No. 17-2171

IN THE UNITED STATES COURT OF APPEALS

FOR THE 6th CIRCUIT

USAMA JAMIL HAMAMA, ET. AL.,

Petitioners-Appellees,

v.

THOMAS HOMAN, Deputy Director and

Senior Official Performing the Duties of the Director,

U.S. Immigration and Customs Enforcement, et al.,

Respondent-Appellants.

AMICUS CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE OF THE DECISION BELOW

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CORPORATE DISCLOSURE FORM:

I, Cynthia Nunez, attorney for amicus curiae, certify that the American Immigration Lawyers' Association is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Date: February 9, 2018

/s/ Cynthia Nunez
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RULE 29(A)(4)(E) STATEMENT

Pursuant to FRAP 29(a)(4)(E), amicus curiae affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

Date: February 9, 2018

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Amicus Curiae, AILA, does not request oral argument in this matter.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the American Immigration Lawyers Association (AILA), files the following brief in support of Plaintiffs-Appellees. Fed. R. App. P. 29(a). All parties have consented to the filing of this amicus brief; therefore, no motion is required seeking leave of this Court. Fed. R. App. P. 29(a)(2).

AILA is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Members of AILA practice regularly before the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (including the Board of Immigration Appeals (BIA) and immigration courts), as well as before United States District Courts, United States Courts of Appeals, and the United States Supreme Court. In light of the severe consequences faced by petitioners-appellees in this matter, AILA submits this brief in support of their position and with the hope that the Court might better understand the mechanics of a Motion to Reopen in these matters.

INTRODUCTION

There is no more dire circumstance in immigration law than the moment an individual asks this government to review his removal, if that removal to his home country may result in his persecution, torture or, death. While the government asserts that the systems in place with the Department of Homeland Security (DHS) and the Department of Justice (DOJ) are adequate to meet all requirements under the Constitution and international law, the realities faced by removal defense members of AILA and their clients reveal a system that frustrates constitutional safeguards in a manner that is impermissible. A Motion to Reopen Removal Proceedings based on changed country conditions, in order to seek review of, and cease the execution of, a removal order, is a time-consuming and complex legal process. Likened to a last-minute challenge that must reveal a slow-motion replay, the class members here seek to stop their imminent removal by revealing errors in their record below and changes in their home country conditions in order to save their lives. They seek the opportunity to review their records and prepare the necessary documentation so that they may meet their burdens of establishing eligibility for lasting relief in the United States. As detailed herein, this process takes time, in large part due to the government's own bureaucratic weight, the difficulty in obtaining and reviewing records and evidence particularized to each

individual respondent, and the sudden strain on a community affected by mass round-up of its members.

SUMMARY OF ARGUMENT

This amicus curiae brief will provide the "who, what, when, where, why, and how" of a Motion to Reopen. The mechanics of filing a Motion to Reopen with either the immigration court or the Board of Immigration Appeals can be a highly-complex and time-consuming process even for the most-seasoned immigration attorney. While the statute, regulations, and case law set forth the elements of a Motion to Reopen based on "changed country conditions" or other changes in the law that affect an individual's removability, AILA practitioners know that the burdens of proof are high, the evidentiary development demanding, and that it takes substantial time to gather the necessary supporting documents, many of which are in the possession of the Government.

ARGUMENTS

A. THE "WHO" OF A MOTION TO REOPEN

Generally, a Motion to Reopen Removal Proceedings is a request to an immigration court or the Board of Immigration Appeals (BIA) for a redetermination of a prior decision to remove (or not remove) a noncitizen[1] to his

[1] This brief will refer to members of the class as "noncitizens", "plaintiffs-appellees," "respondents," or "petitioners" depending on the context.

country of origin or some other country because of some interceding event. 8 USC 1229a(c)(7); 8 CFR 1003.2(c)(7) and 1003.23(b)(3). This request may be made by the respondent *in pro per*, by the respondent through his attorney or BIA-accredited representative, by the government, by the individual and the government jointly, or by the immigration court or BIA *sua sponte*. 8 CFR 1003.23(b)(1); 8 CFR 1003.2(a), respectively.

Specific to this case, an attorney who takes on the legal representation of an individual in his Motion to Reopen is unlikely to be the same attorney who represented the person years prior when they were in removal proceedings. *See* First Abrutyn Decl., para 10-14, R. 77-2; Pg.ID# 1755-56; Realmuto Decl., para 8, R. 77-26; Pg.ID# 1887. Given the complexity of immigration laws, the client may understand only that he was ordered removed. *Id.* at para 11. That person may have saved some of the documents from the proceeding; however, he most likely does not have sufficient records for the level of detailed review required for a complete analysis of the claim. *Id.* at para 11, 13.

