *Jean-Pierre*, 500 F.3d at 1326.

Specifically, remand is required where the BIA fails to give reasoned consideration to a petitioner's particular circumstances or specific grounds for relief. For example, in *Jean-Pierre*, the petitioner claimed that his AIDS-related mental illness would likely make him subject to harsh forms of mistreatment if removed to Haiti. 500 F.3d at 1325. The BIA "obliquely referenc[ed] Jean-Pierre's argument that he would face harsher treatment as a result of mental illness," but the BIA "apparently omitted from its review the central and undisputed facts" indicating that his AIDS-related mental illness would cause him to be "singled out" for serious physical abuse. *Id*. at 1325-26. Thus, remand was required for the BIA to "squarely address" Jean-Pierre's claim. *Id*. at 1326.

Courts in other circuits have likewise held that a petitioner's AIDS status must be considered in determining whether the petitioner will be targeted for torture if removed. *See, e.g.*, *Eneh v. Holder*, 601 F.3d 943, 948-49 (9th Cir. 2010) ("IJ should have at least considered Eneh's testimony and documentary evidence" that he would "be single[d] out for mistreatment" based on AIDS status); *Bosede v. Mukasey*, 512 F.3d 946, 950 (7th Cir. 2008) (remanding case where IJ violated alien's due process rights by failing to consider claim that HIV status would make

it likely petitioner would be tortured).

In addition, the BIA must also consider a petitioner's testimony about past experiences that are central to the claim for relief. In *Kazemzadeh v. U.S. Attorney General*, the Court concluded that the BIA failed to give reasoned consideration to a petitioner's asylum claim where, in evaluating whether he had met his burden, it did not consider the petitioner's credible testimony about his "personal encounters with the Iranian regime." 577 F.3d 1341, 1354 (11th Cir. 2009).

Indeed, where a petitioner has previously been tortured, due consideration of that fact is expressly required. INA regulations instruct that "[i]n assessing whether it is more likely than not that an applicant would be tortured . . . all evidence relevant to the possibility of future torture *shall* be considered, including . . . [e]vidence of past torture inflicted upon the applicant." 8 C.F.R. § 208.16(c)(3)(i) (emphasis added). As the regulation reflects, '"[e]vidence of past torture inflicted upon the applicant' is of paramount importance" in determining the likelihood of torture. *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004) (*citing* 8 C.F.R. § 208.16(c)(3)(i)).

Here, the BIA failed to address *in any respect* the undisputed facts: Hill had been beaten unconscious and repeatedly stabbed based on his sexual orientation,

and he had AIDS.[5] In the absence of contrary evidence, these facts were established by Hill's testimony, which the BIA assumed to be credible, and by the corroborating testimony of Mr. Fuller. (AR 164-68, 194-95.) Furthermore, Hill repeatedly emphasized these facts in his arguments to the BIA. (*See, e.g.*, AR 73 ("I fear being further prosecuted and/or death, If I was to return. In 1990 I was beating tremendously and left uncountious in the street with cuts all over my body and head."); AR 15 ("Deporting this petitioner sends him to his Death in Two way either he dies from Gang attackd or he will surely die from lack of his (HIV)Medication needed to sustain his Life"); AR 15-16 ("we also had Hills Statements regarding all the attacks and Abuse he received in Jamaica based on him being homosexual").)

Instead of addressing this evidence, the BIA asserted that "the respondent has not met his burden of demonstrating it is more likely than not that the Jamaican government would subject him to torture, or consent to or acquiesce in this torture by others . . . ." (AR 4.) The BIA discussed *only* the Country Report, and it

[5] The type of harm Hill suffered is an "extreme form of cruel and inhuman treatment" that rises to the level of torture. 8 C.F.R. § 208.18(a)(2). Severely beating and stabbing an individual because of his sexual orientation is an act causing "severe pain or suffering" that is "intentionally inflicted on a person . . . based on discrimination." § 208.18(a)(1); *see also Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (holding that 2005 Country Report for Jamaica "establishe[s] that gay men are victims of beatings, killings, and other forms of torture"); *Al-Saher v. I.N.S.*, 268 F.3d 1143, 1146-47 (9th Cir. 2001) ("sustained beatings and cigarette burns" constitute torture).

opined that this report "did not indicate that the Jamaican government would engage in torture or turn a blind eye to torture (I.J. at 17-18)." (AR 4.) The BIA then stated, without any additional discussion, that "we agree with the IJ and find the respondent's speculation as to what may happen to him if removed to Jamaica on account of his sexual orientation too remote to bring respondent within the ambit of protection of the CAT." (AR 5.)

As in *Jean-Pierre* and *Kazemadeh*, therefore, the BIA's analysis is not based on reasoned consideration because it failed to address the grounds Hill presented—his past experience of torture and his AIDS status—both of which increased the likelihood of torture. *See Jean-Pierre*, 500 F.3d at 1326; *Kazemzadeh*, 577 F.3d at 1354. The BIA accordingly did not "squarely address" Hill's central claim that these facts, *along with* the undisputed evidence of widespread attacks based on sexual orientation in Jamaica, showed a likelihood of future torture. *Jean-Pierre*, 500 F.3d at 1326. By relying exclusively on its analysis of the Country Report to conclude that Hill had not met his burden, the BIA did not give reasoned consideration to Hill's claim.

Thus, the BIA's determination that Hill did not face a likelihood of torture if removed is legal error on two independent grounds. It is a factual finding made after de novo review of the record, which is impermissible on appeal. *See Zhu*, 703 F.3d at 1314. And, in any event, this determination was not based on reasoned

consideration. *See Jean-Pierre* 500 F.3d at 1325-26. Each error independently requires that the case be remanded to the BIA. *See Zhu*, 703 F.3d at 1314; *Jean-Pierre*, 500 F.3d at 1325-26.

II. THE BIA ALSO FAILED TO GIVE REASONED CONSIDERATION TO WHETHER JAMAICAN OFFICIALS ACQUIESCE TO TORTURE BASED ON SEXUAL ORIENTATION.

To establish entitlement to CAT relief based on harm inflicted by a private party, the petitioner must demonstrate that the government would acquiesce to the torture. 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." *Id.* § 208.18(a)(7). Here, the BIA held that Hill had not shown that the Jamaican government would acquiesce to torture by private individuals based on sexual orientation. (AR 5.) The BIA's analysis of this issue lacked reasoned consideration because it failed entirely to address important record evidence and mischaracterized the one document on which it did rely.

As discussed above, a BIA decision lacks reasoned consideration where it "ignore[s] the import" of relevant evidence, *Ayala*, 605 F.3d at 949, and also where it "misstate[s] the contents of the record," or fails to adequately explain any illogical conclusions, *Tan*, 446 F.3d at 1375. For example, in *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011), the BIA failed to make a reasoned determination where it

concluded that a Country Report did not show that individuals would be tortured even though the report described "serious problems" of police abuse that "corroborate[d] rather than contradict[ed]" the other evidence of torture. *Id*. at 772-73; *see also Akapo v. U.S. Att'y Gen.*, 299 F. App'x 873, 876 (11th Cir. 2008) (per curiam) (unpublished) (holding no reasoned consideration where BIA concluded there was "no indication" that petitioner would be targeted despite documentary evidence that petitioner had been threatened).

Here, the BIA relied solely on the IJ's analysis of the Country Report for Jamaica to conclude that Hill had not shown the Jamaican government would acquiesce to torture based on sexual orientation. (AR 5.) The BIA noted in its recitation of the facts Hill's testimony about government acquiescence and purported to assume that Hill was credible, but it then failed to address that same testimony in its analysis of the acquiescence issue. (AR 4.) Moreover, the BIA incorrectly stated that there was a lack of corroborating evidence. (AR 4.) Nowhere did the BIA mention Fuller's testimony at the merits hearing, the three affidavits Hill submitted, or the documentary evidence Hill provided, all of which discuss the Jamaican government's acquiescence to torture based on sexual orientation.[6] This failure to evaluate record evidence shows lack of reasoned

[6] *See, e.g.*, AR 195 (Fuller's testimony that the police in Jamaica "wouldn't do [anything] that much" in response to a crime against a homosexual and that "no one would get arrested"); AR 233-34 (affidavit of Leroy Fuller); AR 235-36

consideration. *See Akapo*, 299 F. App'x at 876.