In particular, reviewing the Record of Proceedings (ROP) before the immigration court, maintained by the Executive Office for Immigration Review, an agency of the Department of Justice, and the individual's "A-file," maintained by the Department of Homeland Security, is a necessary part of any ethical and responsible legal representation. However, neither the ROP nor the A-file are

readily available. Both must be requested pursuant to the Freedom of Information Act and it takes time to secure them from the government. *See* Second Abrutyn Decl., para 3-12, R. 77-28; Pg.ID# 1900-1902; Realmuto, *supra*, para 6-12. Although the focus of a Motion to Reopen based on changed country conditions must necessarily involve evidentiary development *since* the final order of removal, the ROP and A-files contain material relevant to an individual's prima facie eligibility. *Id.* Additionally, in order to determine whether conditions have *changed* since the final order of removal, it is necessary to determine what the agency considered at the time of the original proceeding.

Obtaining the necessary documents takes a significant amount of time. After the attorney obtains mandatory signed releases, the attorney must send the records requests to at least two separate agencies: the Department of Justice (for the immigration court ROP) and the Department of Homeland Security (for copies of the individual's A-file). Although the FOIA has a statutory mandate requiring agencies to respond to requests within 20 working days, in practice, this rarely happens. FOIA requests for the ROP take approximately 1-3 months, whereas FOIA requests for the A-file can take 4-8 months. *See* Second Abrutyn Decl., *supra* at para. 6-12.

Even if the individual were able to retain the same immigration attorney whom he had secured for his initial removal proceedings, the passage of years may

have likely extended beyond those required under a state bar association's requirement for record retention. For those whose eligibility to reopen may be based upon other changes in the law that offer them new opportunity to apply for asylum and/or withholding of removal, other state court records or action may be necessary. *See* First Abrutyn Decl., *supra*, para 10; Scholten Decl., para 8, R. 77-27; Pg.ID# 1896.

For those individuals who are unable to secure legal representation through privately-retained counsel, they may turn to *pro bono* legal services. A nonprofit legal service may provide legal representation or mentor and/or train a volunteer attorney in handling immigration matters. *See* Reed Decl., para 2, 3, 5, 7, R. 77-12; Pg.ID# 1797-1799. "Very few, if any, free or low cost nonprofit immigration legal service providers handle cases of the complexity or duration contemplated here." *Id* at para 7, 11-15. Also, a person may appear *in pro per* before the immigration court or BIA.

The BIA also authorizes "accredited representatives" to represent respondents in immigration matters. Accredited representatives are not licensed attorneys; but they are individuals who have received training in representing individuals before the immigration court, including Motions to Reopen. *See* Scholten Decl., *supra*, para 4.

Finally, an immigration judge or the BIA may determine that a matter should be reopened *sua sponte*. 8 CFR 1003.23(b)(1); 8 CFR 1003.2(a). For immigration purposes, *sua sponte* reopening usually occurs only upon motion by a party. 8 CFR 1003.23(b)(1) provides, "[a]n immigration judge may upon his or her motion at any time, or upon the motion of the Service or the alien, reopen . . . any case in which he or she has made a decision, unless jurisdiction is vested with the [BIA]." 8 CFR 1003.2(a) provides, "[t]he Board may at any time reopen . . . on its own motion any case in which it has rendered a decision."

B. THE "WHAT" OF A MOTION TO REOPEN

Generally, a Motion to Reopen based on changed country conditions should set forth the elements that establish prima facie eligibility for the relief sought. 8 USC 1229a(c)(7). The Motion must (1) set forth a complete description of the new facts that comprise the new circumstances, (2) articulate how those new circumstances affect the party's eligibility for relief, and (3) include evidence of the changed circumstances. 8 CFR 1003.2(c); 1003.23(b)(3) and (4)(*i*); Immigration Court Practice Manual, Chapter 5.7(e)(*i*) (June 10, 2013).

Furthermore, the Motion to Reopen must include the application for the relief sought and supporting documents which will be used to prove eligibility should the Motion be granted. To be prima facially eligible, the motion and

supporting documentation should demonstrate (1) that there has been a material change in the conditions of the country of respondent's origin or in the country designated for removal, (2) with evidence that was not previously available, and (3) this information could not have been discovered or presented at the earlier hearing. 8 USC 1229a(c)(7)(C)(*ii*); 8 CFR 1003.2(c); 1003.23(b)(3); *Zhang v Holder*, 702 F.3d 878 (6th Cir. 2012).