Furthermore, the BIA did not give reasoned consideration to the only piece of evidence that it *did* address on the acquiescence issue. The BIA's analysis of the Country Report, in total, was as follows:

> The Immigration Judge properly considered the background evidence (Exh. 4A, 2011 Human Rights Report), which reported the existence of laws in Jamaica prohibiting sexual conduct and physical intimacy between people of the same sex, widespread homophobia, and discrimination and serious violent incidents and human rights abuses committed against homosexuals, but found that the evidence also showed that the laws prohibiting certain sexual conduct were not widely enforced, that the newly-elected Prime Minister had indicated she would not consider sexual orientation in appointing her cabinet members and would allow reexamination of these discriminatory laws, and that the evidence did not indicate that the Jamaican government would engage in torture or turn a blind eye to torture (I.J. 17-18).

(AR 4.) This discussion ignores the Country Report's statements specifically

(continued…)

(affidavit of Joy Fuller); AR 237 (affidavit of Rupert Neith); AR 248 (article quoting a statement from Amnesty International that Jamaican "[p]olice have reportedly failed to investigate homophobic hate crimes and have arrested and detained men overnight whom they suspect of being gay"); AR 249 ("Police abuse is a fact of life for many men who have sex with men . . . in all of the communities that Human Rights Watch visited in Jamaica." (quoting Human Rights Watch report)); AR 250 ("For the police in general, according to a number of the reports, male homosexuals are not to be protected by the security forces, but to be arrested and otherwise penalised for being homosexuals." (quoting Robert Carr, Caribbean Journal of Social Work, Vol. 2, July 2003)).

demonstrating that the Jamaican government acquiesces to torture. As to the "serious violent incidents and human rights abuses" referenced by the BIA,[7] the Country Report states that the "police often did not investigate such incidents." (AR 291.) In a number of the reported violent incidents, moreover, "[m]embers of the police force reportedly were the perpetrators." (AR 291.) Yet, the BIA makes no mention of the police's acquiescence in the widespread serious violence against homosexuals.[8]

The BIA's failure to discuss the Country Report's findings regarding the Jamaican police demonstrates a lack of reasoned consideration. The Ninth Circuit relied on the Country Report for Jamaica and held its findings demonstrate "*that the Jamaican government . . . acquiesces in the torture of gay men*." *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (emphasis added). The BIA cited

[7] The Country Report details that this violence based on sexual orientation includes "assault with deadly weapons" as well as "mob attacks, stabbings," and "targeted shootings." (AR 291.)

[8] Regarding the Prime Minister's statements indicating that she does not endorse homophobia or Jamaica's laws prohibiting same sex conduct, (*see* AR 4), the Country Report finds that these statements "led to more public discourse on the issues of sexual orientation and gender identity, but this *did not result in a change in conditions* in society." (AR 291 (emphasis added).) Neither the BIA nor the IJ discuss this finding. (*See* AR 2-4; AR 18-19.) Thus, these statements provide no basis to conclude that the Jamaican government does not acquiesce to torture based on sexual orientation. In addition, contrary to the BIA's conclusion, the Country Report does not state that both the "anti-buggery" and "gross indecency" laws punishing same-sex sexual conduct are not widely enforced. (AR 4.) It instead reports that the "anti-buggery" law alone was not widely enforced. (AR 291.)

not that decision about Jamaica, but rather a Fifth Circuit decision about Albania, which emphasized a Country Report's findings that most incidents of torture by public officials *had* been investigated and prosecuted. (AR 5 (citing *Demiraj v. Holder*, 631 F.3d 194, 201 (5th Cir. 2011).) Here, the BIA's conclusion is illogical because the Country Report's findings it ignored *distinguish* the decision in *Demiraj* and instead support the *same* determination the court reached in *Bromfield*—that Jamaican public officials acquiesce to torture based on sexual orientation.

Thus, by not addressing the Country Report's statements about the Jamaican police, the BIA mischaracterized the contents of the Country Report. *Tan*, 446 F.3d at 1375; *see also Cole*, 659 F.3d at 773 (holding mischaracterization of Country Report shows lack of reasoned consideration). The BIA also "failed to adequately explain" why those statements in the Country Report (and the other evidence unmentioned in the decision) do not show that the police would acquiesce to torture by private individuals. *Tan*, 446 F.3d at 1375. The BIA's decision should be vacated and the case remanded for reasoned consideration of whether the Jamaican government would acquiesce to torture based on sexual orientation.

III. HILL WAS DENIED DUE PROCESS WHEN THE IJ MISINFORMED HIM OF THE LEGAL STANDARD THAT APPLIED TO HIS CAT CLAIM.

"It is well settled that individuals in deportation proceedings are entitled to due process of law under the Fifth Amendment." *Frech v. U.S. Att'y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). To prevail on a procedural due process challenge, the petitioner must show: (1) that he did not receive a "full and fair" hearing, and (2) that he suffered "substantial prejudice" because, absent the error, "the outcome would have been different." *Ibrahim v. INS*, 821 F.2d 1547, 1550 (11th Cir. 1987). Both elements are met here.

A hearing is "full and fair" only where it affords the petitioner "the opportunity to be heard at a meaningful time and in a meaningful manner." *Rusu v. INS*, 296 F.3d 316, 321 (4th Cir. 2002); *see also* 8 U.S.C. § 1229a(b)(4)(B) ("[T]he alien shall have a reasonable opportunity to . . . present evidence on the alien's own behalf."). To ensure that the petitioner has had a "meaningful" opportunity to be heard, the IJ has the affirmative obligation to establish and develop the record. *See Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004) (holding pro se alien's due process rights were violated where IJ did not

develop the record fully as required by 8 U.S.C. § 1229a(b)).[9]

Specifically, when a petitioner is proceeding pro se, the IJ must adequately explain the legal standard the petitioner must satisfy to meet his burden. *See United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) ("our removal system relies on IJs to explain the law accurately to *pro se* aliens"). Pro se applicants are unlikely to "possess the legal knowledge to fully appreciate which facts are relevant" to their claims. *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000). Absent an explanation by the IJ, therefore, pro se petitioners "have no way of knowing what information [i]s relevant to their cases and would be practically foreclosed from making a case against removal." *Copeland*, 376 F.3d at 71. For example, in *Jacinto*, the IJ failed to instruct the petitioner that, to be eligible for asylum, she needed to establish that her fear of persecution was based on a protected factor. 208 F.3d at 734. *Jacinto* held that this failure deprived the

[9] *See also Zhou v. Att'y Gen.*, 276 F. App'x 942, 944 (11th Cir. 2008) (per curiam) (unpublished) ("Although the burden at an asylum hearing is on the petitioner, the IJ has an obligation to establish and develop the record." (citations omitted)); *Ezeaguwuna v. Ashcroft*, 325 F.3d 396, 410 (3d Cir. 2003) (noting the IJ's duty to develop the record fully); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) ("[T]he IJ . . . is not merely the fact finder and adjudicator but also has an obligation to establish the record." (citations omitted)); *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000) ("[I]mmigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel."); Charles H. Koch, Jr., Administrative Law and Practice § 5.25 (3d ed. 2013) (noting that "[t]he administrative judge is pivotal to the fact-finding function of an evidentiary hearing and hence, unlike a trial judge, an administrative judge has a well-established affirmative duty to develop the record.").

petitioner of the opportunity to present evidence on her behalf and thus denied her a full and fair hearing. *Id.* at 734-35.