A Motion to Reopen is usually decided upon paper review by the immigration judge or BIA adjudicator -- without a hearing or oral argument. If the Motion is granted by an immigration judge, then the individual must pay the fees, if any, associated with the forms and an evidentiary hearing is held. If the Motion is granted by the BIA, then the matter is remanded to immigration judge for full evidentiary findings.

Specific to this case, the Motion to Reopen is likely a thick packet of a materials that must include:

- A Notice of Entry of Appearance of Attorney, Form EOIR-27 (if matter is properly before the Board of Immigration Appeals) or Form EOIR-28 (if the matter is properly before the immigration court).
- A check or money order in the amount of $110 to file the motion, or a fee waiver request, Form EOIR-26A. For relief under asylum, withholding,

or protection under CAT, there is likely no fee required. 8 CFR 1003.8(a), 1003.24(b) and 1103.7(b)(2).

- A Cover Page labeled "Motion to Reopen."
- A signed motion brief.
- A copy of the underlying removal order, sought to be reopened.
- Affidavits and other documentary evidence in support of the motion. 8 USC 1229a(c)(7)(B); 8 CFR 1003.2(c)(1) and 1003.23(b)(3).
- If the motion is based on eligibility for relief, a copy of that completed application for relief and all supporting documentation, with original signatures and accurate and complete translations of all documents not in English. For relief under asylum, withholding, or CAT, this means Form I-589. 8 CFR 1003.2(c)(1); 1003.23(b)(3).
- A proposed order.
- Proof of service on the opposing party.
- A Change of Address Form/BIA EOIR-33.

A respondent faces a "heavy burden" to prevail on a Motion to Reopen based on changed country conditions. *Matter of S-Y-G-*, 24 I & N Dec. 247 (BIA 2007).

C. THE "WHEN" OF A MOTION TO REOPEN

Generally, a Motion to Reopen must be filed within 90 days from the date of a final removal order; however, there are exceptions. 8 USC 1229a(c)(6); 8 CFR 1003.2(c)(2); *Matter of Susma*, 22 I & N Dec. 947 (BIA 1999). A Motion to Reopen may occur beyond this 90-day time limit (1) if the filing is joint and agreed upon by all the parties, (8 CFR 1003.23(b)(1), 1003.2(c)(3)(iii).) (2) if the BIA or IJ decides to do so *sua sponte*, (8 USC 1003.2(a); 1003.23(b)(1), respectively.) (3) if ineffective assistance of counsel has equitably tolled this time limit, (4) if an *in absentia* order was entered and improper notice or exceptional circumstances were later determined, (8 USC 1229a(b)(5)(C).) (5) if the government requests reopening due to fraud in the original proceedings or if a subsequent criminal conviction supports termination of asylum, (8 CFR 1003.23(b)(1), 1003.2(c)(3)(*iv*).) and (6) if there are changed circumstances arising in the respondent's home country or country to which deportation has been ordered materially affecting a respondent's eligibility for asylum, withholding of removal, and protection under the CAT. 8 USC 1229a(c)(7)(C)(*ii*); *Id*; 8 CFR 1003.23(b)(4)(*iv*).

The government argues that plaintiffs-appellees sat on their rights to file a Motion to Reopen Removal Proceedings based on changed country conditions. But, while the federal government was unable or unwilling to remove Iraqi nationals to Iraq, it would have been a waste of time and resources for plaintiffs-

appellees to file a Motion to Reopen when their removal was not imminent. A similar situation was addressed in the Second Circuit with regard to Petitions for Review, in *In re Immigration Petitions for Review Pending in the U.S. Court of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012). There, the Court of Appeals for the Second Circuit developed a procedure to avoid adjudication of petitions for review that had no immediate need for determination given the government's lack of desire or ability to remove particular individuals (either as a matter of prosecutorial discretion or because of difficulty obtaining travel documents). As the 2nd Circuit stated, "it is wasteful to commit judicial resources to immigration cases when circumstances suggest that, if the Government prevails, it is unlikely to promptly effect the petitioner's removal." 702 F.3d at 160. Under those circumstances, the Second Circuit indicated that "the adjudication of the petition will be merely an empty exercise tantamount to issuing an advisory opinion." *Id* at 161. Petitioners here should not be punished for having failed to engage in such an "empty exercise" triggering "wasteful" use of BIA resources at a time when adjudication of their motions would have been "merely an empty exercise tantamount to issuing an advisory opinion." *Id* at 160-161.