Here, as in *Jacinto*, the IJ failed to timely inform Hill of the correct legal standard or how he could meet his burden. In fact, the IJ *repeatedly misrepresented* the standard for entitlement to CAT relief. To be eligible for CAT relief, Hill needed to put forth *objective* evidence that it was more likely than not that he would be tortured if removed to Jamaica. *See* 8 C.F.R. § 1208.16(c)(2). His *subjective fear* of torture was irrelevant. *See Francois v. U.S. Att'y Gen.*, 344 F. App'x 566, 569 (11th Cir. 2009) (per curiam) (unpublished) (holding that credible testimony about fear of torture did not establish that petitioner would likely be tortured if removed). At the May 17, 2012 hearing, however, the IJ told Hill that he was eligible only for CAT relief and then said that he would "have an hour, two hours, three hours to testify about [his] *fear*." (AR 124 (emphasis added).) And, again, when the IJ discussed the importance of the Country Report, he instructed Hill to specify those portions of the report that were "all about [his] *fear*." (AR 126 (emphasis added).) The IJ did not inform Hill of the correct legal standard until the June 14 hearing, a mere two weeks before the originally scheduled date for Hill's merits hearing. (*See* AR 136 ("You will . . . have the opportunity to testify about why you think someone in Jamaica would more likely than not torture you, okay?").) By that time, however, Hill had no opportunity to

obtain evidence from family members about the likelihood of torture given the time it would take to receive materials from Jamaica. (*See* AR 198 (stating that it would take three or four weeks to get a letter from Jamaica).)

The IJ's failure to accurately explain the legal standard that applied to Hill's CAT claim and to describe how he could meet his burden deprived Hill of a "reasonable opportunity" to present evidence in support of his claim. 8 U.S.C. § 1229a(b)(4)(B); *see also Ibrahim*, 821 F.2d at 1550. Hill simply did not know (and could not discover) what kind of evidence he needed. *See Jacinto*, 208 F.3d at 734; *see also* AR 74 (Hill's statement that he failed to obtain letters from his family members because he did not know he needed them). Hill had no reason to believe that declarations from family members would be necessary to demonstrate his subjective fear of torture in Jamaica. He could credibly testify about *his own fear* without such support. Because the IJ did not provide the correct *objective* standard in time for Hill to obtain necessary evidence, Hill was "practically foreclosed from making a case against removal." *Copeland*, 376 F.3d at 71.

The IJ's failure to explain the correct legal standard and to describe how Hill could meet this burden substantially prejudiced him. As an initial matter, it prevented Hill from obtaining declarations from family members attesting to the fact that he had been beaten unconscious and repeatedly stabbed based on his

sexual orientation. As discussed *supra*, section I.B, such evidence of past torture is "of paramount importance" to determining the likelihood of future torture. *Kay*, 387 F.3d at 676 (citing 8 C.F.R. § 208.16(c)(3)(i)). Moreover, the IJ expressly noted the absence of such declarations and relied on that absence to hold that Hill failed to meet his burden of establishing entitlement to CAT relief. (*See* AR 93, 97.) If Hill had not been misinformed about the legal standard, he could have produced declarations from relatives to corroborate his testimony about the 1990 incident and establish that he would likely be tortured if removed.

Accordingly, Hill did not receive a full and fair hearing before the IJ and suffered substantial prejudice. This Court should thus vacate the BIA's decision and remand with instructions to remand to the IJ for a new hearing. *See Al Khouri*, 362 F.3d at 464–65.

CONCLUSION

Hill's petition should be granted, the BIA's decision vacated, and the case remanded to the BIA.

October 7, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 8,312 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, as counted using the word-count function on Microsoft Word 2007 software. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared in proportionally spaced typeface using Times New Roman, font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2013, I filed the foregoing Petitioner's Opening Brief with this Court, by causing a copy to be electronically uploaded and by causing seven paper copies to be delivered by UPS. I further certify that, by agreement among counsel, I caused two paper copies of the brief to be served on October 7, 2013, via UPS on the following counsel:

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