The court below has ordered that plaintiffs should have 90 days from the receipt of their A-file and Record of Proceedings within which to file their Motions to Reopen. This 90-day court-prescribed time period in which to file a Motion to

Reopen should include an exception for good cause for those plaintiffs whose file is voluminous and complex. As the government complains that the mere production of these records is burdensomeness, consideration should be given to the respondent, through his counsel, who must review and interpret these same records. *See* Scholten Decl., *supra* at para 7-15; First Abrutyn Decl., *supra* at para 10-14. Counsel must walk a labyrinth to obtain an individual's files from the government, secure the necessary sworn affidavits from abroad about their native governments and threats to life from abroad, translate the documents to English, locate and secure expert witnesses and their affidavits, obtain criminal records and transcripts of proceedings to review any constitutional concerns. *Id.* Six months may be necessary for effective assistance by counsel. *Id.*

D.THE "WHERE" OF A MOTION TO REOPEN

Generally, a Motion to Reopen must be filed with that administrative body that last made a decision. BIA Practice Manual, Ch. 5.6(a). So, if a respondent did not appeal the immigration judge's decision to remove them to the BIA, the motion to reopen is filed with the immigration court who issued the final administrative order. 8 CFR 1003.23. If the last decision was made by the BIA or beyond, the Motion to Reopen is filed with the BIA. 8 CFR 1003.2. If the BIA grants a Motion to Reopen, the matter is remanded to the immigration court for further hearing.

Specific to this case, the "where" of a Motion to Reopen becomes frustratingly burdensome. The "easier" case is a native-born Iraqi who was ordered removed in Detroit immigration court and is not detained or detained in a facility close to Southeast Michigan, such as Monroe County Jail or St. Clair County Jail – both detention centers about only one hour from the Metro Detroit area. Multiple trips to the detention center to interview the respondent, gather information from him and his family, and secure original signatures on documents presents fewer obstacles than other plaintiff's circumstances. Some plaintiffs may have removal orders from immigration courts in other jurisdictions even though they live in Michigan. Paying local counsel to travel cross country to pursue a Motion to Reopen for a person detained in a third site stretches due process to its snapping point. Technological advances in the 21st century are not always found within detention facilities and the limitations on the detainees' communications with professionals lengthen the time needed to present a meritorious Motion to Reopen.

E. THE "WHY" OF A MOTION TO REOPEN

It is a federal statutory right for plaintiffs-appellees to seek to reopen their removal proceedings based on changed country conditions if they can demonstrate prima facie eligibility. 8 USC 1229a(c)(7)(*ii*); 8 CFR 1003.23 and 1003.2(a); *Reyes Mata v Lynch*, 135 S. Ct. 2150, 2153 (2015); *Perez Santana v Holder*, 731

F.3d 50, 58-59 (1st Cir. 2013) (citing cases). Furthermore, significant legal developments in the interpretation of criminal convictions in the immigration context may now render persons eligible for relief from removal that was not previously possible. 8 USC 1229a(c)(6); 8 USC 1231(b)(3)(B); *Mathis v United States*, 136 S. Ct. 2243 (2016); *Matter of Chairez*, 27 I & N Dec. 21 (BIA 2017); *Moncrieffe v Holder*, 132 S. Ct. 1678 (2013). After all, as the U.S. Supreme Court reasoned in *Dada v Mukasey*, the "purpose of a motion to reopen is to ensure a proper and lawful disposition" of immigration proceedings. 554 US 1, 4-5, 18 (2008); *Kucana v Holder*, 558 US 233, 242 (2010).

Plaintiffs-appellees may now be able to establish their eligibility for asylum based on changed country conditions if the criminal convictions that previously rendered them ineligible are now reconsidered under the changed laws. 8 USC § 1101(a)(42)(A); 8 USC § 1158(b)(1)(A); *Kaba v Mukasey*, 546 F.3d 741, 747 (6th Cir. 2008). If the ROP reveals that the immigration judge "did not fully explain the opportunity for relief at the prior hearing" or "evidence that relief is now available due to 'circumstances that have arisen subsequent to the hearing'," asylum or withholding may still be available. 8 CFR 1003.2(c)(1).

If the Motion to Reopen is granted, then respondent will need to meet his applicable burden of proof -- at the hearing before the immigration judge -- that he is eligible for asylum, withholding, or protection under CAT. In order to claim

protection under withholding of removal, a respondent must prove that there is a clear probability that he will be subject to persecution if he is forced to return to his home country or designated removal country. 8 USC 1231(b)(3); 8 CFR § 208.16(b)(1)(*i*)-(*ii*); *Gaye v Lynch*, 788 F.3d 519 (6th Cir. 2015); *Yousif v Lynch*, 796 F.3d 622 (6th Cir. 2015). Withholding of removal is statutorily mandated if a respondent can prove his claim. *Melendez v DOJ*, 926 F.2d 211, 216-219 (2nd Cir. 1991), *Chavarria v DOJ*, 722 F.2d 666, 660-70 (11th Cir 1984). In order to claim protection under CAT, a petitioner must show by a preponderance of the evidence that he would be tortured if removed to the proposed country of removal. 8 USC § 1158, 1252(b)(4); 8 CFR § 208.16(c)(2); 8 CFR 1208.18; *Gaye v Lynch*, supra. If proven, relief is mandatory. The government cannot remove a person to a country where they would face torture. *Id.*

F. THE "HOW" OF A MOTION TO REOPEN

A Motion to Reopen is usually decided without oral argument or hearing. If the Motion is granted by either the BIA or the IJ, the respondent's immigration status reverts to that status he held pre-removal. *Nken v Holder*, 556 US 418, 429 n. 1, 430, 435 (2009). The BIA's standard for granting Motions to Reopen based on changed country conditions is set forth in *Matter of S-Y-G-*, 24 I & N Dec. 247 (BIA 2007).

The BIA cannot make credibility determinations on Motions to Reopen; rather, it should grant the Motion and remand if a prima facie case for Reopening has been met. *Trujillo Diaz v Sessions*, 880 F.3d 244, (Case No. 17-3669, 6th Cir. January 17, 2018) This Court recently likened the role of the IJ or BIA in deciding Motions to Reopen to that of a trial court deciding a motion for summary judgement. *Id* at p 10. In deciding a Motion to Reopen, the IJ or BIA "must accept as true reasonably specific facts proffered by an alien in support of a motion to reopen unless it finds those facts to be inherently unbelievable." *Id.* In *Trujillo Diaz*, this Court found that the BIA abused its discretion when it denied a Motion to Reopen after making a credibility determination of a material declarant's statements supporting Ms. Trujillo Diaz' claim for asylum and withholding. *Id* at p 9-11. This Court reasoned "[i]n both cases the purpose of the inquiry is to isolate cases worthy of further consideration; in neither case is the court or agency to assess the credibility of the evidence." *Id* at p 10, quoting from *Haftlang v INS*, 790 F.2d 140, 143 (D.C. Cir. 1986). Given this Court's decision in *Trujillo Diaz*, prior case law that held the BIA and immigration judge did have "broad discretion" when ruling on a Motion to Reopen based on changed country conditions is obsolete and not-statutorily mandated. Since the Motion to Reopen statute, 8 USC 1229a(c)(7), makes no mention of the immigration judge or the BIA's discretionary authority, *Chevron* deference by the Courts should be applied.

Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc., 467 US 837, 842-43 (1984).

Additionally, the BIA abuses its discretion when it disregards its own precedent rulings, such as when it makes credibility determinations on matters of fact. *Matter of Z-Z-O-*, 26 I & N Dec. 586 (BIA 2015). The BIA itself has held that it may not reach factual matters presented in a Motion to Reopen because it is not ruling on the ultimate merits. *Matter of L-O-G-*, 21 I & N Dec. 413 (BIA 1996); 8 CFR 1003.2(c)(1); 8 CFR 103.5(a)(2). A conclusive showing that relief would be granted is not required. *Id.*

SIGNED CONCLUSION

Amicus curiae, American Immigration Lawyers Association, respectfully request that this Honorable Court accept and consider this brief in the above-captioned matter and deny this Appeal.

Dated: February 9, 2018

Respectfully Submitted,

/s/ Cynthia M. Nunez

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(b) because it is has 4,460 words and 525 lines of text. The type-face is Times New Roman, 14-point.

/s/Cynthia M. Nunez
Cynthia M. Nunez
Attorney for Amicus AILA
Dated February 9, 2018

CERTIFICATE OF SERVICE

I, Cynthia M. Nunez, certify that I served "Motion by Amicus Curiae AILA Seeking Leave to File an Amicus Brief" and "Amicus Curiae Brief of AILA in Support of Petitioners-Appellees and Affirmance of the Decision Below" to all counsel of record through the CM/ECF system.

/s/Cynthia M. Nunez
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Dated February 9, 2018

DESIGNATION OF RELEVANT DOCUMENTS

ECF No.	Page ID #	Date Filed	Description
77-2	1752-1756	07-17-2017	First Declaration of Russell Abrutyn
77-12	1796-1801	07-17-2017	Declaration of Susan E. Reed
77-26	1885-92	07-17-2017	Declaration of Trina Realmuto
77-28	1898-1902	07-17-2017	Second Declaration of Russell Abrutyn
77-27	1893-97	07-17-2017	Declaration of Hillary J. Scholten